A

TREATISE

ON THE

LAW OF INSURANCE.

By WILLARD PHILLIPS.

IN TWO VOLUMES.

FOURTH EDITION.

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CONTENTS.

CHAPTER XIV.

AMOUNT OF INSURABLE INTEREST.

		PAGE
SEC.	1. Valued Policies	1
	2. Open Policies	34
	3. Clause as to Prior Insurance	54
	4. Increase and Diminution of the Interest	61

CHAPTER XV.

GENERAL AVERAGE.

SEC.	1. What distinguishes General Average from other Losses	64
	2. Jettisons and Sacrifices of a Part of the Interest at Risk	69
	3. Whether Contribution is made unless the impending Peril is avoided	94
	4. Expense of Delay to refit on Account of Sea-Perils	101
	5. Expense of Salvage and of claiming or recovering Property on Capture or other Disaster	110
	6. Expense of Detention by Embargo	118
	7. Whether Contribution must be claimed in the first Instance from the Parties concerned	120
	8. Amount of the Contribution	122
	9. In Reference to what Time the Contributory Value is estimated	133
	10. Contributory Value of the Ship	135
	11. Contributory Value of Freight	138
	12. What Goods contribute, and at what Value	145
	13. Liability of Insurers to pay Contributions	157
	14. Adjustments abroad, or by Competent Courts	160

CHAPTER XVI.

PARTICULAR AVERAGE AND PARTIAL LOSS.

		PAGE
Sec. 1.	Particular Average in general	179
2.	On the Ship	180
3.	On Freight	197
4.	On Goods, Profits, and Commissions	211
Sec. 5.	The Amount payable. — Salvage Loss.	224
6.	Under Fire Policies, Life Policies, and on the Interest in an Hypothecated Subject	229

CHAPTER XVII.

TOTAL LOSS AND ABANDONMENT.

Sec. 1.	In what Cases Abandonment is necessary to Recover for a Total Loss	237
2.	Notice and Claim of Loss under Fire Policies	251
3.	Notice and Claim of Loss under Life Policies	253
4.	What Interest, and what Control of the Property, and what Authority, are requisite	255
5.	Of the Ship	256
6.	Of the Cargo	322
7.	Of the Freight	342
8.	Of Profits and Commissions	358
9.	Of Different Subjects insured in the same Policy	362
10.	The existing Facts constitute the Loss	365
11.	Upon what Intelligence Abandonment may be made	369
Sec. 12.	Within what Time Abandonment must be made	372
13.	Form of Abandonment	383
14.	Acceptance of Abandonment	391
15.	Revocation of Abandonment. — Waiver of Right to abandon	396
16.	Whether an Abandonment may be defeated by Subsequent Events	399
17.	Effect as to Rights of Property, Salvage, and Claims and Liabilities	401
18.	Effect as to Conduct of Agents	427
19.	Effect of the Abandonment of the Ship as to Freight	432
20.	Adjustment. — Amount recoverable	438
21.	Total Loss in Fire and Life Insurance, and Bottomry	445

CHAPTER XVIII.

PAGE

EXCEPTED LOSSES. — THE MEMORANDUM 450

CHAPTER XIX.

LIMITATION OF THE LIABILITY OF UNDERWRITERS. — SET-OFF. — DEDUCTIONS.

SEC. 1. Limit of the Liability of Underwriters 488

SEC. 2. Set-off and Deductions in Adjustments 490

CHAPTER XX.

NOTICE AND PRELIMINARY PROOF OF LOSS.

SEC. 1. Marine Policies 493

SEC. 2. Fire Policies 498

CHAPTER XXI.

ADJUSTMENT OF A CLAIM FOR A LOSS 506

CHAPTER XXII.

RETURN OF PREMIUM.

SEC. 1. Where there is no Risk 513

2. Stipulations for Return of Premium 531

3. Forfeiture of a Warranty or Condition 535

4. Illegality and Fraud 535

5. What Payment is a ground to claim Return 538

SEC. 6. Return under an Assignment 539

7. Abatement of Marine Interest 540

CHAPTER XXIII.

INSURANCE AGENTS. — THEIR APPOINTMENT, POWERS, RIGHTS, AND LIABILITIES.

	PAGE
SEC. 1. Insurance Agent in General. — Appointment. — Revocation	542
2. Agents of Underwriters	553
3. Subjects and Extent of the Agency	556
4. Qualifications, Duties, and Liabilities of Agents	561
SEC. 5. Lien and Set-off, and Repayments between the Agent and the Assured	573
6. Lien and Set-off, and Repayments between the Agent and Underwriters	582

CHAPTER XXIV.

JURISDICTION 587

CHAPTER XXV.

PROVINCES OF THE COURT AND OF THE JURY . . . 597

CHAPTER XXVI.

FORM OF ACTION. — PARTIES. — RIGHT OF ACTION . . 604

CHAPTER XXVII.

DECLARATION 627

CHAPTER XXVIII.

PLEADINGS 642

CHAPTER XXIX.

EVIDENCE.

	PAGE
SEC. 1. What in general must be proved. — The Authentication of Testimony	647
2. Witnesses	651
3. Depositions	654
4. Admissions, Agreements, Burden of Proof, Presumptions and Inferences	655
5. Documents. — Books. — Entries. — Statements	662
6. Judgments	667
7. Foreign Laws	673
8. Experts. — Opinions	674
9. Parties	677
SEC. 10. Execution of the Policy	678
11. Construction of the Policy. — Evidence aliunde	679
12. Compliance with Conditions	683
13. Interest	685
14. That the Subject was within the Description of the Risks	694
15. Loss	694
16. The Amount of the Loss	698
17. Notice of the Loss	702
18. Adjustments	702
19. Evidence in Defence	703

INDEX 711

A

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AMOUNT OF INSURABLE INTEREST.

SECT. 1. Valued policies.
2. Open policies.
3. Clause as to prior insurance.
4. Increase and diminution of the interest.

SECTION I. VALUED POLICIES.

1176. *It is requisite under every policy on any interest in property to determine the value of the subject,* either by agreement, or by certain rules and by proof.

Insurance being a contract of indemnity, the underwriters are not liable to pay any loss except such as the assured has actually sustained. Whether the loss is occasioned by the injury or destruction of a part or the whole of the thing insured, the amount of it cannot be ascertained without determining the value of the subject. In a case of total loss, the value of the property necessarily comes in question, for it must be ascertained whether the whole value is equal to the sum insured by the underwriter; since, if it be less, he is obliged to pay only its value, although the amount insured by him is greater. If the sum of a thousand

dollars is insured on goods of the value of eight hundred, which are lost, he is liable to pay but eight hundred; if the value of the subject is exactly equal to the sum insured, the whole amount insured is to be paid; if the sum insured is less than its value, the assured stands underwriter for himself on the excess. If the sum of eight hundred dollars is insured on property worth one thousand dollars, then, in any case of loss, whether partial or total, or particular, or general, the underwriter pays four fifths of it, and one fifth falls upon the assured himself, unless he has effected other insurance on this excess. It is therefore necessary to ascertain the value of the subject insured, for the purpose of determining whether the underwriter is liable to pay the whole, or only a part, and what part, of a loss.

1177. *In effecting insurance the assured should have regard to the rules by which the value of the interest is determined.*

As certain rules are adopted in fixing the value of the property insured in cases of loss, the assured must have a regard to these rules in effecting insurance, to determine the amount to be insured, in order to give him, as nearly as possible, an indemnity for his loss. If he causes less than the true value to be insured, he is not indemnified in case of loss. If he insures more than the value, he loses a part of the premium; for where a premium is returned for short interest, the underwriter usually retains one half per cent. on the excess insured. In case of large premiums this is of less importance, but in short voyages, and where the premium is at a very low rate, this sum retained by the underwriter makes a considerable proportion of it. And it is, in all cases, an absolute loss to the assured; although it is justly and fairly due to the underwriter for his trouble in making a contract, which he is ready to fulfil, but for which it is the assured's neglect or choice not to supply a sufficient subject. The rules, therefore, by which the value of the property is ascertained, are important, as well in making insurance as in settling losses.

1178. *In some policies the value of the subject is agreed upon by the parties. A policy of this description is called a* VALUED *policy. If the subject is not estimated at any particular amount,*

or rate, in the contract, it is an OPEN *policy;*[1] the value in such case being open to inquiry and proof; whereas, in the case of a valued policy, the valuation, if made without any fraud or illegality, is binding on the parties.

1179. *The same policy may be a valued and an open one;* as where the ship is insured at a certain value, and the freight is insured in the same policy without a valuation;[2] or where a part only of the goods insured in the same policy are valued.

1180. *A valuation is usually made by saying, after the description of the subject, "valued at" a certain amount.*

An agreement that, "in case of loss, no proof of property shall be required," was held in Massachusetts not to be a valuation.[3]

The indorsement, "380 kegs of tobacco, worth 9,600 dollars," referred to in the policy, is a valuation.[4]

1181. *If the valuation is intended to cover an illegal subject or risk, it will be void* itself, at least, if it does not make the whole contract so, as appears from the general principles already stated in relation to illegal contracts.[5]

We have seen that wagering policies have been prohibited by statutes, and held by some courts to be void as against the policy of the law, without any legislation upon the subject.[6]

Lord Mansfield says, if a valuation is made merely to cover a wager, as an insurance of £2,000, and valuation of the interest at that sum, where the assured has only the value of a cable at risk, it will be considered a mere evasion of the law.[7]

Where wagering policies are prohibited by positive statutes, an

[1] The same expression of "open policy" is also applied to policies which have become of frequent use in maritime insurance on goods whereby a gross amount is insured, with a provision that the policy is to attach to goods put at risk specified from time to time by indorsement and premiums to accrue accordingly. The trouble of making a new policy for every new shipment is thus saved.

[2] Riley *v.* Hartford Ins. Co., 2 Conn. R. 368.

[3] Hemmenway *v.* Eaton, 13 Mass. R. 108.

[4] Harris *v.* Eagle Ins. Co., 5 Johns. 368.

[5] Supra, c. 3, s. 2, and c. 13, s. 1, No. 1043.

[6] Supra, No. 211.

[7] Lewis *v.* Rucker, 2 Burr. 1167.

overvaluing with the intention of both parties to violate the law would no doubt make the whole contract void; but where they are not so prohibited, but are merely held to impose no legal obligation, an overvaluing for the purpose, in both parties, of combining a wager with an insurance, as it has been held in Massachusetts, will not make the insurance void, and prevent its covering the interest which the assured actually has at risk.[1]

1182. *If the goods* have been *fraudulently overvalued, the valuation is not binding.* Where an overvaluation is fraudulently made, with the intention, on the part of the assured, of destroying the property, for the purpose of recovering of the insurers the amount at which it is valued, such a fraudulent purpose will make the whole contract void. Goods worth £1,400, being valued at £5,000, the ship was run away with, and the goods actually on board were disposed of by the supercargo. The loss was adjusted on the production, by the assured, of bills of lading, showing that they had shipped property to the amount of £5,000. But it appeared that these bills of lading were fictitious, and the adjustment made upon the strength of them was accordingly not binding. The assignees of the assured, who had become bankrupts, claimed for the £1,400. Sir J. Mansfield said: "If the bankrupts intended from the beginning to cheat the underwriters, the assignees can recover nothing. The fraud entirely vitiates the contract."[2]

This is no more than the application to this agreement of a principle that is applicable to all contracts.

Where the valuation is subject to some objection which does not infect the whole contract, it may be set aside, and the policy still be valid as an open one.[3]

1183. *If the valuation is neither intended as a cover for a*

[1] Clark *v.* Ocean Ins. Co., 16 Pick. 289; Wolcott *v.* Eagle Ins. Co., 4 id. 429.

[2] Haigh *v.* De La Cour, 3 Camp. 319. See also Akin *v.* Miss. Mar. & Fire Ins. Co., 4 Martin, N. S. 661; Marshall *v.* Parker, 2 Camp. 69. See 12 Mass. R. 75; 1 Emerigon, 264, c. 9, s. 2; 3 Caines, 16.

[3] M'Kim *v.* Phœnix Penn. Ins. Co., 2 Wash. C. C. R. 89. And see Adams *v.* Penn. Ins. Co., 1 Rawle, 97; Hughes *v.* Union Ins. Co., 8 Wheat. 294.

wager, by both parties, *nor fraudulently made, it is binding on the parties*, in case it can be carried into effect, and will, as between them, determine the value of the property.[1] And the circumstance of the property being valued very high has not in itself been held to be a sufficient proof of a wager, or of a fraudulent intention on the part of the assured.[2]

The amount will not be inquired into in such case, says Mr. Justice Yeates, "unless the valuation is grossly enormous."[3] Some value must be proved, it is said,[4] since, if no goods are at risk, the policy never attaches. But it is uniformly held that the valuation must be very excessive to raise any presumption against the contract on this account merely.

Mr. Justice Cushing, giving the opinion of the court, in a case on a policy upon a vessel valued at $10,000, on which the sum of $8,000 was insured, said: "If it appeared that her actual worth were no more than $3,000, it would not necessarily avoid the contract, nor restrict the damages to that sum; for she may, notwithstanding, have fairly cost her owners the whole amount of the valuation."[5]

[1] See the cases and authorities cited above, as to the effect of fraud. Also Shawe *v.* Felton, 2 East, 109; Marine Ins. Co. of Alexandria *v.* Hodgson, 6 Cranch, 220; S. C., 7 id. 332; M'Nair *v.* Coulter, 4 Browne's P. C. 450; Millar on Insurance, 255.

[2] The ordinances of some countries have prohibited the overvaluing of property insured, and either made the valuation void, on this account, or the whole contract. Weskett, art. Valuation, n. 7; art. Double Insurance, n. 2; 1 Emerigon, 264, c. 9, s. 2; Code de Commerce, n. 336. The Danish ordinance fixes the value at which goods may be insured from one European port to another, excepting Iceland, at the cost, charges, and premium; on homeward cargoes from the East Indies, to double the amount of the outward cargo, and from any other ports beyond the limits of Europe, to fifty per cent. over that of the outward cargo. Art. 3; Benecke, c. 1, p. 34, London ed. 1824. In Spain the insurance is made void if more than the cost and charges, and premium, is insured. But insurance of profits to the amount of twenty-five per cent. is permitted in voyages to the Indies and other remote parts of the world. Ord. de Bilboa, c. 22, a. 7, s. 11. See remarks of Lord Mansfield on valuations, Hamilton *v.* Mendes, 2 Burr. 1198.

[3] Miner *v.* Tagert, 3 Binn. 204.

[4] Marsh. Ins. 97.

[5] Hodgson *v.* Marine Ins. Co. of Alexandria, 5 Cranch, 100; S. C., 6 id. 206; 7 id. 332. See also Feise *v.*

It often happens that expenses or profits are accruing, or expected to accrue, on the property, which the assured wishes to cover, and for this purpose makes the valuation. Though the value at the commencement of the risk constitutes the amount of interest in an open policy, yet it is not necessary to suppose that the parties have this value in view in agreeing upon a valuation. A valuation of goods which would be very high at the beginning of the risk, may be very low in a subsequent period of it, when great additional expenses have been incurred in the transportation of them, or their proceeds have become more valuable by trade. A high valuation, therefore, affords of itself very slight grounds of presumption against the assured.

1184. *Whether the assured should value high?*

No general rule can be laid down as to the expediency, or advantages and disadvantages, of valuing high or low. In regard to some partial losses and to general averages, it is for the interest of the underwriters to insure at a high value, since the premium is graduated by the value, and under such a valuation they may be liable to indemnify or contribute on a lower value than that on which they receive a premium. But in regard to total or partial losses with salvage, it is for their interest to value at a low rate, since the amount of salvage on a quarter or half of the insurable interest is the same whether it be valued high or low. It is an objection to a high valuation on the part of the insurers, that it may make it for the interest of the assured to have a loss; and this is no doubt the motive for the limitation, in some ordinances, of the amount or proportion of the interest that may be legally insured. It is for the interest of the assured so to value, that, in case of loss, he may be as nearly as possible indemnified, and nothing more nor less than indemnified. According to the voyage, state of the markets, and other circumstances, a valuation to a greater or less excess over cost and charges will afford indemnity; but this is a subject of estimate in each particular voyage.

Aguilar, 3 Taunt. 506. Proof of over-valuation is admissible only as proof of fraud. Gardner *v.* Columbian Ins. Co., 2 Cranch, C. C. R. 550, or of mistake where the question is as to reforming the policy.

1185. *The ship is usually valued, and the freight is frequently so.*

The value of a vessel is not so certain as that of goods, and cannot usually be so satisfactorily and exactly proved. Insurance on vessels is therefore commonly made by valued policies. For the same reason, freight is usually valued, where the owner of the vessel is also owner of the cargo, and most frequently in other cases. If no part of the cargo is shipped by the owner of the vessel, the gross amount of freight is readily ascertained by the bills of lading; but where the whole or a part of the cargo belongs to the owners of the vessel, or to the charterers, who are owners pro hac vice, the same uncertainty and difficulty occur in proving the value of freight as in proving that of the vessel.

1186. *Goods are more frequently insured in open policies, since the value is easily proved* by the invoices, or by showing the price current at the time. But if the goods are of a kind the price current of which cannot be easily shown, or if the price has greatly changed subsequently to the purchase of the goods, or if their value has been increased by transportation, insurance is often made upon them by a valued policy.

1187. *Under a valued policy, the assured,* in order to recover for a loss, *need not prove the value.* Whereas, in an open policy, he must not only prove that the property was exposed to the risks insured against, and that its loss was occasioned by them; but he must also prove the value of the property.[1]

1188. *The valuation,* in a valued policy, *is a mere substitute,* as between the parties, *for the computation* or estimate *of the value* of the subject *in an open policy.*

1189. *The object of a valuation is to determine the amount of a loss, and whether there is to be a return of the whole or a part of the premium; and,* in the latter case, *how much.*

1190. *The same party may be insured on the same interest* in the same subject, in an open policy by one underwriter, and in a valued policy by the same, or another; or *at different values*

[1] Feise *v.* Aguilar, 3 Taunt. 506.

in divers valued policies, whether by the same or divers underwriters.

1191. *A valuation in a policy has no effect whatever in respect of any other policy on the same subject*, and where divers policies are made upon a subject, the questions of loss and return of premium under any one of them are settled precisely as if all others were open policies; or as if there were no other policies, unless one policy contains a reference to another whereby the construction is affected.

Though the valuation in other valued policies, or the invoice value in other open policies, may be higher than in the valued policy which is in question, still the claim of the assured and liability of the underwriter under that policy are not to be thereby affected, but should be determined by the value as agreed upon in that policy. If the other policies do not cover the whole value as estimated in those policies, but leave a certain proportion, say a fifth or eighth uninsured, the policy in question, whether it contains the priority clause or not, may be applied to that eighth, notwithstanding that the aggregate amount thus recoverable for a total loss under all the policies should exceed the valuation in the policy in question. This is in fact adhering to the valuation.[1]

[1] Bousfield *v.* Barnes. 4 Camp. 228, referred to by Lord Tenterden in Irving *v.* Richardson, 2 B. & Ad. 193, though not expressly confirmed or doubted. The doctrine of the ruling by Lord Ellenborough in this case seems to be objectionable. See supra, No. 370, but the facts which, as heretofore stated, in this place in the third edition of this work, seem to constitute an equitable case in favor of the assured, will also, under the rule above stated in the text, constitute a legal right to recover the full amount insured. A New York case, Kenny *v.* Clarkson, 1 Johns. R. 385, decided by Spencer, C. J., and his associates, had, nine years before the ruling of Lord Ellenborough, just referred to, asserted the doctrine expressed by Lord Ellenborough, namely, that, where the value of the insured vessel is $7,000, and $5,000 had been previously insured, and then a policy for $2,000 was made upon the same vessel valued at $2,000, the assured in the last policy might, on a total loss, recover the whole two thousand dollars, even though the policy in this case contained the priority clause. This was annulling the valuation. According to the rule stated in the text the legal claim was limited by the agreement of the parties to two sevenths of two thousand dollars, though there may have been an equity in favor of re-

That the construction of the valuation in one policy is not affected by that in others is a familiar doctrine, which is frequently illustrated in jurisprudence.

Where a vessel insured in Boston in an open policy was afterwards insured in a valued policy at Calcutta, and a total loss took place, the loss under the Boston policy was settled without any regard to the valuation in the other, and just as if the latter had been an open policy.[1]

Insurance of $40,000 was made on coffee, "valued at twenty-five cents per pound," with the usual clause, that the insurers were to be answerable only to the amount not covered by previous policies; and an insurance had been previously effected in Europe by an open policy on the whole cargo, including coffee, pepper, sugar, and saffron-wood, to the amount of $155,555. It was contended on the part of the underwriters, that, as all the pepper, sugar, and saffron-wood, and a part of the coffee, were covered by the previous insurance, taking the whole cargo at prime cost, they were answerable only for the risk on the quantity of coffee not covered by the first policy. That is to say, in ascertaining the loss under this valued policy, they were to estimate that part of the coffee covered by the prior policy, at prime cost, which, being paid for by the previous underwriters, was to be put out of the question, and then the underwriters in this policy were to pay for the excess according to the valuation. The assured contended, on the other hand, that, in ascertaining what part of the coffee had been insured in the previous policy, the pepper, sugar, and saffron-wood were to be estimated at prime cost, but the coffee at twenty-five cents per pound, and that these underwriters were answerable for the amount of coffee not covered by this mode of calculation. The whole of this coffee must, they said, as between these parties, be estimated at twenty-

forming the valuation on the ground of mistake. In case of the freight of a ship being, by the freight-list, $26,000, and valued at $20,000, and lost, with salvage of $10,000, on a reference of the matter to the author, twenty twenty-sixths of the salvage was awarded to the underwriters. Capen & Bangs *v.* Boylston Ins. Co., Ship Samoset.

[1] Higginson *v.* Dall, 13 Mass. R. 96.

five cents per pound. And the court was of this opinion. They said: "The whole of the coffee is to be calculated at the valuation, because the parties have agreed on that valuation in reference to this policy."[1]

The same rule has been adopted in other cases.[2]

Seven open policies being made on goods shipped in Russia, the assured then effected an eighth policy on the same goods, "valuing the invoice ruble at forty cents," and then a ninth, valuing the ruble at forty-six cents. The court held that under the eighth and ninth policies the valuation extended to the whole of the goods, from the amount of which, at the rate of valuation in the policy, the sum previously insured was to be deducted, and the excess was the amount of insurable interest under each of those policies.[3]

1192. *Whether, under the clause for deducting prior insurance in a valued policy, the valuation is to be set aside, or the deduction made from the valuation?*

Where a ship worth $15,000 was insured, with the prior insurance clause, in Philadelphia, to the amount of $12,000, by a policy in which it was valued at that sum, and it was subsequently learned that it had been previously bottomried in a foreign port, which was in fact a prior insurance, Mr. Justice Washington decided, that, in adjusting the loss, the amount of the bottomry was to be deducted from the $15,000, and not from $12,000.[4]

This mode of adjustment does not set aside the valuation and clause relative to prior insurance, provided the bottomry bond is estimated at a certain proportion of the value. Suppose the bottomry to be for $3,000, which would be one fifth of the value. Then the loss under the policy might be adjusted by deducting one fifth of $12,000 for the bottomry bond, and holding the

[1] Minturn *v.* Columbian Ins. Co., 10 Johns. 75.

[2] Kane *v.* Commercial Ins. Co., 8 Johns. 229. See also M'Kim *v.* Phœnix Ins. Co., 2 Wash. C. C. R. 89.

[3] Pleasants *v.* Maryland Ins. Co., 8 Cranch, 55. See also Murray *v.* Ins. Co. of Penn., 1 Hall's Law Jour. 161; S. C., 2 Wash. C. C. R. 186, and Mr. Justice Thompson's remarks upon that case, 8 Johns. 182.

[4] Watson *v.* Ins. Co. of North America, 3 Wash. C. C. R. 1.

underwriters to be liable on $9,600. But Mr. Justice Washington seems in this case to have absolutely set aside the valuation.

The deduction of the proportion, as above suggested, gets rid of the objection in reference to annulling the valuation, but it is inconsistent with the other cases above referred to, where the value in the prior policy is less than in a subsequent one, for in those cases not the PROPORTION, but the AMOUNT, covered by the prior policy is deducted from the value as fixed in the subsequent one. In all these cases the court may have been influenced by the obvious equity, since in each of them there was evidently a mistake by the assured, in making the valuation, the intention being to value what of his interest was not covered by any prior insurance or bottomry.

If the policy admits of that construction, in favor of which the plain equity is likely to dispose the court to be astute, the difficulty vanishes. If the question can be made one of fact merely, the jury will very probably be influenced by an equitable bias. The phraseology and other provisions of the policy, or the circumstances known to the parties, or not known to them, will naturally be invoked as auxiliary to equity in such a case. But as a question of doctrine, it seems to me that *an agreement by parties, that,* as between themselves, *any loss or claim for return of premium shall be settled on the basis of a specified value* of the subject deducting prior insurance, *can be complied with only by deducting the* amount of the *prior policy* or bottomry for the same risks *from the* amount of the *valuation* in the policy containing the agreement.

1193. Where the assured expects goods to be shipped, but does not know the kind or the amount, *the policy is sometimes made on goods "to be thereafter declared and valued."* Under a policy in this form *the declaration of the value,* to make it a valued policy, *must be made* by the assured *before* he has *intelligence of a loss.*[1]

Under a policy in this form, the clerk of the assured, by his order, wrote out and signed a specification of the interest, with a

[1] Craufurd *v.* Hunter, 8 T. R. 15, n.

valuation, on a separate piece of paper, which he wafered to the policy; but it did not appear that this had been shown to the underwriters before the loss was known. Lord Ellenborough said: "A declaration necessarily imports two parties, the person who makes it, and the person to whom it is made," and ruled, that where there was no notice of a declaration of value prior to loss, it must be treated as an open policy.[1]

1194. *A mistake in declaring the value may be corrected.*

A declaration being made under a policy in this form on goods by the Tweende Venner and Neptunus, through mistake, the goods intended to be declared on, and valued, having been shipped by the America, Lord Ellenborough said: "If this was without fraud, and without prejudice to the underwriters, I think it might be corrected without their assent."[2]

1195. *A valuation of goods by an assured,* whose interest is a certain share or proportion, *may be applied to his proportion.*

Insurance being made on goods valued at £19,000, of which the assured owned four ninths, it was contended that the valuation was intended for the entire property, and accordingly that the interest of the assured was valued at four ninth parts of that sum. But Sir James Mansfield said: "If the assured are interested, is not that sufficient? We must take it that the value insured is the value of the assured's interest."[3]

So where the policy was on one fourth of the vessel, valued at $5,500, and one fourth of the cargo, valued at $10,000, it was held to be a valuation of one fourth part of each at those respective sums, which made the amount insured in the policy.[4]

1196. *A valuation of a cargo avails only pro rata where only a part of the subject valued is at risk.*[5]

Mr. Justice Putnam, giving the opinion of the court, says: "If the assured should put on board only a part of the goods to which he intended the valuation should apply, he should recover such

[1] Harman *v.* Kingston, 3 Camp. 150.
[2] Robinson *v.* Touray, 3 Camp. 158.
[3] Feise *v.* Aguilar, 3 Taunt. 506.
[4] Post *v.* Phœnix Ins. Co., 10 Johns. 79.
[5] Wolcott *v.* Eagle Ins. Co., 4 Pick. 429; Alsop *v.* Commercial Ins. Co., 1 Sumner's R. 451.

proportion of the valuation as the goods which were on board and at risk should bear to the whole valuation." [1]

In a case decided by referees,[2] in Boston, 1831, on a policy "on property" on board of a vessel, from Boston to Aux Cayes and back, valued at $5,000, consisting partly of fish insured free of average, which, by reason of damage, was sold at Aux Cayes for less than sound by $460, a bad debt of $445 was made upon the rest, and $125 was paid out of the proceeds of the cargo, for light money and port charges. No freight was payable at that port. The rest of the proceeds, being $3,400, was invested in a return cargo, and put on board and lost by shipwreck at the same port. The referees considered a full return cargo would have been $3,400 added to $460, $445, and $125, equal to $4,430, valued in the policy at $5,000, and awarded the $\frac{3400}{4430}$th part of that sum. The damage to the fish was deducted, on the principle that the assured was his own underwriter for that loss, and the case was the same as if that amount had been paid to him for that loss by other underwriters. The only doubt of the referees was, whether the estimated outward freight should have been deducted.[3]

So it has been held in Louisiana, that a valuation of seventy-four mules at $11,000 was equivalent to a valuation of each mule at a seventy-fourth part of that amount, and accordingly, only thirty-five mules having been put at risk under the policy and totally lost, that the assured could recover only thirty-five seventy-fourth parts of the amount of the valuation.[4]

1197. *A valuation of a cargo and its proceeds, is such of the proceeds of the whole cargo.*[5]

Insurance being from New York to Bourbon, the Isle of France, ports in Java and Calcutta, and back to the United States, upon "pipes of wine and returns home, valued at $14,000," the super-

[1] Wolcott *v.* Eagle Ins. Co., 4 Pick. 429. See also Forbes *v.* Aspinwall, 13 East, 323.

[2] The author being one.

[3] Rix *v.* Ocean Ins. Co.

[4] Brook *v.* Louisiana Ins. Co., 4 Martin, N. S. 640, 681. See also Watson *v.* Ins. Co. of North America, 3 Wash. C. C. R. 1.

[5] Wolcott *v.* Eagle Ins. Co., 4 Pick. 429; Rix *v.* Ocean Ins. Co., supra, No. 1196.

cargo, not being willing to sell the outward cargo at the market price at the time, in Batavia, left it there in pledge with a Mr. Loesman, who advanced $8,621 upon it for the purchase of a return cargo, which was totally lost on the homeward voyage. It was held by Savage, C. J., and his associates of the Supreme Court of New York, that, if the return cargo had been purchased with the avails of the sale of the wine, there was no doubt that the insurers would have been liable for the whole $14,000, though the proceeds had not exceeded $7,000; and that it was indifferent whether the return cargo was purchased with the proceeds of the sale of the wines or with funds so advanced, provided the cost of the return cargo did not fall very greatly short of the value of the wines. It appeared that they were eventually sold for much less than the advance. Judgment in that court was for the amount of the valuation,[1] which was unanimously confirmed in the Court of Errors.[2]

The value of the wines was estimated to be considerably over $10,000 at Batavia, at the time of the vessel being there, and the judgment was, therefore, not in conformity to the doctrine above stated; for the valuation of the return cargo, as being the whole proceeds of the outward one, must, no doubt, refer to that time; and not be fluctuating with the rise and fall of the market for an indefinite period.

1198. *Whether, under a policy for an outward and homeward voyage, the valuation of the outward cargo is applicable to its proceeds on the return voyage?*

The goods purchased with the funds accruing from the sale of the cargo are, in the ordinary sense, its proceeds.

Goods purchased by an advance made by the consignees on the credit of the outward cargo have been held in New York and Massachusetts to be proceeds of the outward cargo.[3]

Under a policy on cargo out and home, the outward cargo was valued at a certain rate per bale of cotton and per ton of logwood. On account of the market being dull at St. Petersburg, the port

[1] Whitney *v.* American Ins. Co., 3 Cowen, 210.

[2] American Ins. Co. *v.* Whitney, 5 Cowen, 712.

[3] Supra, No. 441.

of destination, the consignees advanced a return cargo on the credit of that consigned to them, and it was held by Parker, C. J., of the Supreme Court in Massachusetts, and his associates, that the valuation was applicable to the return cargo so advanced, and that, if the amount so advanced was equal to what would have been the proceeds of the sale of the whole cargo, the valuation would be filled; if less, it must be applied pro rata.[1]

Mr. Justice Washington, on the contrary, ruled that a valuation of the outward cargo under a policy for the round voyage is not such of its proceeds, and that, in respect to the homeward voyage, the policy is an open one.[2]

But there is not wanting a ground for making the two constructions equivalent, each to the other, in effect. The valuation fixes the value of the outward cargo as between the parties. The prime cost of the return cargo to the assured is the entire value of the outward one. The value of the cargo as between the parties under an open policy is ordinarily its prime cost, which, as between the parties, in the case put, is precisely the amount at which the outward cargo is valued.

The description of cargo, kind of voyage, and other provisions of the policy, will very probably have some bearing in most cases, but in the absence of any such collateral consideration I conclude the preferable doctrine to be, that

A valuation of the outward cargo in a policy for the round voyage, is to be presumed to be such of its whole proceeds for the return voyage, or for subsequent passages.

1199. *A valuation at a certain rate per pound refers to the pound of the place where the policy is made,* not that of the foreign place from which the article is insured:

As in an insurance made in New York from Jeremie, in the West Indies, to that port, on coffee valued at a certain rate per pound, without specifying which port is referred to.[3]

1200. *A valuation of goods is said to fix the prime cost;*[4] but

[1] Haven *v.* Gray, 12 Mass. R. 71.

[2] M'Kim *v.* Phœnix Ins. Co., 2 Wash. C. C. R. 89.

[3] Gracie *v.* Bowne, 2 Caines's R. 30.

[4] 2 Burr. 1167, 1171; 1 Johns. 433; 5 id. 368.

wherever this description is given of it, *the meaning appears to be, that it fixes the amount of insurable interest.*

Lawrence, J., says, it is "the practice of binding parties as to the amount of their interest." [1]

1201. *Whether a valuation includes the premium?*

This question is applicable under a policy upon the ship, freight, or cargo, in reference to the adjustment of a particular or general average; and, in some instances, in reference to that of a total loss. That the premium constitutes a part of the interest or value in every subject of insurance is a familiar doctrine. Thus, if the market value of any subject is $100, and the premium ten per cent., the insurable interest is $110; and the present inquiry is, whether a valuation of the subject at any amount, whether $110, or above or under that amount, is a valuation of the whole insurable interest of $110, or is such of the market value, without the premium, so that the assured in a policy for $100 on the subject valued at that sum, is still but partially insured, and stands his own underwriter in the proportion of one eleventh. The question, in other words, is, whether the valuation is of an interest differing in amount from the insurable interest.

As a valuation is made for the purpose of fixing the amount of insurable interest, and as the premium is always a part of that interest, it should seem to be the more obvious construction of the valuation, to consider it as including the premium, unless the contrary appears from the manner of valuing, or from some other part of the policy. If goods are valued at so much in the lump, the valuation is generally understood to include the premium. This appears to have been taken for granted by the parties and the court, in a New York case; [2] and so it seems to be generally understood by underwriters.

This question was discussed in a case of an insurance of $9,000, at a premium of forty-five per cent., on a ship valued at $18,000, of which, on a total loss having occurred, the assured proved himself to be owner of but one third. Estimating in this proportion, therefore, on the valuation, he had lost but $6,000.

[1] 2 East, 115. [2] Ogden *v.* Columbian Ins. Co., 10 Johns. 273.

If the underwriters retained the whole premium on the $9,000, he would by this mode of adjustment obtain for a total loss but $1,350 over the amount of premium he had paid; if a third of the premium was to be returned, then he would receive $2,700 over the amount of premium retained by the underwriters; but if, as the court in Massachusetts stated the case, the valuation was construed to be of the vessel without adding the premium, and the insurance construed to be of an interest consisting of the amount of the valuation and rate of premium added to it, viz. $26,100, one third of this sum, or $8,700, was what had been at risk under the policy. The court, consisting of Parker, C. J., and his associates, took this latter method by way of approximation to what they deemed, and what seems actually to have been, the equity of the case, and decided in favor of a recovery of the whole amount of $9,000, on the ground that this was the amount which the assured intended to cover, and that the insurance was fairly effected on a valuation of $18,000, instead of $2,700.[1]

This was in effect setting aside the valuation, unless there was something in the policy showing a notice to the underwriters that the rate of premium was to be added to the valuation, in estimating the value under the policy. The case does not show such notice, but, on the contrary, from the statement of what the assured intended, without any intimation of notice of his intention by the policy itself, it is to be inferred that the policy contained nothing in support of the construction adopted by the court.

In a subsequent case, the same court adopted the rule, that the premium is included in the valuation in directing the mode of adjustment to be adopted in reference to the application of the exception of partial losses under five per cent.[2] Mr. Benecke[3] says, that a valuation at so much per livre, rupee, &c. of the invoice, includes the premium.

In a New York case of a valuation of coffee at a certain rate

[1] Mayo *v.* Maine Fire & Mar. Ins. Co., 12 Mass. R. 259.

[2] Brooks *v.* Oriental Ins. Co., 7 Pick. 259.

[3] Page 159, London ed. 1824; Benecke & Stevens by Phil., 1833, p. 54.

per pound, the parties agreed in making up the insurable interest by adding the rate of premium, no question being made as to this method of computation.[1]

The better doctrine on this subject seems to be, that

A valuation of the subject in gross, or by the weight, measure, or piece, is such of the entire interest including the premium, unless a different construction is indicated by the policy.

The valuation of the ship and freight is necessarily made in gross, and, except in the case above referred to, no doubt has, to my knowledge, been suggested, that it includes the premium, or, in other words, is an estimate of the entire insurable interest. This is a ground for applying the same rule to the cargo.

Where only a particular part of the subject included in the policy is valued, the presumption should seem to be, that the premium is not included in the valuation.

1202. *A policy specifying the value of a foreign currency in which the invoice of goods to be shipped at a foreign port may be made out, is not a valued policy for this reason merely:*

As where it was agreed to estimate the French franc at forty-four cents.[2]

1203. *Whether the valuation of goods, or any other subject, is opened in adjusting a partial loss?*

Though it should seem from the preceding cases that a valuation of the goods makes the case the same as if they had actually cost, including the premium, the amount at which they are valued, yet if we are to understand as literally accurate what has been said in a few instances, it is otherwise.

Lord Mansfield is reported to have said: "An average loss opens the policy. I will give you the origin of this custom. It was in a case[3] where Lord C. J. Lee said, valuation at the sum insured is an estoppel in case of a total loss, but not so in an average loss only."

[1] Minturn *v.* Columbian Ins. Co., 10 Johns. 75.

[2] Ogden *v.* Columbian Ins. Co., 10 Johns. 273.

[3] Erasmus *v.* Banks, Mich. 21 Geo. II., cited 2 East, 113.

In 1747, the same point came before Lord Ellenborough and his associates, when the same doctrine was again stated.[1]

Sewall, J., giving the opinion of the court in Massachusetts, says: "In valued policies the value is understood to be settled without further proof only in the event of total loss, and not in the adjustment of a partial loss, whether general or particular."[2]

Weskett[3] supposes the case of a vessel worth £1,500, and valued at £1,000, on which a loss of £400 accrues, and says: "Now this £400 ought to be borne by the real value of £1,500, making £26 13*s.* 4*d.* per cent., and not by £1,000, the nominal value, which would make 40 per cent.; and yet it is certain that averages on ships undervalued are very often paid by this latter and erroneous calculation; whereas, in case of average, whether on ship, goods, or freight, the policy ought to be opened if there be an undervaluation."

Magens says: "It is not sufficient to make a valuation in the lump, because it would only serve in a total loss; but to make a valuation of service, where goods are damaged or partly lost, the policy must express what particular goods they were, and their value by the piece, pound, yard, &c."[4] He accordingly supposes the only reason for opening the policy, in case of a partial loss, to be the impossibility of applying the valuation in adjusting such a loss. But it will appear in the sequel that a partial loss may be adjusted upon the basis of the valuation.

Notwithstanding the reiteration of this proposition, the jurisprudence of Lord Mansfield's, as well as Lord Ellenborough's time, furnishes instances of adjustments of a partial loss upon the basis of the valuation.

Sugars, valued at £30 per hogshead, which was probably higher than the invoice price, as it was the price at which the assured limited his agent in the sales at Hamburg, were insured from the West Indies to that place. They had been damaged by sea-water about seventeen per cent.; and Lord Mansfield and his associates

[1] Shawe *v.* Felton, 2 East, 109.

[2] Clark *v.* United Mar. & Fire Ins. Co., 7 Mass. R. 365.

[3] Valuation, n. 10.

[4] Vol. I. p. 35, s. 34.

decided, that the underwriters must pay seventeen per cent. of the amount at which they were valued.[1]

Under a policy on goods, valued at £1,500, which cost the assured, including charges, £1,443, half of the goods were lost. Lord Ellenborough and his associates decided that the underwriters should pay half of the sum at which they were valued, and no question was made, whether the policy was to be opened because it was a partial loss.[2]

Coffee was insured and valued at £3,000, the invoice price of which was £2,720. A partial loss occurred, and neither the parties, nor the English Court of Common Pleas, expressed any doubt that it must be settled according to the valuation.[3]

The freight of a vessel was insured from Hayti to Liverpool, "valued at £6,500." The vessel was lost when only fifty-five bales of cotton had been taken on board towards the cargo for the intended voyage. Lord Ellenborough said: "If the freight of a part only of the goods to be carried be lost, the assured can only recover, in respect of that loss, according to the proportion which that bears to the whole sum at which the entire freight was estimated in the valuation."[4] And this was called "opening" the policy, by which was evidently meant, not setting aside the valuation, but ascertaining to what and in what manner it was to be applied.

Weskett's objection to this way of settling an average is founded on the supposition, that the underwriters would thereby, in case of an undervaluation, be liable to pay partial losses out of proportion to the premium. But whenever the loss can be ascertained to be one quarter, half, or any other definite proportion of the property, the underwriters ought to pay that proportion of the amount at which it is valued. Weskett's reason seems, therefore, not to be so much in favor of opening the valuation, as of adhering to it. The parties have agreed to consider the insurable interest as of a certain value; upon that value the amount of premium is estimated; and consequently the amount of every loss, as far as it is prac-

[1] Lewis *v.* Rucker, 2 Burr. 1167.
[2] Tunno *v.* Edwards, 12 East, 488.
[3] Goldsmid *v.* Gillies, 4 Taunt. 803.
[4] Forbes *v.* Aspinwall, 13 East, 323.

ticable, ought to be determined with reference to this agreed value.

Weskett's position seems to be, merely, that, in order to ascertain the amount of a partial loss, you must go out of the policy, whereas the amount of a total loss appears by the policy itself. In proving a partial loss you must prove what it amounts to; but if you prove a total loss, the policy, if it be a valued one, proves the amount. This is quite a different thing from treating the contract as an open policy. In ascertaining the amount of a partial loss, the policy affords greater or less facilities, according to the subject or subjects insured, and the manner in which they are valued. If the policy is on a hundred bales of cotton, valued at so much in gross, and ten of them are destroyed, or they are damaged, some more and some less, to one tenth part of the whole value, it is plain that the insurer ought to pay one tenth part of the sum at which they are valued; that is, supposing the whole sum at which they are valued is insured, which we are supposing all along. I presume that nobody ever knew of a loss of this sort adjusted upon any other principle. And yet it may give the assured more than indemnity, or less; for the article may be valued at twenty per cent. less than he gave for it, or at twenty per cent. more than he could sell it for. But as between the parties he is precisely indemnified, for they have agreed what shall be considered an indemnity.

But suppose the subject to consist of a hundred bags of sugar, and as many bales of cotton; and the whole to be valued together at one sum; and a loss to happen as before, by the destruction of ten bales, or damage to the amount of ten per cent. of the cotton. The same facts will not show the amount of the loss in this case, as in the former; showing a loss of ten per cent. on the cotton does not give the proportion of the insurable interest lost. To find this, it is necessary to show, further, what proportion of the interest consisted of cotton, and what of sugar. Now, the going out of the policy to show this last fact, instead of finding it in the policy by a separate valuation of the different articles, is all that Weskett could have meant by opening the policy.

Nothing more than this can be supposed ever to have been de-

liberately intended by any court of law. Strictly to open a policy, or treat a valued as an open policy, whether in respect of a partial or total, or a general, or particular, loss, — what is it, but to substitute another contract for that which the parties have made? Unintelligible, impracticable, or illegal stipulations may be void, or may defeat a contract; but where the thing agreed on is intelligible and lawful, the only legal question, if any, seems to be, how far it is practicable to carry it into effect.

In case of the total loss of a ship insured in a valued policy, the insurers contended that they were answerable for only the value at the time of the loss. Lord Kenyon said: "If we were to enter into the calculations contended for, every valued policy would be opened."[1] And the reason applies with equal force to a case of partial loss.

Mr. Stevens is of opinion that a valuation ought not to be opened in adjusting a partial loss.[2]

If a part of the cargo insured is valued, it is easy to ascertain what amount that is not valued is covered, by deducting from the sum insured the amount of the part valued. If different subjects, as ship and cargo, are insured in the same policy, and separately valued, or if goods are valued at so much the piece, box, &c., the value of a part is fixed by the policy.[3]

Suppose a cargo consisting of different articles, and the vessel and freight, to be insured in one policy, and all valued together at one entire sum, and a loss to happen on either one species of goods, upon the ship, or the freight; how can the loss be settled according to the valuation? or, in other words, how is the amount insured on each to be determined? for that being determined, the mode of adjusting the loss appears from the above instances. Such a case has occurred.

A policy was made on ship, cargo, and freight, all valued in gross, at $5,000. It was contended in behalf of the underwriters, that this policy was void for uncertainty, because, without a speci-

[1] Shawe *v.* Felton, 2 East, 109.

[2] Part 2, art. 1, p. 168; Benecke & Stevens by Phil., 1833, p. 1.

[3] Amery *v.* Rogers, 1 Espinasse, 207.

fication of the sums respectively insured on ship, cargo, and freight, it could not be known whether the underwriters were liable for a partial loss, or how to apportion the loss. The case turned on another point, and no decision was made upon this, on which, however, the judges were divided in opinion.[1]

There can be no doubt that, if ship, cargo, and freight are insured in an open policy, the contract is valid, and not void for uncertainty, any more than if a cargo consisting of different kinds of goods is so insured. Insurances are often made in this manner, and no question was ever made respecting their validity. If, then, it could be ascertained, under an open policy on ship, freight, and cargo, how much is insured on each, as it undoubtedly can be, what difficulty is there in ascertaining the same thing where any two, or all of them, are valued together? Suppose the whole amount of the insurable interest in ship, cargo, and freight, insured in an open policy, to consist of ten parts, of which the ship constitutes five, the freight one, and the cargo four; and suppose five to be insured in an open policy. It is an easy thing to divide the five into parts having the same proportion to each other. In case of a loss on freight, or damage to the ship or goods, in settling the loss under an open policy it is ascertained what per cent. is lost on the insurable interest, and if the sum insured is a half or quarter of the amount of the interest, the underwriter pays fifty per cent. or twenty-five per cent. of the loss. Under a valued policy he ought to pay the same per cent. upon the agreed amount of the interest, that is, upon the valuation, as far as that amount is covered by the policy. The rate per cent. of loss being ascertained in this way out of the policy, the loss, as between the parties, is ascertained by taking the same proportion of the sum insured upon the agreed value.

Accordingly, the better doctrine, and the one conclusively established, is, that

The valuation is to be adhered to and applied, so far as it is practicable, in settling partial as well as total losses.

In case of damage to goods or the destruction of a part of them,

[1] Stocker *v.* Harris, 3 Mass. R. 409.

or of loss of a part of the freight, there is no practical difficulty in adjusting the loss upon the basis of the valuation. In case of expenses incurred on any subject, questions sometimes arise respecting the application of the valuation, the consideration of which belongs to the subsequent chapters on particular and general average.

1204. *A valuation of the freight of a ship is presumed to be that of a full cargo, or the charter of the entire ship*, and is so applied, unless the phraseology of the policy or the circumstances are ground for a different construction.[1]

If, therefore, only a part of the freight of an entire cargo is at risk at the time of a loss, the valuation is applied pro rata in adjusting the loss.[2]

1205. *Though freight is* usually agreed for and *estimated in money, it is not necessary to the validity of a valuation* of this interest, *that it should actually amount to the sum at which it is valued.*

Under a policy on freight from Bourdeaux to Philadelphia, valued at $7,500, where a great part of the cargo was shipped by the assured himself, the vessel was captured and a valid abandonment was made, and on recapture and restitution of the ship with the allowance of freight, though to an amount less than the valuation, it was held in Pennsylvania, by Tilghman, C. J., and his associates, not to be necessary that the freight list, including the goods of the assured estimated at the usual rate, should amount to the valuation.[3]

[1] Wolcott *v.* Eagle Ins. Co., 4 Pick. 429.

[2] Forbes *v.* Aspinwall, 13 East, 323; Montgomery *v.* Eggington, 3 T. R. 362; Coolidge *v.* Gloucester Mar. Ins. Co., 15 Mass. R. 341; Riley *v.* Hartford Ins. Co., 2 Conn. R. 368.

[3] Dumas *v.* Union Ins. Co., 12 Serg. & R. 437. The assured being willing to allow for his own goods freight pro rata upon the basis of the valuation, the deficiency in comparison with the valuation was reduced to an amount within the limits which the court deemed not to be unreasonable, though the Chief Justice, in giving the opinion of the court, said he did not consider them as deciding that, in case the assured had himself shipped the whole cargo, the valuation would have precluded all question as to the actual amount of the freight.

1206. *Policies are sometimes made upon "net" freight*, and Weskett says, the London Assurance Company usually refused to insure this subject otherwise.[1] According to him,[2] *net freight means the profit of the hire of the ship*, after deducting port charges, wages, &c.[3]

If the owner ships the cargo, the value of net freight will, by the same rule, be the current rate for the voyage insured, deducting wages, &c.

In a policy made in Philadelphia, about 1800, the freight is valued at two thirds of the gross amount;[4] the same proportion of the gross freight was also insured in a policy in New York,[5] and insurers in some other places have adopted a similar rule, which shows some uniformity of practice in fixing the amount to be insured upon this interest.

1207. *A valuation of freight much above its gross amount, fairly made, is valid;* no less than on other subjects.

In one case, the court in Massachusetts said: "The parties agree that freight shall be valued at a sum, which eventually proves to be three times the value of the carriage of the goods. But we do not perceive that the estimate was unfairly made." And it was adjudged that the underwriters should pay a loss according to the valuation.[6]

Where the policy was on the freight, valued at the sum insured, "carried or not carried," and at the time of a loss only a part of the interest had accrued, a part of the cargo only being on board, it was held in New York that the amount was fixed at the full valuation.[7] In other words, by this clause, "carried or not carried," the insurers were understood to assume the risk of not procuring goods to be shipped, on which the freight was to be earned.

[1] Title, Freight, n. 10.

[2] Same title, n. 1.

[3] The published rules of one insurance company (the Patapsco Ins. Co. of Baltimore) define it to mean two thirds of the gross freight.

[4] Jones *v.* Ins. Co. of North America, 4 Dall. 246.

[5] Cheriot *v.* Barker, 2 Johns. 346.

[6] Coolidge *v.* Gloucester Mar. Ins. Co., 15 Mass. R. 341.

[7] Delonguemere *v.* Phœnix Ins. Co., 10 Johns. 127.

1208. *Suppose the voyage to have intermediate stages at which freight up to the time is earned*, and becomes due, independently of the circumstance of the vessel's arriving at subsequent stages; *and the freight of the whole voyage is valued in gross, — Is this a valuation of the amount of all the freights, or of the amount of each severally?*

A case of this description has occurred in New York. Insurance was made on freight valued at $2,000, "at and from Philadelphia to Omoa and Golfo Dolco, and at and from thence to Philadelphia." The assured was owner of the ship and cargo. In the outward voyage, the ship earned freight to the amount insured. A return cargo was taken on board, the freight of which would have amounted to the same sum. This freight was lost. The assured insisted that the outward and homeward freight were each valued by this policy at $2,000; the insurers said both freights were valued at that sum, and as half of the whole amount of freight for the voyage round had been earned, it was a loss of only fifty per cent. of the amount insured. It was held to be a valuation of each successive freight separately at the amount of the valuation.[1]

Two policies being made on freight valued at $12,000 in each, on a voyage from Teneriffe to Havana and thence to New York, with liberty in one to stop at Matanzas, the vessel had freight for $7,000 to Havana, which was paid on delivery of the cargo at Matanzas, where the consignee consented to receive it. The ship then proceeded to Havana, and there took a cargo for New York, for which the freight was to be $420, and was lost on the passage. The question was made, whether only the freight from Teneriffe was insured. It was held in New York, that the policy covered the freight from Havana, and judgment was given for the $420, this being all that was demanded.[2]

In a policy on freight for a year with a valuation, it was assumed by the parties and the court in Massachusetts, that the valuation was of the freight of each successive passage separately.[3]

[1] Davy *v.* Hallett, 3 Caines, 16.

[2] Hughes *v.* Union Ins. Co., 8 Wheat. 429.

[3] Wolcott *v.* Eagle Ins. Co., 4 Pick. 294.

Insurance of $1,000 being on the freight of a vessel, laden or to be laden, valued at the sum insured, at a premium of $2\frac{3}{4}$ per cent., at and from Baltimore to Aux Cayes, with the privilege of another port, and at and from either back to Baltimore, the outward freight of $500 was paid at Aux Cayes, and on the homeward voyage there was a total loss of freight, which, for that passage, was at least $500. The valuation was held, by the Court of Appeals in Maryland, to apply to the freight of each passage separately, and the judgment was for the full amount of the valuation.[1]

Insurance being on freight valued at $4,000, from Gibraltar to Bourdeaux, and thence to Philadelphia, the vessel left Gibraltar with 20,000 specie dollars, the master being ordered to purchase a cargo of brandy at Bourdeaux, if the price should be within a certain rate, or to take a cargo on freight for Philadelphia, or to proceed to St. Petersburg. The ship was lost on the passage to Bourdeaux. It was held in Pennsylvania, that the valuation was of the freight from Bourdeaux to Philadelphia, and that the interest in the freight of that passage had not commenced; and, accordingly, that the insurers were not liable for the amount of the valuation.[2]

A case occurred in Boston, before referees, under a policy for a voyage to India and back, underwritten in Salem, on the freight of a ship, which was piratically taken possession of on the coast of Sumatra, and plundered of the specie remaining on board, when only a part of the homeward cargo had been taken on board. The master having thus lost his funds for the purchase of the remainder of a homeward cargo, and being able to find but a small quantity of goods on freight, came home with but a part of a cargo, and the owners claimed for a loss on freight. The question was, whether the freight of a whole cargo, or what part of it, was at risk at the time of the loss. As the particular voyage was described in the policy, and it was stated that the ship carried out specie; and as the premium was at a rate predicated upon

[1] Patapsco Ins. Co. *v.* Piscoe, 7 Gill & Johns. 293.

[2] Adams *v.* Pennsylvania Ins. Co., 1 Rawle, 97.

the supposition of the whole freight being at risk both outward and homeward, and as pepper was to be had on the coast, and, with specie on board to purchase it, the ship was more certain of a return cargo than she could have been with a mere contract or charter-party for the supply of a cargo ; the referees were of opinion, that equitably, at least, as between the parties to the policy, the freight of a whole cargo was at risk at the time of the piracy, and that the assured were entitled to recover for a loss of freight in the proportion of the deficiency of the homeward cargo.[1]

The result of this jurisprudence is in favor of the valuation of freight on time, or for successive passages, being of that successively pending on the separate passages, and not the aggregate freight of all the passages. This cannot, however, be the invariable construction. In the Maryland case just referred to,[2] the valuation was about double the interest at risk on either passage, and the construction that the valuation was of the aggregate freight would have corresponded more nearly to a contract of indemnity. In case of a succession of long and short passages, the application of the valuation to the freight of each successive passage would give it a very irregular operation.

If the size of the vessel, the comparative length of the successive passages described or to be expected, and the ordinary rate or amount of freight in the trade, can be taken into consideration in case of ambiguity on the face of the policy, it will assist materially in putting a construction upon such a valuation ; and I do not perceive any objection to resorting to those circumstances of the subject-matter, in giving a construction to such an ambiguous valuation.

I conclude, therefore, that the doctrine applicable to the subject is, that

A valuation of freight in a time policy, or one *for successive passages, is presumed to be of that successively pending, but this presumption may be rebutted by the other provisions of the policy, or by proof* of the nature of the trade, or the ordinary amount of

[1] Peabody *v.* Salem Mar. Ins. Co., Boston, 1839.

[2] Patapsco Ins. Co. *v.* Piscoe, supra, p. 27.

the freight, that the parties, at the time of making the policy, may reasonably have supposed would be pending at successive periods, *showing that the valuation is applicable to the aggregate amount of the successive freights.*

1209. *Insurance on profits is usually made by a valuation.* Mr. Justice Livingston, giving the opinion of the court, in New York, said: "Every insurance on profits must of necessity be considered a valued, and not an open policy. If it were otherwise, it would be next to impossible to prove their value. How are you to ascertain what is often imaginary, and must depend on so many contingencies?" [1]

The prevailing practice of agreeing to settle a loss, under a policy on profits, by the same rules, and at the same rate, as a loss on the goods, is conformable to this principle, for it admits that the ownership of the goods gives, of itself, an insurable interest in profits, independently of the circumstance that the goods would actually have afforded a profit at the port of destination. It is consistent with this practice to go still further, and admit that the amount insured on profits in a policy in an open form is the value of the interest; for if a proof of the amount of interest is required in this case, as in an open policy on goods, it would be requiring the proof of a fact to show the amount of the interest, which, if required at all, should be required to show the existence of the interest; for if the amount depends on what profit would be actually made at the port of destination, it seems to follow, that, if no profit would be made, there is no interest. And as the interest is admitted without this proof, so should be its amount. This is also conformable to what is universally understood of an insurance on profits, namely, that it is the same thing as the insurance of goods at a valuation above the prime cost. But the same question might arise here as in case of a policy upon freight, namely, whether all the goods, of which the profits were intended to be insured, had been put at risk.

Under a policy on the profits of a cargo on a voyage from Phila-

[1] Mumford *v.* Hallett, 1 Johns. 433; Riley *v.* Hartford Ins. Co., 2 Conn. R. 368.

delphia to the Mediterranean, and thence to South America, valued at $20,000, the ship and cargo were destroyed by fire at Gibraltar. It was held that the assured was entitled to recover the whole amount of the valuation against the underwriters, without proving that there would have been any ultimate profit on the voyage, if it had been pursued without interruption or disaster.[1] And this is the prevalent doctrine in the United States.

But a different doctrine prevails in England. There it is held,[2] that the property in the goods does not necessarily give an insurable interest in profits; to constitute such an interest, it must be shown that there would have been a profit had the goods arrived at the port of destination.[3] The interest being considered of a kind, the amount of which can be ascertained and proved, the same proof is required of the amount of this interest as of that in goods or a vessel.[4] In England, therefore, under a valued policy on profits, the assured must show that all of the goods were at risk, and that there would have been some profit; the valuation will then attach to it, and determine the amount as between the parties. But if the insurance be in the form of an open policy, the amount of interest must be proved, and a return of premium may be claimed for short interest, as in other cases.

Mr. Benecke[5] is of opinion, that expected profit should always be insured in an open policy, for otherwise it will, he says, be a wager, "those rare cases only excepted where the profit does not depend on the state of the market, and can be looked upon as certain." But as one object, and often the only object, of a valuation, is to avoid the difficulty of settling the amount of interest in an open policy, many cases occur in which it is expedient to value profits as well as any other interest. In considering this question we may dismiss the phrase "expected profits," since, in the United States at least, the word "profits" is ordinarily used to mean all

[1] Patapsco Ins. Co. *v.* Coulter, 3 Peters's Sup. Ct. R. 222.

[2] Supra, c. 3, s. 8.

[3] Barclay *v.* Cousins, 2 East, 544; Hodgson *v.* Glover, 6 East, 316.

[4] Eyre *v.* Glover, 16 East, 218.

[5] London ed. 1834, p. 28; Benecke & Stevens by Phil., 1833, p. 32.

that can be understood either here or in England by expected profits; for if profits are not expected, but are realized, they must have been realized in the form of merchandise, money, or debts due, and will of course be insurable under those descriptions. The profit, then, which is the subject of a policy upon this interest, is the excess of the value of the subject at the port of destination over its value at the shipping port. It is only in case of loss that the policy is of any avail to the assured, and he wishes that it may avail him in a total as well as partial loss. In the latter case, the loss may be adjusted, under an open policy, on the English doctrine, by ascertaining how much less the profit is than it would have been if the goods had arrived sound.

But in case of a total loss by the ship never arriving, it is very difficult to say what the profits would have been had the ship arrived, since it is not possible to determine when she would have arrived; and if this difficulty is got over by assuming some probable time, there must be often a long delay in hearing from a distant port of destination, and learning the state of the markets. The prompt return of his capital to the assured in case of loss, which is a very important consideration in insuring, requires a valuation of the profits, in preference to an open policy subject to an adjustment upon the English doctrine of determining the amount by the state of the market at the port of destination. The same difficulty does not arise in case of a loss on goods, which is adjusted on the invoice value. There does not appear to be any way of avoiding this difficulty but by a valuation, and this is felt in practice, since policies on profits are usually valued.

1210. *Whether the valuation of "catchings and profits" on a fishing voyage is applicable* to the catchings on shore in the process of being dried and cured so as to be fit to be put on board of the vessel; or when prepared; or not *before the same are on board of the vessel?*

The valuation and insurance are supposed in this question to attach simultaneously.

Insurance was made on "property on board of the T., valued at $5,000," from the United States to the Falkland Islands, &c., "the valuation to include catchings and profits during the voyage."

The vessel was wrecked, having a part of a cargo of skins on board. A part of the skins which had been put on board had, before the loss of the vessel, been transferred to another. Another quantity taken had been salted on board of the same other vessel, never having been on board of the T. A third quantity were still at the rocks where the skins were taken, never having been put on board of any vessel, and not having been salted in preparation for the voyage home. All these skins were saved. The loss being total in its character, the assured was accountable to the underwriters for what was saved in deduction from the valuation. A question arose whether all, or what part, of the catchings were to be accounted for as salvage. The opinions of three counsellors were taken separately on the case. One was of opinion, that the valuation applied only to the skins that had been on board of the T., as being the only ones that were subjects of the policy, whether as to the risk or the valuation. Another opinion was, that the valuation, as it purported to extend to the profits and catchings during the voyage, applied to all the skins taken, whether they had ever been on board or not. The third opinion[1] was, that the valuation would apply to the skins so soon as they should be in a state to be put on board as cargo, whether they should in fact be then put on board or not, and accordingly did apply to those on board of the other vessel, but did not apply to those still remaining at the rocks. It was not necessary that the skins should be at risk under the policy, in order to make the valuation applicable to them. Those at the rocks, not being at the time in a state ready for transportation as cargo, were not to be included in the valuation as being a part of the salvage. The case was not brought before any judicial tribunal.

1211. *Insurance on buildings against fire is usually by open policies.*

1212. *In fire policies* on movable property on land such as stocks of goods, furniture, &c., *articles of uncertain value*, for instance, pictures, statuary, or engravings, *are frequently valued.*

1213. *A fire policy* for any amount on any description of sub-

[1] By the author.

ject on land *is not a valuation* of it *at that amount, unless it is expressed to be so.*[1]

1214. *Though a fire company is prohibited* by its charter *to insure over a certain proportion of the value of a building, yet, if they insure not exceeding that proportion of a valuation deliberately approved by their committee,* and there is no fraud, they are estopped to object that it is of less value.[2]

1215. *There may be over-insurance in a fire policy,* no less than in a marine.[3]

In such case, if there is no clause as to prior insurance in the subsequent policies, the different sets of underwriters contribute as in marine insurance.[4]

Where $1,500 was insured on a building, stated in the policy not to exceed three fourths of its value, the same with the land appurtenant being worth $3,050, and represented at the time of effecting the policy to be subject to a mortgage of $1,650 to secure a debt for which the assured was not personally liable, the question was made whether the value of the building subject to the mortgage was to be considered to be only $1,400, or as much as $2,000. As between the parties, the Supreme Court in Massachusetts held that it was to be considered to be of the latter value; on the ground that the insurance company, being a mutual one, knowing the value of the estate and amount of the encumbrance, took a premium on $1,500 as being not over three fourths of the amount of the assured's interest.[5]

1216. *In a policy in favor of a creditor on the life of a debtor as security for a debt* of a fixed amount, *the* amount of the *insurable interest may be estimated,* as in any insurance upon pro-

[1] Wallace *v.* Ins. Co., 4 La. R. 289; Millaudon *v.* Western Mar. & Fire Ins. Co., 9 id. 32; Laurent *v.* Chatham Ins. Co., 1 Hall, 41; Alchhorne *v.* Saville, 6 J. B. Moore, 199.

[2] Fuller *v.* Boston Mut. Fire Ins. Co., 4 Metc. 206. See also Howell *v.* Cincinnati Ins. Co., 7 Ohio R. 276.

[3] Millaudon *v.* Western Fire & Mar. Ins. Co., 9 La. R. 32.

[4] S. C.

[5] Borden *v.* Hingham Mut. Fire Ins. Co., 18 Pick. R. 523.

perty, and an English statute[1] provides for a return of premium for short interest under such a policy.

1217. *In a life policy in favor of the life insured, or* on the life of another *in favor of a party having a pecuniary interest the amount of which cannot be computed,* as where the assured depends upon the life insured for support, or has an indefinite pecuniary interest subject to be affected by the skill, capacity, or knowledge of the insured life, *the policy,* though in form open, *is, in effect, a valued one,* in which the interest is conclusively assumed to be at least equal in amount to the sum insured.

SECTION II. OPEN POLICIES.

1218. *Under an open policy the value of the interest must be proved* by the assured according to certain established rules, before he can recover for a loss.

1219. The greater number of insurances, and especially those on ships or cargoes, have relation to an interest, the value of which may change. *It is* accordingly *necessary to fix on some period at which the value is to be estimated;* and as this must be done by a general rule, *the time fixed upon* for this purpose *can be no other than the commencement of the risk.* No subsequent time can be taken, since the interest may cease directly after the commencement of the risk, by the destruction of the thing insured. The value of the interest is therefore to be estimated at the time of the commencement of the risk.[2]

1220. *The indemnity proposed in marine insurance, in case of loss, is to restore the assured, as nearly as may be, to the condition he was in at the outset.*

The general principle, by which the amount of insurable interest is computed, is the same that runs through the whole subject of insurance, namely, that of indemnity. It is not intended

[1] 14 Geo. III. c. 48.

[2] 2 East, 109, 116; 7 Mass. R. 365, 369; 9 id. 436; 7 Johns. 343; 13 Mass. R. 250; Lewis *v.* Rucker, 2 Burr. 1167; Usher *v.* Noble, 12 East, 639; Snell *v.* Delaware Ins. Co., 4 Dall. 430; Carson *v.* Marine Ins. Co., 2 Wash. C. C. R. 468; 1 id. 509.

by the contract of insurance to put the assured in the same situation, in case of a loss, that he would have been in had the adventure terminated successfully. He must take the chances of his speculation on the state of the markets. The indemnity refers to the beginning of the risk upon the specific subject insured, and losses are adjusted upon this principle.

1221. *In all cases the premium paid for the insurance constitutes a part of the insurable interest,*[1] which shows that the amount of insurable interest is not precisely the price current or marketable value. And since the assured pays a premium for insuring the part of his interest that consists of the premium given, it follows, that the shorter the duration of the successive risks, the less expensive is the insurance. But it is hazardous to divide the same continuous risk into different portions, as the assured may lose his indemnity between the underwriters successively for one portion and the other, where the cause of a loss exists during one portion of the risk, and the loss actually happens after the commencement of another portion.[2] The risk is, therefore, usually made to commence at times at which the condition and value of the property can be most satisfactorily proved.

The premium on the premium is to be included in computing the amount to be insured in order to cover the interest and replace the exact value of the subject in case of total loss.[3]

Where the policy stipulates for a return of premium on a certain condition, it results that this part of the premium should be conditionally a part of the insurable interest, depending upon the same contingency, in order to give the assured indemnity in case of loss. Mr. Benecke adjusts a loss in this way.[4]

[1] 1 Magens, 37, s. 37; Pothier, tit. Insurance, n. 43.

[2] Supra, c. 13, s. 15, No. 1148.

[3] This is done by deducting the rate per cent. of the premium, say 10 per cent., from the invoice value, say $100, and then 90 : 100 : : 100 : $111\frac{11}{100}$, the amount to be insured.

[4] Page 131, London ed. 1824; Benecke & Stevens by Phil. 26. For example, if one per cent. of the premium is to be returned for convoy, or the omission of a passage, the whole premium, say 10 per cent., is to be included in computing the amount of the insurable interest, since the assured pays the whole, and no part of it may be returnable. Let the invoice

Where the insurers reserve 1 or 2 per cent. out of all losses, it is necessary to add the same proportion — that is, as 1 to 99, or 2 to 98 — to the amount of the interest, if a full indemnity is intended, so that in a total loss the assured may receive back the capital put at risk. As no abatement is thus in fact made, the provision respecting it becomes useless, and it is accordingly said to have been struck out of the common form of policies in England, about the year 1763.[1] Weskett supposes the reservation of this abatement to have been borrowed from the provisions of marine codes, prohibiting the insurance of property to its full value.[2] The court in New York considered it as having the effect of preventing the assured from fully covering the amount at risk.[3] But the general practice in the United States appears to be the same that Weskett describes it to have been in England, the rate per cent. of the abatement is included in computing the amount of the interest.

The practical effect of this provision is not, then, to prevent the assured from fully covering his interest. Its only effect is to make the premium more or less above the nominal rate. If the underwriters reserved an abatement of 50 per cent. from losses, the assured would be obliged, in order to be fully indemnified, to effect a policy on double the amount really put at risk; or rather on double the amount of what the insurable interest would be, if no such abatement were made. Accordingly, a nominal premium of 5 per cent. in such a policy is in fact a premium of 10 per cent. on the real amount of his interest. The effect is the same

be $1,000, then 900 : 1,000 : : 1,000 : $1,111 $\frac{11}{100}$, the amount of the insurable interest subject to the contingency. As the assured is eventually in effect liable for only a premium on $1,098$\frac{80}{819}$, instead of $1,111.11$\frac{91}{819}$, on which the premium was in fact computed, he is entitled to a return of about $1.20, being the premium on about $12.21, the amount added to the insurable interest by computing the premium at 10 per cent., the rate named in the policy, instead of 9 per cent., the rate for which the assured proves eventually to be liable, after the deduction for the returned premium.

[1] 1 Weskett, art. Loss, n. 2.

[2] Ibid.; and see Molloy, b. 2, c. 7, s. 6.

[3] 1 Johns. 82.

in a less degree if an abatement of only 1 or 2 per cent. is reserved. In comparing the rate of premium demanded by different companies, therefore, it is of importance to observe whether the abatement made from losses by both of them is the same.

1222. *The amount of the insurable interest in a ship, in an open policy, is its value in the market at the beginning of the risk, and it continues to be the same during the period for which it is insured.*

It becomes of less value by decay, and wear and tear, but as between the parties to the policy it continues to be of the same value, and the same amount will be recoverable in a total loss, at whatever period of the risk it may happen, as will more distinctly appear under the head of total losses.

Where a ship has been recently purchased, its cost, with the addition of the premium, is its value in the policy.[1]

1223. *The ship, as a subject of insurance, includes the tackle, boat, and whatever is necessary to equip it for the voyage.*[2]

The guns, ammunition, &c. of an armed ship constitute a part of its insurable value.[3]

The provisions are included.[4] Mr. Benecke[5] says, that under the ordinances of Hamburg and Sweden it is understood that, if the gross freight is insured, the outfits are not included in the value of the ship, and that the ordinance of Copenhagen excludes from the value of the ship, such articles as are subject to be used in the voyage, as provisions and ammunition. The laws of the United States make no such exception.

1224. *In the adjustment of a loss, reference is necessarily had to the interest existing at the time of the disaster*, for whatever interest the assured may have had at the commencement of the risk, he cannot be entitled to indemnity, except for his interest subsisting at the time of the loss.[6]

The assured in a policy for whom it might concern being owner

[1] Weskett, tit. Interest, n. 9.
[2] 1 Caines's R. 80.
[3] 2 Valin, 55; 1 Emerigon, 277.
[4] 1 Caines's R. 80.
[5] Page 65, ed. of 1824; Benecke & Stevens, by Phil. 29, 43.
[6] Supra, Vol. I. p. 121, No. 185.

of half of a vessel, the other half being pledged to him by a parol agreement as security against his liability as indorser for the other joint-owners, the other half being transferred to him by a bill of sale before the loss, it was held in Massachusetts that he had an insurable interest in the whole vessel to which the policy attached at its date, and that he had such interest at the time of the loss.[1]

1225. *The amount of the insurable interest which a charterer has in a vessel depends on what he is liable to pay or to lose* in case of its being lost.[2] The insurance of his interest is in effect a re-insurance.

1226. *The amount of insurable interest in goods is their market value at the time and place of the commencement of the risk.*[3]

The best, though not conclusive, criterion, of this interest, is the cost of the goods to the assured. This is the most satisfactory proof of the value, in case they are purchased near the time when the risk commences.

1227. *If an open policy is made upon successive passages* from port to port, *upon shipments successively made* at different ports, *though the subsequent shipments are only the proceeds of the first, yet the insurable interest may be greater;* for the invoice value of each shipment is the measure of the interest.

1228. *By provisions in the policy showing the risk* to be divided, and *to commence successively* from time to time, *at successive ports*, the amount of insurable interest in the very same goods may vary successively at the commencement of the successive passages.

The sum of $10,000 was insured on a cargo of flour, "from Alexandria to St. Thomas, and two other ports in the West Indies, and back to the port of discharge in the United States," half per cent. of the premium to be returned for each port not used or attempted. A part of the flour, to the amount of more than $3,000, was sold at St. Thomas, and the vessel was wrecked at Cape Haytien, but the remaining part of the cargo was saved, in

[1] Martin *v.* Fishing Ins. Co., 20 Pick. 389.

[2] Puller *v.* Staniforth, 11 East, 232; Horncastle *v.* Stewart, 7 id. 400.

[3] Le Roy *v.* United Ins. Co., 7 Johns. 343.

a damaged state, however, and an abandonment was made on account of the loss of the voyage. At the time of the vessel's sailing, the amount of cargo on board was over $16,000; at the time of the loss, over $12,000. The question was made, whether, at the time of the loss, the policy covered the cargo then on board, to the whole amount underwritten, or only twelve sixteenths of it, that is, the proportion covered at the commencement of the risk. Mr. Justice Story, giving the opinion of the court, said: "We think the true intent and object of the policy was to cover $10,000 during the whole voyage out and home, as long as the assured had that amount on board. The premium is apportioned accordingly, for a half per cent. is to be returned 'for each port not used or attempted.' And the contemplation of the parties evidently is, that the premium should be paid during the round voyage for the full sum insured. The loss must be apportioned between the parties in the proportion which the sum insured bears to the amount of value on board at the time of the loss." [1]

1229. *The amount of insurable interest is most frequently the invoice price.* But stating a price in the invoice does not determine the amount of interest any further than as it is a proof of the actual cost.

A quantity of hides insured was invoiced at twelve cents per pound, which sum they were worth, but they had cost but ten cents; the court said, "Generally speaking, the prime cost is the best rule by which to test the value;" and it was held that they should be estimated at ten cents. But the court said, "The prime cost might not be a just rule where the goods had remained on hand a considerable length of time." [2] In such case the market price may have greatly varied; and the market price at the commencement of the risk is the true amount of insurable interest.[3] The prime cost is not, therefore, conclusive proof of the value. Yet the court always leans in favor of the actual cost.[4]

[1] Columbian Ins. Co. *v.* Catlett, 12 Wheat. 383.

[2] Le Roy *v.* United Ins. Co., 7 Johns. 343.

[3] Carson *v.* Marine Ins. Co., 2 Wash. C. C. R. 468.

[4] Gahn *v.* Broome, 1 Johns. Cas. 120. See Ord. Copenhagen, art. 3.

Where the risk on cotton was to commence at the Isle of France, and it was invoiced at the value there, which was more than the cost to the assured, the court held that the interest was to be estimated according to the invoice.[1]

"Suppose," says Mr. Justice Washington, "the property to be destroyed within an hour after the risk has commenced, (and the time makes no difference in principle,) what does the owner lose? Precisely as much as it was worth, or would have commanded in the market at the time and place it was shipped. If the property cost him less than it was worth when shipped, he loses (in case of total loss) as well the first cost as the increased value, for which he is entitled to claim indemnity from the insurer. If it costs him more, he can have no claim under the contract [of insurance] for the difference between the first cost and diminished value. It is impossible that the first cost can furnish a just rule of indemnity, when it exceeds or falls short of the actual value of the property when it is put at risk. The invoice price furnishes no rule of indemnity in any case where it exceeds or is less than the market value." [2]

1230. Where goods are purchased by barter in a foreign port, their value in an open policy is a subject of estimate in the precious metals at the place and time in question, adding or deducting for the rate of exchange with the place where the policy is made.[3]

If the goods are purchased by barter in a foreign port with which there is no mode of estimating the rate of exchange, the French code provides that the amount of interest shall be the cost and

[1] Coffin *v.* Newburyport Marine Ins. Co., 9 Mass. R. 436.

[2] Carson *v.* Marine Ins. Co., 2 Wash. C. C. R. 468. See also Snell *v.* Delaware Ins. Co., 4 Dall. 430; 1 Wash. C. C. R. 509. Emerigon says, the actual cost is the rule, though the goods have fallen since the purchase. Tome I. p. 261.

[3] To make this more plain to the student, suppose goods purchased by barter in the East Indies, of the value of 100 Spanish dollars there, or a weight of silver equal to that sum, to be insured in New York, where the market rate of 100 Spanish dollars placed in the East Indies is $110, this will be the amount of insurable interest in New York.

charges of the goods given in barter ; [1] to which should be added the expense of shipping and transporting them.[2]

Magens says, goods sent from places where no exchange is current ought to be estimated at no higher value than the bullion, or the coin or specie, brought thence, would produce, after the payment of the premium for the risk of the voyage, freight and other expenses of transportation.[3]

1231. *The rate of exchange at the commencement of the risk on the goods in question is the true measure.*

Goods shipped at Havre, and invoiced in French currency, were insured in England, when the French crown of three livres was at twenty-four pence ; but it was reduced to seventeen pence, by the falling of exchange on France, before a loss that took place was paid. The insurers were willing to pay the loss, estimating the invoice value of the French crown at its rate at the time of payment ; the assured claimed to recover according to the value as the rate of exchange was at the time of effecting the policy. Lord Kenyon said : "The insurers did not insure against the debasement of the coin. In case exchange had risen, the assured would have had the benefit of the rise, and in case of a fall should submit to the loss." [4]

This was in effect holding that the amount of the insurable interest was varying with the rate of exchange, not only while the risk continued, but also afterwards, until the loss was paid. The reason thus given by Lord Kenyon, if his remark be meant as such, seems in effect to be a mere assumption of the conclusion as a ground of making it ; and the fact of the variableness of the amount of the interest upon his rule seems to be a conclusive reason for the contrary one above stated.

1232. *Besides the price paid for goods, the charges upon them are included in the amount of interest.*

These include labor, storage, expense of transportation and

[1] Code de Commerce, l. 2, tit. 10, s. 1, n. 340. See also Le Guid. c. 15, a. 15 ; 1 Magens, 43, s. 41.

[2] Benecke, London ed. 1824, p. 119 ; Benecke & Stevens by Phil., 1833, p. 14. See also Catlett *v.* Columbia Ins. Co., 3 Cranch, C. C. R. 192.

[3] Vol. I. p. 41, s. 40.

[4] Thellusson *v.* Bewick, 1 Esp. 77.

commissions actually paid to agents and factors.[1] The commission which is paid to an agent for effecting insurance is included in estimating the amount of interest. Mr. Stevens says, that these are included at Lloyd's only in cases where the commission is actually paid.[2] The rule is the same in the United States, as to including only the commissions which are actually paid.[3]

If the goods have been transported, either by land or sea, subsequently to the purchase of them by the assured, and previously to the commencement of the risk, the expense of such transportation is a part of the interest to be covered.

The shipping charges on goods insured for a voyage are a part of their insurable value for such voyage in an open policy.[4]

Under an open policy on goods previously deposited in the custom-house stores, subject to a duty, the insurable interest is the same as if the duty had been paid,[5] where the importer is absolutely liable to the government for the duty.

1233. *The freight and other expenses to be incurred on the goods during the risk are not a part of the insurable interest.*[6]

1234. *Freight advanced on goods, though not to be repaid in any event, is not included in their insurable value in an open policy,* without some express provision or some implication in the policy that it is to be included.

Experienced insurers have expressed the opinion, that freight so advanced constitutes a part of the insurable interest, since the advance would be lost in case of the loss of the goods.

A different doctrine has been held by the Court of King's Bench in England. Where the charterer made advances to defray the expenses of the navigation of the ship, it was held that such ad-

[1] Fontaine *v.* Columbian Ins. Co., 9 Johns. 29.

[2] Page 161; Benecke & Stevens by Phil., 1833, p. 16. See Usher *v.* Noble, 12 East, 639; also Weskett, art. Loss, n. 2.

[3] Anon., 1 Johns. 312. Rules of the Patapsco Ins. Co. of Baltimore.

[4] Benecke, London ed. 1824, p. 119; Benecke & Stevens by Phil., p. 114.

[5] Wolfe *v.* Howard Ins. Co., 1 Sandford, 124.

[6] Gibson *v.* Philadelphia Ins. Co., 1 Binn. 405.

vances did not constitute any part of the insurable interest in the goods.[1]

A policy of insurance was made on specie, shipped in the L., in the River Plata, and on the same or the returns thereof, as interest might appear, at and from the River Plata to Canton, during the vessel's stay there, and back to the River Plata. The assured had chartered a vessel for the voyage, agreeing to advance the port charges, and other incidental expenses in China, the remainder of the agreed charter-money, namely, $10,000, to be paid on return to Buenos Ayres. The underwriters had no notice of the charter-party. A shipment of specie was made by the assured, and, after payment of port charges and incidental expenses in China out of it, the remainder was invested in teas, and the vessel was captured on the return voyage, and was condemned as enemy property; whereupon the question arose whether the value of the teas at risk on the return voyage was the whole amount of the specie shipped outward, or only the remainder, after payment of the port charges and incidental expenses in China. Lord Tenterden and his associates held that the latter was the amount at risk, on the ground that the sum of $10,000 would have been payable on the arrival at Buenos Ayres, though the whole shipment of specie outward had been left in China, and also that "the sums payable for the use of the ship had no distinct relation to the goods."[2]

Lord Tenterden, by saying that the "sums payable for the use of the ship bear no distinct relation to the goods," probably meant that they were not so much additional value of the goods, and not proportional to their value. Such an advance for the use of the ship appears rather to give an insurable interest in freight, than to enhance the amount of the interest in the cargo. The absolute purchase of the use of the whole ship for a voyage, is the acquisition of the entire interest in freight for that voyage, provided the agreed amount is to be paid at all events, the perils of the seas,

[1] Mansfield *v.* Maitland, 4 B. & A. 582. See also Wilson *v.* Royal Exch. Ass. Co., 2 Camp. 623.

[2] Winter *v.* Haldiman, 2 B. & Ad. 649.

loss, and disaster notwithstanding. And a like agreement and unconditional payment for the use of the ship for a part of the voyage, or a part payment for the use of the whole ship for the voyage, seems to give a like insurable interest in freight rather than to increase the amount of the insurable interest in the goods. When the goods have been transported in pursuance of such an agreement, the amount so advanced has then become incorporated into their value.

1235. *Whether, if a drawback or bounty is allowed on the exportation of goods on the voyage insured, it is to be deducted in estimating the amount of the insurable interest?*

Weskett says, that in computing the interest in an open policy on goods exported, and entitled to a bounty on exportation, the bounty is to be deducted.[1]

But it has been held in New York, that the drawback, in case of goods entitled to debenture, is not to be deducted from the invoice. The court says: "The drawback is intended for the benefit of the merchant, and although it may enter into the estimate of the value of the goods for exportation, it is no part of their actual price in the market here. To entitle the goods to drawback, they cannot be relanded within the United States, and the shipper is obliged to give security that they shall not be relanded. The drawback is therefore contingent, and in the case of relanding by barratry, the assured would not only lose the amount of the drawback, but be exposed to inconvenience and additional loss on account of the security. To permit the drawback to reduce the value to be recovered, would, therefore, impose on the assured a burden and a risk without an indemnity, a burden by giving the security, and a risk in case of barratry."[2] This opinion was subsequently confirmed.[3]

The cases of bounty are distinguishable. Where the bounty is intended as a reward, as in case of some bounties in France, it plainly ought not to be deducted in estimating the insurable value.

[1] Art. Fish, n. 1.

[2] 1 Johns. Cas. 122; Gahn *v.* Broome, 1 Johns. 75.

[3] Minturn *v.* Columbian Ins. Co., 10 Johns. 75.

In some cases, as those on exported salted fish in the United States, the bounty is intended as a reimbursement of the duty paid on the salt used in curing the fish. In such case it stands upon the same footing as a specific drawback of duties.

Though it is plain that the contingency hanging over the allowance of the drawback on exported goods is very slight, still, as stated by the court in New York, there is such a contingency, and consequently the assured has, to the same extent, a contingent interest in the exported goods to the amount of their value without a deduction for the drawback, in a policy on the outward voyage to the foreign port where their being landed gives the exporter a right to the drawback. He therefore has an insurable interest of that amount.[1] In determining on the amount of the insurable interest in adjusting a loss, and deciding on the claim for a return of premium, which must both be decided by the same rule so far as either is affected by the amount of the insurable interest, the better rule, accordingly, seems to be, that,

In computing the insurable value of exported goods at the port of departure, the drawback is not to be deducted.

As this mode of estimating the value does not correspond to the amount really at risk so nearly as the remainder after the deduction of the drawback ordinarily would, it is for the interest of both assureds and insurers to have a provision in the printed form of the policy, for the deduction on account of the drawback.

1236. *Where a contingent pecuniary interest depends upon circumstances which cannot be made subjects of any satisfactory calculation, it is not insurable in an open policy.*

It was held in the English Court of Chancery, that the value of an interest in an expectancy on the decease of a bachelor of sixty years of age, contingent on his dying without leaving issue, was not a subject of calculation, and so not of insurance in an open policy.[2]

1237. *The value of ship, goods, or freight may be, and usually is, different under an open or valued policy, and in a contribution to general average.*

[1] See supra, No. 176.

[2] Baker *v.* Bent, 1 Russ. & M. 224, cited Beaumont on Fire & Life Insurance, 2d ed. 1846, p. 8, n.

In speaking of the market value of the goods at the commencement of the risk as being the amount of insurable interest in them, reference is had to the value between the parties to the policy upon which the claims of the assured and the liability of the insurers are determined.[1]

1238. The insurable interest in freight is described by Weskett to be the net amount, after deducting the expenses that would have been necessarily incurred in earning it. But at present both, *in England and*, most generally, at least, *in the United States, the amount of the insurable interest in freight is the gross amount to be received* according to the bills of lading or charter-party.[2] In general, therefore, the amount of insurable interest in freight will depend on the contract between the owners and shippers. Where the same party owns ship and cargo, the amount of freight will be the price usually given between the same ports.

Under an open policy on freight from India to London, the gross freight was £3,068, to earn which it was necessary to expend £699, and, a total loss having taken place, the question arose whether the amount of interest under the policy should be estimated at the gross or net freight. Witnesses conversant in the subject of insurance at Lloyd's, where the policy was made, stated, that, according to the invariable usage there, the gross freight constituted the amount of the interest. Mr. Justice Park and Mr. Justice Burrough considered, accordingly, that the amount of interest, and so of the loss, was the gross freight, and so was the decision of the court, there being only three judges present. Mr. Chief Justice Dallas doubted of the propriety of this rule, since

[1] Willings *v.* Consequa, 1 Peters's C. C. R. 172, 301.

[2] Stevens on Average, London ed. 1824, p. 176; Benecke & Stevens by Phil. 1833, p. 10; Stevens *v.* Columbian Ins. Co., 3 Caines, 43; Paradise *v.* Sun Mut. Ins. Co., 6 La. Ann. R. Mr. Justice Washington considered the amount of interest to be the net freight. M'Gregor *v.* Ins. Co. of Pennsylvania, 1 Wash. C. C. R. 39. And in the same case evidence was given of a custom in Philadelphia to consider two thirds of the gross freight as the amount of insurable interest. And it seems that the court was of opinion that the contract might, under some circumstances, be affected by such a custom.

it allowed the assured to recover more than an indemnity, and opened a door for frauds.[1]

Where the gross amount of charter-money was £800, and the charterer agreed to advance about half of it, from time to time, to defray the expenses of the navigation, the interest of the owner in the charter-money, and that of the charterer in the amount so advanced by him, were insured in separate policies in the same office, the owner having insured half of the gross amount. The office knew that the charterer had insured for his advances, and that the interest of the owner in the freight under his policy was only the excess of the amount of the charter-money over and above the amount of the expenses of the navigation of the vessel. The effecting of the two policies with the same underwriters, with an explanation of all the circumstances, was a sufficient notice to the underwriters that such was to be considered the insurable interest as between the parties.[2]

In the above case, the actual amount of the owner's interest seems to have been in fact one half of the gross freight; for the master had agreed to navigate the vessel and defray all expenses for this purpose, for about one half of the gross amount of the charter-money agreed for by the charter-party, and the charterer agreed to advance this amount to the master, which, in the event of a loss, he had no right to recover back from the owner, as appears from his insuring on his own account the amount so advanced by him; the sum, therefore, which the owner would lose by the loss of the vessel was only one half of the gross freight, since this only was to come into his hands in any event.

Where the owner of a chartered ship is at the risk of the perils of the seas, the insurable interest of the charterer in freight, in respect to those perils, is the excess of the gross amount of freight over the amount he is liable to pay, in case of the ship earning freight.[3]

1239. *The amount of interest in freight, as in ship or goods, is the same for any part, or for the whole, of a passage.*[4] The

[1] Palmer *v.* Blackburn, 1 Bingham, 61.

[2] Etches *v.* Aldan, 1 M. & R. 157.

[3] Clark *v.* Ocean Ins. Co., 16 Pick. 289.

[4] 15 East, 324.

assured must, therefore, in order to cover his interest, insure the same amount for any part, that he would insure for the whole voyage, from the port of lading to that of discharge.

1240. *Where the voyage is for successive passages, the amount of insurable interest for an open policy on any passage is that depending upon the performance of such passage.*

The subject of the valuation of freight for a voyage made up of successive passages has already been considered.[1] A question somewhat analogous arises as to the amount of the insurable interest in an open policy on freight for a voyage consisting of successive passages. If the interest in freight for the second passage has accrued during the first, then the amount for both passages is at risk and insurable for the first; and if the payment of freight for the first passage depends upon the vessel's performing the second, then the amount of freight for the two is at risk during the second passage. Where a ship was chartered for a voyage from Philadelphia to Tampico, Campeachy, and thence to New York, for $2,000, one half payable on delivery of her outward cargo, the other half on her arrival home, and insurance to the amount of $2,000 was made on freight, it was held that the interest in the whole amount of the charter commenced on the outward passage, and the vessel being lost on that passage, the whole amount was recovered against the underwriters.[2]

1241. *The profit made on the outward voyage is an additional insurable interest in the goods*, and may be insured in a new open policy on the homeward cargo, for it has now in fact become goods.[3]

1242. *Insurance on profits on goods requires a provision for the adjustment of loss in the same manner as on the goods.*

If the insurance on profits, without any express valuation, is an open policy, and not one in which the interest of the assured is implicitly valued at the amount insured, that is, if there is any open policy on profits, the only way of ascertaining the interest is, by showing what would have been made had no disaster hap-

[1] Supra, No. 1208.

[2] Meech *v.* Philadelphia Fire & Inland Nav. Ins. Co., 3 Whart. 473.

[3] Valin, tit. Insurance, a. 47; Emerigon, c. 9, s. 7; M'Kim *v.* Phœnix Ins. Co., 2 Wash. 89.

pened from the perils enumerated in the policy. The question has already been suggested, whether a profit is to be presumed to the amount insured on that interest in a policy open in its form, provided all the goods contemplated by the parties are at risk ;[1] or whether, in an open policy on profits, there is any interest, if it appears by the state of the markets that no profit would have been made.

Mr. Benecke states, that in such case there is no insurable interest under the policy.[2]

And Lord Ellenborough, speaking of insurance of profits, says: "The difficulty of making the calculation cannot affect the question of interest. Short interest can be no more than a short profit to the extent of the whole sum insured."[3] He supposes the calculation to be made upon the state of the market at the port of destination.

It accordingly appears to be quite necessary, in such a policy, to stipulate for a settlement of loss and claim for return of premium, in the same manner as on the goods, or to make some other agreement to avoid the uncertainty with which the insurance would be otherwise beset.

1243. *The amount of a consignee's insurable interest*, distinct from that of his principal, *is that for which he has a lien* on the goods ; resembling very much the interest of a mortgagee, or lender at respondentia.

1244. *On an open marine or fire policy in favor of a mortgager or mortgagee*, or consignee, or person having any lien, *the calculation of the amount of the insurable interest must depend on what interest appears by the contract to be intended to be insured*, and which, supposing it to be intended, may, by the terms of the policy, be covered.[4]

Under a policy on the assured's interest under a mortgage on property subject to prior encumbrances, the insurable amount is the excess of the value over such encumbrances, adding the premium.

[1] Supra, No. 1209.

[2] Pages 27, 28, London ed. 1824.

[3] Eyre *v.* Glover, 16 East, 218.

[4] Irving *v.* Richardson, 2 B. & Ad. 193 ; S. C., 1 M. & R. 158.

1245. *The value of a building, or of any article, in a fire policy, is what it could be sold for;* since its value must be proved, and it does not appear what other value than this could be satisfactorily shown.

That the amount of the insurable interest is a subject of question and proof, appears from a New York case, in which it was held that the value of a lease to a tenant under an open policy is the amount for which it could be sold subject to the payment of the future rent by the purchaser.[1]

These two questions are correlative, and the answer to the latter depends on that to the former.

The obvious presumption is, that the rule is the same in a fire policy as in marine insurance;[2] viz. that the value of the subject at the beginning of the risk is referred to, where the policy, by its provisions, or the description of the subject, does not require a different construction. If this were not the rule, the amount of the insurable interest would be fluctuating, according to the price of the subject in the market, at different times during the period of the risk.[3]

The insurable value, as between the parties to the policy, is not affected by any peculiar disadvantage to which the assured himself may be subject in respect to using or disposing of the property. Where the insured building, put up by a lessee on leasehold premises, was burnt near the time of the expiration of the lease, the insurers contended that they were liable only for its value to be removed, but it was held that the estimate must be of the value of such a building generally, and not subject to any such incidental disadvantage, especially if, as in this case, the disadvantage was contingent.[4]

[1] Laurent *v.* Chatham Fire Ins. Co., 1 Hall's R. 41. See also Millaudon *v.* Western Mar. & Fire Ins. Co., 9 La. R. 32.

[2] Supra, No. 1219.

[3] The literal expression of the court in Laurent *v.* Chatham Fire Ins. Co., 1 Hall's R. 41, seems to import that the value at the time of the loss is to be regarded; but the meaning intended is, that the assured can recover for the loss of only what interest he has at the time, of which there is no doubt; but this is a different question from the one under consideration in this place.

[4] Laurent *v.* Chatham Fire Ins. Co., 1 Hall's R. 41.

1246. *The value of the subject may be different under successive fire policies, as it may be under successive marine policies.*

The amount of $15,000 being insured on buildings in an open policy, with a stipulation, that, in case of subsequent insurance in another office, "each office should be liable to the payment only of a ratable proportion of any loss," a like amount was subsequently insured in another office on the same buildings valued at $30,000. On the buildings being burnt down, the first underwriters contended that the same were not worth $30,000, and that they were liable for only a part of the amount in their policy, in the ratio of the actual value to the amount insured in both policies. Bullard, J., giving the opinion of the court in Louisiana, said: "If the defendants will not adopt the second insurance as a valuation, we cannot see how they can take advantage of it for the purpose of exonerating themselves from a part of the loss"; and they were held liable for $15,000.[1] The alternative was not, however, as stated by the court. The adjustment contended for by the underwriters on the first policy was the same which would be made in a marine insurance under such a stipulation, and there does not appear to be any ground for a distinction in the two kinds of insurance, in putting a construction upon the stipulation. The court did, in fact, adopt the valuation in the second policy, in putting their construction upon the first.[2]

1247. *In a policy on a life, if the interest is certain, as a debt, the amount may be ascertained in the usual way.*[3]

1248. *In reinsurance, the amount of interest is the sum insured in the original policy, with the addition of the premium of reinsurance,* deducting the original premium. Valin[4] is of opinion that this deduction is to be made. Emerigon,[5] on the contrary, thinks the original premium is not to be deducted in estimating the amount of interest for reinsurance. Where the two premiums are at the same rate, this mode of computing the interest makes the reassured a gainer by a total loss, to the amount of the pre-

[1] Millaudon *v.* Western Mar. & Fire Ins. Co., 9 La. R. 32.

[2] See infra, No. 1482 a.

[3] Stat. 14 Geo. III. c. 48, s. 3.

[4] Tome 2, p. 63, tit. Insurance, a. 20.

[5] Tome 2, p. 249, c. 8, s. 14.

mium on the original policy, where the reinsurance is against all the risks covered by the original policy. This is inconsistent with the general principle, that the interest is to be so computed under an open policy that, in case of total loss, the assured shall be exactly indemnified.

1249. *The lender in bottomry or respondentia has an interest to the amount of the loan,*[1] *adding the usual rate of interest*, being a part of the marine interest; for the legal interest may be included as part of the amount of his insurable interest, where the bottomry risk is to end at a certain date; or where a certain period for estimating interest is agreed upon in the policy. *The lender also adds the premium which he pays on the policy for insuring his interest* as in other cases. But in an open policy without any stipulation for including the interest on the sum loaned, the insurable interest will be estimated, as it usually is, in reference to the commencement of the risk, and, therefore, will include only the principal and the premium of insurance. *The borrower may insure the excess of the value* of the property over the amount of the loan, including the rate of premium on the whole.[2] Or if the lender takes only a particular risk, the borrower has an insurable interest in the whole value as to other risks. The ordinance of Hamburg allows insurance by the lender, "to the full amount of principal, interest, and premium."[3] The French law prohibits the insurance of the marine interest,[4] upon the same principle on which it prohibits the insurance of freight and profits.

Since a bond of hypothecation is subject to be reformed by a court of admiralty[5] it may be good for only a part of the amount loaned; the amount of the insurable interest of the lender is liable to be affected accordingly.

The lender is an insurer in respect to the borrower, and usually,

[1] Supra, c. 3.

[2] Supra, c. 3; Williams *v.* Smith, 2 Caines's R. 13; S. C., 2 Caines's Cas. in Error, 110.

[3] Title 9, a. 2; 2 Magens, 225, No. 930.

[4] Code de Commerce, l. 2, tit. 10, s. 1, n. 158.

[5] The Packet, 3 Mason's R. 255; The Virgin, 8 Peters's Sup. Ct. R. 538; The Hunter, Ware's R. 249; The Cognac, 2 Hagg. Ad. R. 277; The Beddington, id. 422; The Prince George, 4 Moore's Appeal Cas. 21.

at least, if not invariably, according to the form of hypothecation now in use, assumes the risk of general and particular average, which raises a question, not satisfactorily settled in the precedents and treatises, respecting the proportion of the amount of the lender's and borrower's interest in the hypothecated subject, and the liability of each for losses, where the value of the subject exceeds the amount of the loan. In respect to loss by damage to the subject and consequent diminution of its value at the end of the risk, as the lender has a lien on the whole subject, though its value may be double the amount of the loan, he consequently is entitled to the whole of the remnant or salvage, up to the amount of his loan and the marine interest, and where the remnant or salvage does not exceed that amount he can have no pretence for claiming of the borrower the payment to himself of the amount of such a loss, for he himself proves to be the only party benefited by the circumstance that the original value of the subject exceeded the amount of the loan, so that the salvage or remnant is greater than it would otherwise have been, though still below the amount of the loan and interest.

The case may be different where the salvage or remnant exceeds the amount of the loan and marine interest, if the loss, whether general or particular, instead of being merely damage to the subject, has been by payments, as for instance, contribution in general average, or expense for repairs. In this case the borrower is benefited by the payment in the proportion of such excess, and the loss should evidently be ratably apportioned between him and the lender precisely as in case of prior and subsequent insurance under policies providing that the subsequent underwriters shall be liable only on the excess of the value of the subject over the amount of the prior policy. By this rule the apportionment of the whole amount of the insurable interest at risk between the parties to the hypothecation will have reference to the beginning of the risk, the amount of that of the lender being the original loan with the addition of the rate of premium for the voyage. The rule has been adopted in Pennsylvania.[1] The moment the debt becomes absolute by

[1] Gibson *v.* Philadelphia Ins. Co., 1 Binn. R. 405.

the termination of the lender's risk, he and the borrower assume the relation of mortgagee and mortgager of the subject, the debt due to the lender, now mortgagee, that is, creditor with a lien, being diminished by the deduction of the amount of the particular average, or contribution to general average, for which he is liable.

SECTION III. CLAUSE AS TO PRIOR INSURANCE.

1250. *In fire as well as marine insurance*, if the policy contains no stipulation on the subject, *the assured may insure with different underwriters to any amount, and recover indemnity from any of the underwriters.*

"It is well settled," says Mr. Justice Woodworth, in giving the opinion of the court in a case on a fire policy, "that upon a double insurance, though the assured is not entitled to two satisfactions, yet in the first action he may recover the whole sum insured, leaving the defendant to recover a ratable satisfaction from the other insurers.[1] In such cases the two policies are considered to make but one insurance. The assured may sue the underwriters on both policies, but he can recover only the real amount of his loss, to which all the underwriters shall contribute in proportion to their several subscriptions."[2]

1251. *American marine policies contain a provision, that, "if the assured has made any other insurance* upon the subject, *prior in date, the underwriters shall be answerable only for so much as the amount of such prior insurance may be deficient towards covering the property."*[3]

Under this provision the amount of interest, in respect to a subsequent policy against the same risks, is the excess of the value over the amount insured by the previous policies. It is of importance to distinguish whether the policies are in favor of the same party and against the same risks,[4] since making an insurance against

[1] See supra, No. 361.

[2] Lucas *v.* Jefferson Ins. Co., 6 Cowen, 635.

[3] Kemble *v.* Bowne, 1 Caines, 75.

[4] Columbian Ins. Co. *v.* Lynch, 11 Johns. 233; Peters *v.* Delaware Ins. Co., 5 Serg. & Rawle, 473; Warder *v.* Horton, 4 Binn. 529; Perkins *v.* New England Mar. Ins. Co., 12 Mass. R. 214.

one peril, with the clause as to prior policies, does not diminish the interest as to other perils; although the property is insured to its full value against capture only, the assured has still the same amount of interest to be insured against perils of the seas.

If the subsequent policy contain no provision in respect of prior insurance, the amount of insurable interest for such policy will be the same as for the first, for the assured may insure again and again the same property against the same risks, if he will pay the premiums. The different underwriters are by this means made sureties for each other.[1] This was one reason for introducing the clause respecting prior insurances.[2]

1252. *It has been held that the clause as to a prior policy relates to priority in date, and not in the commencement of the risk.*

Where the property had been fully insured by policies prior in date and subsisting at the time of making the policy in question, but before the risk could commence under any of the policies, the prior policies were cancelled, Mr. Justice Story instructed the jury, that the memorandum by which those policies were discharged had no effect as between the parties to the subsequent one, and that it was not competent for the assured to change the legal predicament of the underwriters.[3]

1253. *In determining which is the prior insurance, it may be proved that a policy was subscribed on a different day from that of its date,*[4] *and which of two policies, made on the same day, was subscribed at an earlier hour.*

If two policies containing this clause are made at the same time in the day, so that it cannot be distinguished which was first subscribed, the construction of them, in respect to each other, is the same as if they did not contain this clause.[5]

[1] Davis *v.* Gildart, Park, 424; Rogers *v.* Davis, id. 423; Craig *v.* Murgatroyd, 4 Yeates, 161; Casar. Disc. 1, n. 91; Godin *v.* London Ass. Co., 1 Burr. 489; Thurston *v.* Koch, 4 Dall. 348, and Appendix xxvii; Millaudon *v.* Western Mar. & Fire Ins. Co., 9 La. R. 32.

[2] 5 Serg. & Rawle, 475.

[3] Seamans *v.* Loring, 1 Mason, 128.

[4] Lee *v.* Mass. Fire *v.* Mar. Ins. Co., 6 Mass. R. 208.

[5] Potter *v.* Marine Ins. Co., 2 Mason's R. 475; Wiggin *v.* Suffolk Ins. Co., 18 Pick. 145.

A policy underwritten in Philadelphia stipulated, that, if any previous policy were made in England, it should supersede an equal amount of the Philadelphia policy. Insurance was made in England eight days after the date of the policy underwritten in Philadelphia. Mr. Justice Washington held that the foreign insurance did not supersede any part of that made at Philadelphia.[1]

1254. *The clause will apply where the previous insurance is made by an agent*, trustee, or consignee, *with authority from the assured.*

1255. *The policies of many fire insurance companies contain a clause, that, in case of any other insurance* on the same subject, *without notice to the underwriters, the policy shall be void.*

1256. *Some policies contain* the clause, that, in case of other insurance, the *assured shall not recover any greater proportion of the loss than the amount insured in the policy bears to the whole amount insured on the property.*

The construction put upon this clause in New York was, that in case of loss, if the other underwriters had settled under the other policies containing the same clause, that would not affect the policy in question; for in that case each set of underwriters would pay only their proportion of the loss, and the greater the aggregate amount insured over the value of the property, the less each set of insurers would be liable to contribute. But it was held, that, if the other policies did not contain a similar clause, and the underwriters in those had paid the whole amount of the loss, then the assured would recover nothing under this policy, because the underwriters in this policy would, in such case, be liable to contribute to the other underwriters proportionally.[2]

1257. *In ascertaining the amount to which a* second or any *subsequent policy is applicable, where a prior policy is to be deducted*, only the amount covered by such prior policy is to be deducted. It is evident, accordingly, that *the premium*, with the premium on the premium *in the prior policy, is not to be included in the amount to be deducted*, but only the amount which the assured would be entitled to recover besides his premium.

[1] Hogan *v.* Delaware Ins. Co., 1 Wash. C. C. R. 419.

[2] Lucas *v.* Jefferson Ins. Co., 6 Cowen, 635.

For instance, if one insures a thousand dollars in the first policy, and pays a premium of fifty dollars for the insurance, the value of the subject will be covered by such prior policy only to the amount of nine hundred and fifty dollars, this last sum being the amount to be deducted in estimating the amount of interest under the second policy.

1258. *If the value* of the same subject *is higher in a second policy, only the amount* (not the proportion) *insured by the first is to be deducted* from the amount of the value in the second, in estimating the amount considered under the second not to be insured in the first.

Four thousand dollars being insured on a ship and cargo valued at that sum, a subsequent policy was made on the same ship and cargo valued at six thousand dollars, with the usual clause as to prior insurance. The question was, how much remained to be covered under the second policy; and Mr. Justice Washington held the amount of insurable interest under this policy to be two thousand dollars.[1]

1259. *The commencement of the risk under a subsequent policy may be postponed under this clause until the prior policy expires.*

A vessel being insured for one year, the owner, two days before the year expired, effected insurance at another office on the vessel for a voyage "at and from B. to C.," &c., by a policy containing the clause as to prior insurance, "whether for the whole voyage or from one port of loading or discharge to another." The vessel sailed on the voyage one or two days before the former policy had expired, and was never heard of. It was contended on the part of the underwriters in the second policy, that it did not attach, since it could not attach at and from B., because the prior policy covered the vessel while lying in B., and for one or two days after it sailed. Putnam, J., giving the opinion of the court, said: "If part of the voyage was protected by the prior policy, and the second should embrace the whole, the underwriters upon the second would be liable for that part not covered by the first;"

[1] Murray *v.* Ins. Co. of Pennsylvania, 2 Wash. C. C. R. 186. See also M'Kim *v.* Phœnix Ins. Co., 2 Wash. C. C. R. 89.

and added, that the case stood as if the underwriters had undertaken to insure for the whole voyage, excepting only for the loss that might happen during the time the vessel was protected by the prior policy.[1]

1260. *As between the assured and his underwriters, the diminution of the amount of goods at risk by withdrawing a part of them from the risks insured against,* by landing them or otherwise, *will not diminish the amount at risk under the policy so long as there remains an amount* exposed to the risks insured against, and answering to the description of the subject in the policy, *equal to that insured by the policy:*[2]

As in a policy upon a cargo from Alexandria, in the District of Columbia, to the West Indies and back to the United States, where, after a part of the cargo had been landed at St. Thomas, the remainder, exceeding in value the amount insured, was lost.[3]

The assured does not, by shipping an excess in the outset, or at any stage of the voyage, impliedly stipulate under any common form of policy to maintain it; and the insurer is not affected by a greater or less excess, for while there is such, the assured and insurer must bear their respective proportions of averages, general or particular, and where the excess is withdrawn the amount of loss for which the insurer is liable is not thereby appreciably enhanced, or if it be so, this is no ground of objection, since there is no obligation on the assured to diminish his liability by putting any excess at risk.

1261. *Whether, if divers policies containing the clause relative to prior insurance are successively made on property of an amount sufficient at the outset to fill them all, but which, after the risk has begun, is diminished below that amount, the insurance under the several policies is diminished proportionally, or the risk continues to the full amount on the prior policies,* and ceases under the subsequent ones?

[1] Kent *v.* Manufacterers' Ins. Co., 18 Pick. 19.

[2] See the able opinion of Senator Tracy in the American Ins. Co. *v.* Griswold, 14 Wend. 399; and see cases generally.

[3] Columbian Ins. Co. *v.* Catlett, 12 Wheat. 343; and see cases generally.

The inquiry relates to policies under which the risk has commenced, and the premium is not returnable.

There seems to be nothing in the common phraseology of the policy to prevent the construction, that the clause refers to the commencement of the risk, and that, when the policies have once attached to a cargo, the operation of the clause ceases in respect to such cargo; and in case of the subsequent diminution of the amount at risk below the aggregate amount insured, by landing a part of theproperty or otherwise, the amount covered by each of the policies is diminished proportionably. This construction, if it is admissible, apportions the risk according to the premium on all the policies, whereas the other construction in question occasions a disproportion in this respect; since, if, under this latter, two policies of $1,000 each are successively made upon a cargo worth $2,000 for a voyage to successive ports, and, when one half of the voyage is performed, half of the goods are landed, only $1,000 will remain at risk under the prior policy for the remainder of the voyage, so that for the same premium the risk under this policy will be double that under the other.[1]

The construction, that a diminution of the amount affects the policies proportionally, seems conclusively to result from the usual provision, that the premium shall be returned upon so much of the sum insured as the underwriters shall be exonerated from by the prior insurance, thus specifically providing for a concurrence of the exoneration from risk and return of premium, and requiring the return in case of exoneration.[2]

The above reasons seem to constitute good ground of dissent from a decision of the Supreme Court of New York, confirmed in

[1] In the case of the Columbian Ins. Co. *v.* Catlett, 12 Wheat. 583, Mr. Justice Story, at page 594, giving the opinion of the court, in stating a supposed case by way of illustration, assumes that the amount of a prior policy is kept filled up. But as Mr. Senator Tracy, in the Court of Errors of New York, in the American Ins. Co. *v.* Griswold, 14 Wendall, 399, at p. 506, remarks, this was a merely incidental obiter assumption, and not entitled to the same weight as a deliberate opinion.

[2] This ground is suggested for this construction by Mr. Senator Tracy, 14 Wend. 502, in the case of the American Ins. Co. *v.* Griswold.

the Court of Errors, Senators Tracy and Jones dissenting. Under divers time policies upon a cargo, exceeding its full amount, on a trading voyage to South America, all containing the clause relative to prior insurance, by the landing of a part of the cargo the amount remaining on board of the ship at the time of a total loss was reduced below the amount insured in all the policies. The prior insurers were held to be liable for the whole of the loss, in exoneration of the subsequent ones.[1]

But, for the above reasons, the better doctrine seems to be, that

The clause relative to prior insurance, in the common form, as between the underwriters on divers policies, has reference to the commencement of the risk upon any specific subject; *and after the risk* on a cargo, of an amount sufficient to fill any or all of the policies, *has commenced, if a part of the property is* subsequently *withdrawn*, so as to reduce the amount below the aggregate amount insured by the policies, *what remains is to be ratably apportioned to the several policies.*

1262. *Under this clause the amount of interest to which a subsequent policy applies will depend upon the amount insured in the previous policies, and also upon the valuation in the subsequent one.*

A cargo valued in a prior policy at $12,000, the amount insured, was valued in a second policy at $27,500. Though the whole cargo was insured in the first policy, yet there remained an insurable interest of $15,500 for the second, since, as the property was valued in the second policy, this excess remained over the amount previously insured.[2]

1263. *The provisions respecting "prior insurance"* in marine policies, *and "other insurance"* in fire policies, *have reference*, by their very terms, to cases of over or double insurance.[3]

[1] American Ins. Co. *v.* Griswold, 14 Wend. 399.

[2] M'Kim *v.* Phœnix Ins. Co., 2 Wash. 89; Higginson *v.* Dall, 13 Mass. R. 96; Minturn *v.* Columbian Ins. Co., 10 Johns. 75; Kane *v.* Commercial Ins. Co., 8 id. 229; Pleasants *v.* Maryland Ins. Co., 8 Cranch, 55.

[3] See supra, No. 366.

1264. *The clause as to double or over insurance is inoperative in a policy of reinsurance, unless the reassured has made other reinsurance.*[1]

SECTION IV. INCREASE AND DIMINUTION OF THE INTEREST.[2]

1265. *A part of the subject insured by a policy on the ship is ordinarily withdrawn during the period of the risk; and the insurable interest in any subject may be liable to reduction.*

Thus, though provisions and outfits constitute, as we have seen, a part of the insurable interest in the ship, a specific part of this subject may be withdrawn from the perils insured against, by the consumption of the provisions, or by the wear and tear and decay of the sails, rigging, &c., and yet the amount of the insurable interest in the subject is not thereby diminished, as between the parties to the insurance.

In whaling voyages the outfits constitute a more considerable proportion of the aggregate insurable interest, and are insured under a separate description, specifically as outfits.[3]

The insurable interest may be diminished by the contract on which it accrues as that of the lender in bottomry with a stipulation for partial successive payments.[4]

So that of a creditor by hypothecation may be reduced by the reduction of the amount of his bond by a decree in admiralty.[5]

Liens on the interest of the owner, as security to creditors for unconditional debts, do not diminish his insurable interest;

As liens by mortgage:[6]

Or those in favor of material-men.

Where the interest is by lien merely, the degree of security thereby may be diminished without any diminution of the amount of the insurable interest. This may take place in case of subse-

[1] Mutual Safety Ins. Co. *v.* Hone, 2 Comst. 235.

[2] And also as to excess of aggregate losses over the amount of the insurable interest. See No. 1268.

[3] See supra, Vol. I. No. 497.

[4] Thorndike *v.* Stone, 11 Pick. 183.

[5] The Cognac, 2 Hagg. Ad. R. 277; The Beddington, id. 422.

[6] Supra, No. 286, 287.

quent bottomry or other preferred liens after insurance is made on a prior lien where all the incumbrances do not cover the whole value of the subject.

1266. *If the ship is damaged, and a subsequent total loss occurs before it has been repaired, the partial loss is merged in the total loss.*

1267. *In case of the ship having been damaged, and been repaired at the expense of the underwriters, the amount of the insurable interest at their risk is still the same as before.*

Magens[1] states the rule as above, and yet seems to have some doubt. Valin[2] says the master ought to give notice to the owner or charterer of funds being borrowed in a foreign port for the necessities of the ship, that he may effect insurance. This implies that under the original policy the insurers are not liable for a subsequent total loss in addition to the expense of the repairs.

In England and the United States, the underwriters are unquestionably liable for a subsequent total loss, in addition to the expense of previous repairs which have been previously paid for by the assured, in distinction from those made by means of funds raised on bottomry.[3] That is, the insurer is liable for the expense of the repairs, and is also liable for subsequent damage to the repaired parts of the ship; in other words, he may be repeatedly liable for the expense of replacing a sail or any other article belonging to the ship and constituting a part of it.

This rule is applicable to the merely replacing and restoring of a lost or damaged part of the ship, for if the assured makes additions or improvements, the expense to that extent, as well of making such additions as of subsequent repairs, is for the assured.[4]

Magens[5] suggests, that in case of repairs in a foreign port at extraordinary expense for the purpose of earning freight, the freight

[1] Vol. I. p. 253, case 8, Numbers R. S. T. U. and W.

[2] Com. tom. 1, ed. 1760, p. 417, tit. Du Capitaine, a. 19.

[3] Livie *v.* Janson, 12 East, 648; Le Cheminant *v.* Pearson, and same Plff. *v.* Allnutt, 4 Taunt. 367; Peele *v.* Merchants' Ins. Co., 3 Mason, 27.

[4] Clarke *v.* United States Mar. & Fire Ins. Co., 7 Mass. R. 365; Buchanan *v.* Ocean Ins. Co., 6 Cowen, 318.

[5] Vol. I. p. 255, case 20, No. N.

should be charged with the excess; but no such rule appears to have been introduced in practice.[1]

1268. *An aggregate of losses exceeding the amount of the insurable interest* of the subject in the policy, *is most frequent in cases of general average and total loss:*

As in cases of capture and expense for reclaiming the property.[2]

[1] It is intimated by Mr. Justice Story, that the underwriters may be answerable for the expense of repairs exceeding the insurable value of the ship in the policy. Peele *v.* Merchants' Ins. Co., 3 Mason, 27. This would be very extraordinary, except in case of successive repairs.

[2] M'Bride *v.* Marine Ins. Co., 7 Johns. 431; Jumel *v.* Marine Ins. Co., id. 412; Barker *v.* Phœnix Ins. Co., 8 id. 307.

CHAPTER XV.

GENERAL AVERAGE.

SECT. 1. What distinguishes general average from other losses.
2. Jettisons and sacrifices of a part of the interest at risk.
3. Whether contribution is made unless the impending peril is avoided.
4. Expense of delay to refit on account of sea-perils.
5. Expense of salvage and of claiming or recovering property on capture or other disaster.
6. Expense of detention by embargo.
7. Whether contribution must be claimed in the first instance from the parties concerned.
8. Amount of the contribution.
9. In reference to what time the contributory value is estimated.
10. Contributory value of the ship.
11. Contributory value of freight.
12. What goods contribute, and at what value.
13. Liability of insurers to pay contributions.
14. Adjustments abroad, or by competent courts.

SECTION 1. WHAT DISTINGUISHES GENERAL AVERAGE FROM OTHER LOSSES.

1269. LOSSES are general or particular, partial or total. *Expenses incurred, sacrifices made, or damage sustained, for the common benefit of ship, freight, and cargo, constitute* GENERAL *or* GROSS AVERAGE. A loss which is not incurred for the general benefit is a PARTICULAR average or TOTAL loss.[1]

A general average loss is, by its character, as being one in which divers interests contribute a part of their value, a partial, as dis-

[1] Certain small charges, which were formerly assessed in part upon the cargo, such as pilotage, towage, port charges, &c., are called *petty average*, in distinction from gross average. Le Guidon, c. 5, a. 13; 2 Weyt. de Average, s. 4; Cunningham's L. Dict., tit. Average; Weskett, a. Petty Average. These charges at length came to be compounded for at a certain rate per cent. on the freight, and bills of lading in use at present contain a provision for the payment of "primage and average accustomed," which is a certain per cent. on the amount of freight on some voyages; while on others no such allowance is made. None of these charges concern the insurer, except when they come under general average, or the clause in the policy authorizing the assured to sue, labor, &c., for the safety of the property.

tinguished from a total loss. The phrase "partial loss" is most frequently used in reference to a particular average.

If one person at the express or implied request of another, or with any authority for so doing, renders such other a service, by bestowing his labor or incurring expense on his account, he is entitled to a compensation for his services, and a reimbursement of his expenses. In some instances the circumstances in which property is placed give any one authority to take charge of, and save it, as where it has been lost, or is in imminent danger of being so. Under such circumstances any one may render services, without any express request from the owner, the occasion giving him an authority, and being equivalent to such a request; and he will be entitled to compensation so far as any such request can be implied. Accordingly, the finder or salvor, in such cases, has a lien on the property for a reasonable compensation, or a contract arises between him and the owner, by which the latter becomes obligated to remunerate him so far as the property is sufficient for this purpose.

General average contributions are founded upon the same principle. Where expenses are incurred, or sacrifices made, on account of ship, freight, and cargo, by the owner of either, the owners of the others are bound to make contribution in the proportion of the value of the several interests.

1270. *In order to constitute a basis for a contribution for an expense or sacrifice, it must be occasioned by an apparently imminent peril.*

1271. A loss, though it be extraordinary, and not a part of the expense and inconvenience of navigating the vessel, if it take place without the agency of the master, or crew, or other persons acting for the general benefit, is not *a subject of general contribution;* which *must be where an expense is incurred, or sacrifice made, with deliberate intent.* The circumstances of deliberate purpose and a view to the common safety distinguish general from particular average.

Mr. Benecke[1] says: "If the master's situation was such, that,

[1] Page 283, London ed. of 1824; Benecke & Stevens by Phil. 110. And see Crockett *v.* Dodge, 3 Fairfield, 190, and infra, No. 1313, as to voluntary stranding.

but for a voluntary destruction of a part of the vessel, or her furniture, the whole would certainly and unavoidably have been lost, he could not claim restitution, because a thing cannot be said to have been sacrificed which had already ceased to have any value." The correctness of this position admits of great doubt; it is inconsistent with cases of undisputed claim for contribution, as, for instance, composition with pirates. It does not appear why the greatness and imminent threatening of the peril should be a reason against contribution for the value of the part that is sacrificed to avoid it. On the contrary, the more imminent the peril is, the less questionable seems to be the claim for contribution on account of a sacrifice made to avoid it.

If the thing abandoned is itself so exposed to destruction that it cannot possibly be retrieved and saved, and its abandonment cannot possibly contribute to the safety of the crew and ship, cargo, or freight, there may be ground of objection to contribution. But, in case of such objection, the construction will be very liberal in favor of contribution.

There is, however, more room for question on the opposite extreme, namely, whether the danger is sufficiently threatening to justify the sacrifice. In this respect it is usually considered sufficient if it appears to the master, or other party having charge of the subject-matter, to require the sacrifice, and the same is made in good faith.

1272. *Damage to vessels by collision with each other, whether without fault, or by fault of both vessels, not being an intentional sacrifice, is not a subject of contribution in general average* by the law of England or that of the United States.[1]

It is provided by many of the marine ordinances of the continent of Europe, that in case of collision without the fault of the master and crew of either ship, or where both are equally in fault, the expense of repairing the damage to both ships is to be assessed upon both equally, or in a certain regulated proportion. The laws of England and the United States make no such provision. But

[1] Peters *v.* Warren Ins. Co., 1 Story's R. 463; and see the jurisprudence on the subject generally.

where a collision occurs between an American and foreign ship, in a foreign port, within the jurisdiction of courts adopting the above rules of apportionment of the damage, the American ship may become subject to such a contribution, and then the question arises, whether the underwriters are liable to reimburse the amount of contribution so made, where it exceeds the expense of the ship's own repairs. This question is considered in a subsequent section.[1]

1273. *General averages are usually* cases of sacrifice *for* the entire interest at risk in *ship, freight, and cargo, and hence called "general." But a contribution may be by a part of those interests* where only a part is in peril, and benefited by the expenses and sacrifices. Mr. Benecke[2] puts the case of contraband goods, to avoid a capture of which the ship is run ashore, or some of the other goods are thrown overboard, in which case (unless there was some express or implied agreement to the contrary, other than that arising by law from the principles of general average) the shippers of goods not liable to capture would not be obliged to contribute for the damage by running aground, or the sacrifice or expense incurred; since those goods were not benefited, nor was their benefit contemplated in making the sacrifice or incurring the expense.

1274. So *a sacrifice* or expense *is sometimes in the nature of a general average, though only the ship is at risk,* and is payable as such under a policy of insurance.[3]

1275. *Contributions in general average are sometimes stipulated against by the shipper.*

The English East India Company, in chartering a ship, make an express stipulation against contribution in general average.[4] It does not appear that any judicial construction has been put upon this clause; it is not easy to imagine that it can be construed to extend beyond expenses and sacrifices for the safety of the ship particularly, for if both ship and cargo should be captured, and expenses incurred indiscriminately to procure their release, the

[1] Infra, No. 1416.

[2] Page 223, London ed. 1824.

[3] Potter *v.* Ocean Ins. Co., 3 Sumner, R. 27.

[4] Hughes on Insurance, 296.

cargo could hardly be exempted from the contribution of its proportion of such expenses.

1276. The occasions for general contribution, and the principles upon which it is made, are the same, whether the property is insured or not.

The *underwriters are only liable to pay* the assured the proportion of *the contribution* assessed upon the amount insured, *when the loss is occasioned by* some of the *perils insured against.* But as general average losses usually arise from the perils insured against in the common form of the policy, underwriters are usually liable to reimburse to the assured the part of the average contributed by the amount insured in the policy. The principles of general average, therefore, become an essential part of the law of insurance.

1277. *The principles of contribution* for sacrifices or expenses, *on account of joint interests* of several owners of property, are not confined to sea-risks, but *are* also *applicable to policies against fire.* In case of a fire policy for $20,000 on a stock of goods worth $35,000, a fire broke out which endangered the goods, to save which, and the building in which they were contained, some blankets were procured by the assured to hang on the side of the building, which in that situation, being constantly kept wet, served to check the fire and contributed materially to save the building and its contents. The blankets being injured in this manner so as to be of no value, the assured claimed the whole value of them against the underwriters, who were, by the terms of the policy, liable for the whole damage to the goods by fire, not exceeding the amount insured.

On the part of the underwriters, it was contended that, as the blankets were used and destroyed to save the building as well as all the goods, the several parties interested were liable proportionally for this damage; that is, the underwriters, on the $20,000 insured; the assured, on $15,000 not covered by the policy, and on $5,000, the value of his lease of the building; and the owner of the building, on $5,000, the value of the building over that of the lease; making the underwriters liable for four ninths of the damage to the blankets.

Per Curiam: "The assured can claim only on the ground of a sacrifice made for the preservation of the property, for a proportion of which they are equitably, if not legally, entitled to recover. They contend, moreover, that this is not a case for contribution, it being customary on fire policies to pay the whole loss. We believe the practice to be as stated, but as the present claim is not within the contract, it certainly is reasonable that the assured should bear a proportion of the sacrifice made for the common benefit. This decision does not call in question the general principle, that a loss under a policy against fire is to be paid without contribution. But it is said that the plaintiffs and defendants are not the only parties who ought to contribute, since all the property in the neighborhood was protected by the expenses in question. But it will not do to take so wide a range in the principle of contribution. It is necessary to limit it to the building and the property therein immediately saved." [1]

SECTION II. JETTISONS AND SACRIFICES OF A PART OF THE INTEREST AT RISK.

1278. *Jettison is the throwing overboard a part of the cargo, or any article on board of a ship, or the cutting and casting away of masts, spars, rigging, sails, or other furniture, for the purpose of lightening or relieving the ship* in case of necessity or emergency.

1279. *When it becomes necessary for the general safety to make a jettison, or other sacrifice of a part of the interest at risk, the loss must be made good by contribution, to be assessed upon what is saved* of ship, cargo, and freight.[2]

Most of the codes of sea-laws require the master to consult the officers and crew before making a jettison. By the practice among the ancient Greeks, jettison was made after consulting all

[1] Welles *v.* Boston Ins. Co., 6 Pick. 182. A similar decision had previously been made in a case referred to the author.

[2] Lege Rhodia cavetur, ut, si levandæ navis gratia jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est. Dig. 14. 2. 1.

the persons on board.[1] But it is often impracticable, since jettisons are most frequently made in time of danger and hurry. Targa says, that, during the sixty years while he had been a magistrate of the admiralty court in Genoa, he knew of but five jettisons regularly made, and those were suspected to be fraudulent on this account.[2]

Where the occasion admits of it, the master will naturally consult his officers and men, but to subject him to their opinion is so far taking the government of the ship out of his hands. Lord Kenyon says: "The rule of consulting the crew is rather founded in prudence, in order to avoid dispute, than in necessity."[3] Chief Justice Tilghman plainly intimates an opinion that a consultation is not necessary.[4]

Mr. Justice Story, in giving the opinion of the court in a case of voluntary standing says: "A consultation with the officers may be highly proper in cases which admit of delay and deliberation, to repel the imputation of rashness and unnecessary stranding by the master;" but he considers it not to be indispensably requisite.[5]

1280. *The act should be that of the master or person in command.* As a general rule, the crew have no authority, without orders, to make a jettison.[6]

1281. *The right to claim contribution depends upon the kind of sacrifice made, and the occasion of making it.*

When a part of the cargo is thrown overboard, there is no doubt of its being a kind of sacrifice for which contribution may be claimed. But if the owner of the vessel is the party claiming contribution, he is entitled to remuneration only for extraordinary expenses and sacrifices, and such as constitute a loss under a pol-

[1] Boekh's Public Economy of Athens by Lewis, c. 23, London ed. 1842, p. 139.

[2] 1 Emerigon, 605, c. 12, s. 40.

[3] Birkley *v.* Presgrave, 1 East, 220. See 2 Binn. 565.

[4] Sims *v.* Gurney, 4 Binney, 513. The law of the United States, July 20, A. D. 1790, c. 56, s. 3, requires the assent of the mate or second officer, and a majority of the crew, to putting back after the voyage is commenced, on account of the unseaworthiness of the vessel.

[5] Columbian Ins. Co. *v.* Ashby, 4 Peters's Sup. Ct. R. 139.

[6] The Nimrod, Ware's R. 14.

icy of insurance, since the ordinary expenses of navigating the vessel must be borne by the owner, as the means of earning freight.

If a mast be cut away, or a cable cut or slipped, or if guns, or a boat, or a part of the ammunition or provisions, are thrown overboard, these are doubtless such losses and sacrifices as, in general, give the owner a right to demand a contribution.[1]

1282. But the right to demand contribution may depend upon the particular situation of the thing sacrificed.

If goods carried on deck are thrown over, it is held, in general, that no contribution can be claimed.[2] The reason given by Valin is, that goods so carried embarrass the navigation of the ship. But he thinks that this doctrine ought to be controlled by the usage of the trade, and accordingly, that contribution may be claimed for goods thrown overboard from the deck of small coasting vessels, or river craft, which usually carry a part of their cargoes on deck.[3]

It is the practice in respect to whaling voyages, to adjust, upon the principles of general average, the loss of oil thrown overboard from the deck, where it is carried for a short time after being put into casks, before it can be properly and safely stowed in the hold.[4]

Vessels employed in the pepper trade in the East Indies are said to supply an example of goods carried on deck by custom, for if a full cargo is taken on board at one port, the vessel sometimes sails with a part of the cargo on deck, and as it proceeds on the voyage the cargo in the hold settles, and in the course of fifteen or twenty days the part put on deck is removed into the hold. There has been no judicial decision on the question, whe-

[1] Le Guidon, c. 5, a 21; Laws of Oleron, a. 9; Code de Commerce, l. 2, tit. 11, a. 211.

[2] Ord. Louis XIV. tit. Jettisons, a. 13; Code de Commerce, a. 232; Abbott on Shipp. 344; and Myer *v.* Vander Deyl., per Lord Ellenborough, Abbott on Shipp. 355, n. d., Story's ed. 1829; Id. note per Story, p. 354; Taunton Copper Co. *v.* Merchants' Ins. Co., 22 Pick. 108; Lenox *v.* United Ins. Co., 3 Johns. Cas. 178; Smith *v.* Wright, 1 Caines's R. 43; Johnson *v.* Crane, Kerr's (New Brunswick) R. 356.

[3] Tome 2, p. 203. And see 1 Emerigon, 640.

[4] See Cram *v.* Aikin, 13 Maine R. 229.

ther in this particular case a jettison of the pepper carried on deck would give occasion to contribution, nor has any custom on this subject come to my knowledge. The case seems to be very similar to that of property jettisoned from the deck in a whaling voyage.

Whether, if usage justifies carrying goods on deck, of a particular description, or in pursuance of usage on a particular voyage, or under particular circumstances in the course of a voyage, *contribution is to be made for the jettison of the goods* so carried?

Articles may be carried on deck in the cases just mentioned, and still be covered under the description of goods and merchandise,[1] or under a specific designation of the kind of goods, or the voyage, so that the ship-owner is not liable to the shipper for improper stowage; and the underwriter is liable for the risk of the goods so carried, where from the policy or otherwise he has noticed that they may be so.[2] The inquiry is then suggested, whether, if articles so carried are thrown over in an emergency for the general safety, the shipper is entitled to compensation by contribution in general average.

Sundry decisions have been made against claims upon the ship-owner for contribution in such case:

As in Maine, against a claim on the master for jettison of barrels of flour on a passage from Georgetown, in the District of Columbia, to Portsmouth, in New Hampshire, the flour being taken at half the usual freight;[3] the decision being put upon the fact of low freight being paid.

The same court decided in a subsequent case against a claim on account of a similar jettison on a similar voyage, of the same kind of article, carried at the usual rate of freight.[4]

A like decision was given in Louisiana on a claim for contribution for jettison of sugar-kettles that were stowed on deck according to usage.[5]

In case of a cargo of timber on a voyage from Quebec to Lon-

[1] Barber *v.* Brace, 3 Conn. R. 49.
[2] See supra, No. 460 and 985.
[3] Dodge *v* Bartol, 5 Greenl. 286.
[4] Cram *v.* Aikin, 13 Maine R. 229.
[5] Hampton *v.* Brig Thaddeus, 4 Martin, N. S. 582.

don, the deck-load, admitted to have been so loaded by consent of the shipper, was jettisoned, and the owners of the cargo claimed contribution from the owners of the vessel. It was admitted by the demurrer, that it was the custom on this voyage to load a part of the timber on deck. The English Court of Common Pleas held, that the owners of the cargo were entitled to contribution from the ship-owner.[1]

In a subsequent trial of the case on a claim by the shipper to recover the full value of the jettisoned deck-load, on the ground that the shipper had not consented to the timber being loaded on deck, it was proved on one side to be a very general practice on this voyage so to carry a part of a cargo of timber, and on the other, that, on its being lost, the ship-owner was liable for the whole value, and for that the jury gave their verdict.[2]

In a more recent case before the Court of Exchequer in Ireland, the owner of pigs shipped by a steam-vessel, and carried on deck on a passage from Waterford in Ireland to London, and jettisoned, recovered against the owners of the steam-vessel for a contribution in general average.[3] Thereupon the owner of the steam-vessel claimed reimbursement against the underwriters in a time policy, not restricting the navigation to any particular voyages, and the case was very elaborately argued before the Court of Queen's Bench. The result was, that, in the opinion of Lord Denman and his associates, if the usage justified the carrying of the pigs on deck, the underwriters were liable; and the jury had found it to be the usage.[4]

[1] Gould *v.* Oliver, 4 Bing. N. C. 134. See also S. C., 5 Scott, 445, A. D. 1836 – 37.

[2] 2 Scott, N. R. 241, A. D. 1840. The same case was before the court in the intermediate time on a matter of practice, 6 Scott, 648. An act of Parliament was passed, 2 and 3 (1838 – 39) Vict. c. 44, and another, 3 and 4 (1839 – 40) Vict. c. 36, 2 Scott, 241 n., forbidding masters of vessels loaded wholly or partly with timber or wood to carry any of such cargo on deck for a voyage from any of the British Provinces of North America or Honduras, from the 1st of September to the 1st of May.

[3] Harley *v.* Milward, 1 Jones & Carey, Exch. R. (Ireland) 224.

[4] Milward *v.* Hibbert, 3 Ad. & El. N. S. 120. The case turned partly upon the pleadings, which the underwriters moved to amend by filing a plea that by usage they were exone-

It thus appears that there is much obscurity in the jurisprudence, in respect to the claim of the shipper whose goods are carried on deck upon the owners of the ship for a contribution for the jettison of his goods. Though it were held that contribution between these parties should be made, a question would still arise as to the liability of other shippers of cargo, carried in the hold, to contribute, and also as to the liability of the underwriters to make indemnity, since they may not have notice of any goods being carried on deck, as in case of a time policy not restricting the vessel to any particular voyage, or in voyages such as those from the United States to the West Indies, in which it is a frequent, but not invariable practice, to carry a deck-load, whereas the ship-owner is, of course, affected by notice that part of the cargo is carried on deck.

Since the ship-owner is necessarily affected by notice that goods are carried on deck, there does not appear to be any ground for exonerating him from contribution in case of their being jettisoned, except that of the usage alleged in one case[1] to prevail in respect of the timber transportation between Canada and Great Britain, namely, that he is liable to pay the shipper the whole value of the jettisoned article.

In respect to the cargo under deck, the shippers obviously ought not to be liable for contribution for jettison of goods stowed on deck, unless they have notice, actual or constructive, by the usage of the trade or otherwise, that a part of the cargo may be so carried. That is to say, they and their underwriters ought to be upon the same footing in this respect.[2]

Taking into consideration the whole jurisprudence on the subject, the better doctrine though opposed by some of the adjudications above cited, seems to be, that *a jettison of a deck-load is to be contributed for* in general average *where the stowing of the jet-*

rated from average for a jettison of the deck-load, leave for which was refused. The object of moving for leave to add this plea was to put the case upon the same ground with that of the above-cited case of Gould *v.* Oliver.

[1] Gould *v.* Oliver, supra, p. 73; 2 Scott, 252.

[2] See supra, No. 985.

tisoned article on deck is justifiable, and the other parties interested have notice by the policy, or by usage, or otherwise, *that such articles may be so carried, and there is no plainly established usage negativing the right to claim such contribution.*

This general doctrine subjects the claim in a very considerable degree to the evidence in the particular case, and there does not appear to be any cogent reason against this. It is enough that the general rule is against contribution for such a jettison, because a great part of the commerce of the world is on voyages in which carrying a deck-load is not justifiable. But, again, in much of the vast inland and coastwise trade, it is usual to carry freight on deck, and such a usage is as well known as any one can be; and it does not appear why, if freight is carried according to the common usage, whether under or on deck, the rights of the parties should not be governed by the common rules which originated in usage. There is the less objection to this doctrine, as the burden is on the claimant to prove the usage to carry a deck-load.

1283. *The distinction in respect to the loss of a boat,* carried on deck, or on the sides, or at the stern of the vessel, which has before been noticed,[1] *is made in cases of jettison,* as well as in particular average; many persons being of opinion that a boat cut away from the sides or stern is not to be contributed for; while others consider it a proper subject of contribution. *The right to claim contribution in such case* evidently *depends upon the usage* to carry the boat in this situation, and upon the expediency of so carrying it. The loss of a boat, cut away from the stern-davits, was considered to be a subject of general average in New York.[2] If it be necessary to carry the boat in this manner for the safety of the ship or crew, there seems to be no reason why the cutting it away should not be the occasion of a contribution.[3]

1284. *Where* a vessel is thrown over upon her side, and *the mast is cut away* to make her "right," *this is a subject of contribution.*

1285. It is provided by some ordinances, and some writers are

[1] Supra, No. 1105. [2] Lenox *v.* United Ins. Co., 3 Johns. Cas. 178.
[3] 1 Emerigon, 624, c. 12, s. 41.

of opinion, that *cutting away a mast that is sprung, or* cutting *the rigging which hangs over the sides,* for the purpose of disengaging the vessel from it, or from a broken mast or spar, *is a subject of general contribution,* according to the value of the mast or rigging in its situation at the time of being cut away.[1] Mr. Stevens says, "The situation in which these articles are placed renders them of no value."[2] But if this be the only reason why they are not to be contributed for, it is conceding that they are subjects of contribution under these circumstances, provided they are of any value in the situation supposed, and their value in their situation at the time of their being sacrificed, is all that has ever been considered a subject of contribution. How does it appear that they are of no value in this situation? It must depend upon the particular circumstances. If they would be of any value to the owner in case of the sea being smooth and the weather favorable, so that he might make the most of them, he ought to be compensated for this value, since this is what he sacrifices on account of the impending peril, and for the general safety. Mr. Benecke[3] thinks that they should be contributed for at their value as they are, if their condition and the situation of the ship were such that there was any chance of their being saved.

A case very similar to the preceding is that of cutting or slipping a cable when the anchor is fixed in a "foul," that is rocky, bottom. If the cable is cut in such case merely that the vessel may proceed on her voyage, the anchor not having been cast when any danger was impending, and the sailing of the vessel not being necessary to avoid shipwreck, it is a particular loss, to be sustained by the owner or paid by his underwriters,[4] since no agency of the master and crew intervened in causing the loss, which had, in fact, taken place before the cable was cut. But if the cable is cut for the purpose of avoiding impending peril, the question then occurs, whether, under favorable circumstances, the property sacrificed

[1] Ord. Konigsburg, art. 25; Ord. Copenhagen, a. 1, s. 10; 1 Emerigon, 622, c. 12, s. 41.

[2] Part 1, c. 1, s. 1, a. 5.

[3] Page 184, 185, London ed. 1824; Benecke & Stephens by Phil. 111.

[4] Supra, No. 105.

might have been saved, that is, whether, in favorable weather, and without any impending danger, and by the use of all the means afforded by the place at which the vessel lay, there would have been any probability, and how great, of recovering the anchor.

A vessel lying in Funchal Roads was driven in a gale, and dragged her anchor nearly a mile, until she "brought up" at a short distance from a rocky shore. After the gale had abated in some degree, but while it still continued with very considerable violence, the sea at the same time setting towards the shore, the master attempted to raise the anchor for the purpose of removing to a more safe anchoring-ground. It was, however, found to be impracticable to raise it, and, to avoid the danger of the situation, since in case of the anchor's dragging, or the cable's parting, the vessel would have gone upon the rocks, — he cut his cable. The loss of the cable and anchor was considered by referees [1] in Boston to be the subject of contribution, and the whole value was allowed, because it was thought, that in favorable weather, when the vessel could without any immediate danger have remained in her situation, the anchor might have been recovered.

1286. All the *damage incidentally done* to the ship or cargo, *in making a jettison, constitutes a part of the* amount to be made good in *general average.*[2]

Where, in cutting away the mast, it splintered below the "partners," and made an opening by which water was let into the hold in consequence of which the cargo, consisting of corn, was damaged, this damage was considered a subject of contribution.[3]

1287. In case of the vessel's arriving at a port of discharge, after a jettison of goods, the *loss by payment of the full freight* of the jettisoned goods, for the whole voyage performed, *is* one of the consequences of the jettison, and *to be included in the contribution.*[4]

[1] The author being one.

[2] Code de Commerce, l. 3, tit. 13, n. 233, 237; Casar. Disc. 46, n. 13, 57; Q. Weyt. de Average, s. 10; Molloy, l. 2, c. 6, s. 8; 1 Magens, 64, s. 54.

[3] Maggrath *v.* Church, 1 Caines, 196.

[4] 1 Magens, 277, No. E; Code de Commerce, l. 2, tit. 8, Du Fret, a. 112.

1288. *If goods put into boats out of the usual course, for the purpose of floating the ship* when she is aground, *or to lighten her* that she may pass over a shoal or bar, or otherwise for the relief of the ship and cargo, *are lost, they must be contributed for.*[1]

A distinction is made between lightening the vessel in extraordinary circumstances, as in putting into a port of necessity, and in the ordinary course of the voyage, as in putting into the port of destination. Where it is usual for vessels of the same burden, as the one in question, to discharge a part of the cargo on the outside of the bar of the port of destination, no contribution is to be made, though the goods should be damaged in the lighters.[2]

In case of a part of the goods put into lighters to lighten an accidentally stranded ship being damaged on board of the lighters, in going up to Mobile, it was held by the Superior Court of the City of New York, that the damage was to be contributed for by the shippers of the other goods in the lighters, though the ship, after being got off, was again stranded, in attempting to proceed up to Mobile, and wrecked.[3]

A vessel having sprung a leak at sea, a part of the goods were taken out and put on board of other vessels to lighten her, that the leak might be found and stopped. She was thus enabled to proceed on her voyage, and finally arrived at her port of destination. The goods taken out were captured. The goods thus lost were contributed for in general average.[4]

1289. *In case of goods being put into a lighter, from a stranded ship*, not to lighten it, but *merely to save the goods, and of a jettison of a part of them, the ship and cargo*, being saved, *do not contribute* for the jettison.

Whether the lighter and other goods on board of it contribute?

[1] Dig. l. 4, De Leg. Rhod.; Code de Commerce, l. 2, tit. 11, n. 238; Stevens, Part I. c. 1, s. 1, a. 1, n. 1; Q. Weyt. s. 17.

[2] Pothier, Des Average, n. 146; 2 Valin, 210, Du Jettison, a. 19, n.; 1 Emerigon, 613, c. 12, s. 41; Benecke, London ed. 1824, pp. 206, 209, 212; Benecke & Stevens by Phil. 1833, p. 134.

[3] Lewis *v.* Williams, 1 Hall's R. 430.

[4] 1 Magens, 160, Case ix.

A ship having run aground in the river Hoogly, some bags and kegs of dollars were taken from her into the long-boat, for the purpose merely of saving the dollars, not for the safety of the ship and other cargo, and in going to the shore, the boat being in danger of foundering, a keg of dollars, and some other part of the boat-load, were thrown overboard. A claim being made for contribution, it was held in Massachusetts that the ship and rest of the cargo, being afterwards saved, were not subject to contribution for this jettison.

A claim for a contribution by the boat and dollars saved was rejected, on the ground that the jettison was not made for the purpose of saving the boat and other effects in it, and the other no less questionable ground, that the articles on board of the boat were not exposed to a common peril in virtue of a contract whereby the owners of the different articles assumed mutual relations to each other.[1] Both grounds seem to be unsatisfactory. As to the contract and mutual relations of the parties interested in the goods and the long-boat, they still continued as they were on board of the ship, as is assumed in all the jurisprudence on the subject.[2] The New York decision just referred to,[3] is directly in favor of an average. I accordingly conclude, that,

If part of the goods on board of a boat are purposely sacrificed in an emergency by the person having command, or with his approbation, for the safety of the boat and cargo and crew, it is a case for contribution.

1290. Where a *loss* is incurred *in raising funds* to defray expenses that belong to general average, such loss *is* to be *included in* the amount of *the contribution:*

As loss by the necessary sale of outfits at a port of necessity, to raise funds for defraying the expense of repairs that are general average.[4]

1291. *Goods sold at an intermediate port to pay duties on the cargo, where the voyage is broken up, are contributed for by the*

[1] Whitteridge *v.* Norris, 6 Mass. R. 125.

[2] See Valin, tom. 2, p. 205, a. 205.

[3] Lewis *v.* Williams, supra, No. 1288.

[4] Giles *v.* Eagle Ins. Co., 2 Metc. 140.

cargo.[1] The shipment of each shipper is liable for its own duties, but if part of one is sold for payment of duties on the others, the amount is to be reimbursed out of the proceeds of the others.

1292. *The shipper of cargo by a vessel that saves another* at sea, *is not entitled to share in* the *salvage* allowed for saving such other vessel.[2]

The claim for sharing in the salvage in such a case was put upon the ground of a sacrifice on the part of the shipper, by reason of the deviation by delay for the purpose of saving the derelict ship and cargo, but Mr. Justice Story said that the remedy was against the ship-owners and master.

1293. *Jettison of necessity on account of perils when the ship is in possession of captors, is a subject of contribution on recapture.*[3]

1294. *Profits do not contribute and are not contributed for in general average eo nomine,*[4] *but are in effect included in an adjustment made at the port of destination,* since the market value there, according to which the adjustment is made, covers the profits of the voyage.

1295. *The cutting* or slipping *of the cable,* for the purpose of putting to sea on account of the danger of going ashore, or running foul of other vessels, or *to avoid any* other *impending peril,* is unquestionably a subject of contribution.[5]

1296. *Whether the loss of a cable and anchor, by anchoring of necessity under extraordinary circumstances in an unusual and dangerous place, is a case for contribution?*

There is a diversity of opinion on this question. Some are of opinion that this damage, whether it happen in the usual course of the voyage, or under extraordinary circumstances, is a part of the wear and tear of the ship, for which the owner is entitled to no contribution from the owner of the cargo, or indemnity from his underwriters.[6] This may depend upon its being, in a greater or less degree, out of the ordinary course.

[1] The Nathaniel Hooper, 3 Sumner's R. 542.

[2] Ibid.

[3] Price *v.* Noble, 4 Taunt. 123.

[4] The Nathaniel Hooper, 3 Sumner's R. 542.

[5] 1 Magens, 345, Case xxvii.

[6] Stevens on Average, Part I. c. 3,

Where a vessel, on a voyage from Charleston, S. C., to Cowes, had lost part of her sails and rigging, and, the weather being boisterous, and it being dangerous to keep on the course, the master put out the stern anchor, the cable being made fast to a mast of the vessel, and the anchor, cable, and mast were lost by this proceeding, the damage was allowed as a subject of general average by a despacheur at Lloyd's.

If such a loss take place under extraordinary circumstances within the risks insured against, or in consequence of the unusually violent operation of the perils assumed by the insurers, it is difficult to reduce this damage within the mere wear and tear of the voyage, upon any principle which would not exonerate the insurers from all average on account of damage to the ship. Whether it is to be considered general average depends upon its being incurred purposely. If a ship, as often happens, come to anchor to avoid going upon a lee-shore, and can escape from this perilous situation only by cutting or slipping her cable, this is a sacrifice intentionally made, under extraordinary circumstances, and as directly for the general safety as any jettison or other sacrifice can be imagined to be in any case whatever. *The loss of the cable and anchor, or the expense of recovering them, seems to come in such case, or under other extraordinary and perilous circumstances, within the principles of general average.*

But if, under these circumstances, the loss is the consequence of the parting of the cable, or its being chafed off by the rocks, it is a particular average. This loss is, however, not unfrequently adjusted as a general average.[1]

1297. *Whether a loss of sails and spars by carrying a press of sail to keep off a lee-shore, or escape from an enemy, is a subject for contribution?*

Such a loss is to be contributed for according to some authorities and codes.[2] Although the carrying of a press of sail is a

a. 9; Benecke, London ed. 1824, p. 190; Benecke & Stevens by Phil. 1833, p. 116.

[1] See Weskett, tit. General Average, n. 3.

[2] Emerigon, tom. 1, p. 621, c. 12, s. 41; and see Benecke, London ed. 1824, 187; Benecke & Stevens by Phil. 91, 156.

voluntary act, yet it is done in the usual course of navigation; it is not a voluntary sacrifice of the thing lost. On account of the state of the weather, or the situation of the vessel, the sails and spars, though put only to their ordinary and accustomed use, are more than usually exposed to damage. Any loss, although it happen in consequence of what is thus voluntarily done, and for the general safety, is therefore considered as not coming strictly within the conditions of a general average; but — if not wear and tear — as rather belonging to the class of particular average, which is often a consequence, more or less remote, of what is voluntarily done in the course of navigating the ship.[1] Such is the doctrine of some skilful and well-informed insurers. But others, whose opinion is entitled to great respect, consider losses of this description to be proper subjects of contribution.[2] It appears that in Louisiana contribution is allowed, in conformity to the laws of Hamburg, for such damage.[3]

This question is nice and difficult. There is no intentional sacrifice of the spars and sails, which is so far against considering the case to be one for contribution. But they are intentionally exposed to imminent danger of being lost, which makes the case very similar to that of anchoring in a dangerous place. The loss, however, by so anchoring, does not give occasion for contribution, unless it is in an unusual place. This circumstance is a ground of discrimination. In the case in question, there is nothing out of the usual course of proceeding; there is only a greater degree of danger than ordinary, and, in consequence, a greater exposure to loss; but *the loss seems to belong rather to particular than to general average.*

Still, as the claim for contribution can be made only where the danger is escaped, and is usually made against insurers only where the amount is too small to be recoverable as particular average, both shippers and underwriters most frequently put a very liberal

[1] Stevens on Average, Part I. c. 1, a. 1, s. 5, and c. 3, s. 9; Covington *v.* Roberts, 5 B. & P. 378; S. C., Marsh. Ins. 543.

[2] See Weskett, tit. General Average, n. 3.

[3] Shiff *v.* Louisiana State Ins. Co., 6 Martin, N. S. 629.

construction upon meritorious cases of this description, and adjust them as general average.

1298. Mr. Benecke[1] is of opinion, that *sails blown away are subjects of contribution, when they are let go for the purpose of causing the vessel,* when on her beam-ends, *to right ;* and the rule seems plainly to be just.

1299. *Another case of general average is the application of something belonging to the ship to a use different from that to which it is applied in the ordinary course of navigation.*

If spars are cut up to construct a temporary rudder, or cordage is used to fasten it, or a cable or rope and spar are put out to assist in steering the ship in case of the loss of the rudder, or a part of the sails and cordage are used at sea in stopping a leak or "fothering," as it is called,[2] or a cable is cut from the anchor to be used as a hawser,[3] there can be no question that the loss and damage are subjects of contribution.

1300. *Temporary repairs of damage from extraordinary perils of the sea, made at some intermediate port* for the purpose of prosecuting the voyage, where thorough repairs could not be made, or would cause unreasonable delay, or be otherwise attended with material inconvenience and prejudice to all concerned, *so far as such temporary repairs are of no peculiar benefit to the ship-owner,* and leave him subject to the same expense in prosecuting the voyage, and subsequently making repairs, as if the same had not been made, *are general average.*

This ground of claim for contribution is to be strictly limited, since it belongs to the ship-owner in general to furnish a seaworthy ship, and, so far as it is practicable, to keep it in a condition suitable for prosecuting the voyage. The exception to this rule does not depend upon what is most for his interest solely, but upon what is beneficial to all concerned. Subject to such conditions, the temporary repairs belong to general average.

[1] Pages 185 and 186, London ed. 1824; Benecke & Stevens, by Phil. 112.

[2] See Birkley *v.* Presgrave, 1 East, 220; Stevens on Average, Part I. c. 1, a. 1, s. 6.

[3] Marsham *v.* Dutrey, Select Cases of Evidence, 58, cited 2 Arnould's Ins. 895.

It has been so held by the English Court of King's Bench, on a claim by the ship-owner against the shipper, in the case of a vessel on a voyage from Jamaica to London, which put back to Jamaica for repairs requisite for prosecuting the voyage. Lord Ellenborough said: "If the ship by such expenditure gain a lasting benefit, there must be a deduction of so much, which must be placed wholly to the ship-owner's account."[1] This is not, however, I apprehend, a just statement of the rule, for it can make no difference whether the benefit proper to the ship-owner, as distinguished from the other parties interested, is lasting or temporary. If he is, by reason of the repairs, lightened of expense in navigating his ship on the pending voyage, to which he would be subject in the ordinary course of navigation, so far the charge should be upon him as much as for any lasting benefit. So far as the articles or parts to be replaced or repaired, are subject to be materially injured in the ordinary navigation on the voyage, or are actually injured and worn out, as, for instance, sails or cordage, he ought to be chargeable.

The inconvenience and expensiveness to the ship-owner in making complete repairs at the intermediate port may be of weight in excusing him from making them in order to comply with the warranty of seaworthiness, but not a reason for charging the shippers with any part of the expense of the repairs.

A decision similar to that just stated was made upon a time policy in Massachusetts, in case of temporary repairs of a vessel at the Balize, a mere pilot station below New Orleans, required in consequence of damage by running foul of another vessel in coming down the Mississippi, on a passage from New Orleans to Havana, and of previous damage.[2] This was a case of both particular and general average, the principal question being as to making the apportionment between them.

In a case decided by referees in Boston,[3] a vessel on a voyage from India to Boston put into the Vineyard, her sails being too

[1] Plummer *v.* Wildman, 3 M. & S. 482.

[2] Brooks *v.* Oriental Ins. Co., 7 Pick. 259. See also Giles *v.* Eagle Ins. Co., 2 Metc. 140.

[3] The author being one of them.

much injured and worn to proceed with them to Boston, where, or at Salem, it was proposed to repair or sell her. Other sails were accordingly hired to bring her round. It was decided that the owners had no claim on the insurers for the hire of the sails.[1]

1301. *In case of jettison of goods*, as the ship-owner cannot entitle himself to *the freight of them*, since he is prevented from delivering them at the port of destination, this freight is included in the amount of sacrifice, and *must be contributed for*.[2]

1302. *So, in case of* contribution for a loss of the ship by *voluntary stranding, the freight is to be contributed for.*

Mr. Justice Story, giving the opinion of the court, says upon this subject: "It seems to us, that, as by the loss of the ship the freight was totally lost for the voyage, it was properly included in the loss, as a sacrifice of the ship-owners for the common benefit."[3]

1303. The expense of *hiring sailors to supply the place of those that have deserted, or are deceased, is not contributed for.*[4]

1304. *Gratuities promised to seamen by the master in time of danger*, in order to encourage them to do their duty, *cannot be made the subject of contribution* in general average, such promises being considered to be entirely void.[5]

1305. *Damage to the ship in extinguishing a fire, originating in spontaneous combustion, is* held in Pennsylvania *not* to belong to *general average*,[6] *where the cargo is not in danger.*

1306. *Where the master is arrested* in the course of the voyage for a debt due from himself and his owners, but not the subject of contribution in general average on the pending voyage, *and the goods of a shipper are sold to raise funds to* pay the debt and *discharge the master* from arrest, the *interest of the other shippers* in the discharge of the master *is not such as to subject them to contribution* for the goods so sold. The remedy is against the master and owners.

[1] Bryant *v.* Rogers.

[2] The Nathaniel Hooper, 3 Sumner's R. 542.

[3] Columbian Ins. Co. *v.* Ashby, 13 Peters's Sup. Ct. R. 343.

[4] Hughes's Insurance, 292.

[5] Harris *v.* Watson, Peake's N. P. 72. See 3 Kent's Com. 185.

[6] Meech *v.* Robinson, 4 Wharton, 360.

It was so ruled by Lord Ellenborough, in a trial on a claim of one shipper against another, in case of a vessel, which, on a voyage from Hull to St. Petersburgh, put into Stromstadt, in Sweden, for repairs, and afterwards, on proceeding, got aground on the Scaw, and, being got off, put into Copenhagen for repairs. For the expenses thus arising, and for the Sound Dues, the master drew on a merchant of Elsineur, who paid the drafts, and caused the master to be arrested at Copenhagen for the amount.[1]

1307. *Emerigon*,[2] apparently with good reason, *enumerates among the subjects of general average the expense of hiring convoy*, where its protection is essential to the safety of the ship and cargo, and the measure is justifiable.

1308. *The loss of a cable and anchor, by necessarily slipping the cable in order to keep with convoy, is to be contributed for*,[3] where the protection of convoy is necessary.

1309. *Damage* purposely done, or loss purposely *incurred*, as cutting a cable, in order *to escape from an enemy, is general average.*[4]

Emerigon [5] relates at large, with much commendation, a case of average for the loss of the boat of a polacre, commanded by Captain Demoulin, of Marseilles, who, being chased by an enemy, as night came on, extinguished the lights in the ship, and put out his boat with a light on board to deceive the enemy, and divert him from the pursuit, and by this means saved his vessel.

1310. *Whether damage to the ship by fighting and expense of ammunition, in mere defence, and not for making a prize, is to be contributed for?*

The question can arise only in case of mere defence by a private armed vessel.

Casaregis says, the damage to the ship and cargo by fighting is particular average, but if the engagement was intended merely for the defence and safety of the ship and cargo, all the expense of the engagement, including that of healing the wounded and the

[1] Dobson *v.* Wilson, 3 Camp. 480.
[2] Tome II. p. 626, c. 12, s. 41.
[3] Casar. Disc. 46, n. 9.
[4] Benecke, London ed. 1824, p. 230; Benecke & Stevens by Phil. 154.
[5] Tome I. p. 622.

reward to the men for their bravery, are subjects of contribution.[1]

Mr. Benecke is of opinion, that damage to ship and cargo by an engagement with an enemy in defence of the property, ought to be a subject of general average.[2] Such is the rule laid down in some foreign ordinances in respect to either a part or the whole of such damage and expense.[3] No decision to this effect has, however, been made in England or the United States, but, on the contrary, it has been held in England that the claim cannot be sustained.[4] The writers do not agree upon this question.[5]

In respect to a claim for contribution in case of an English merchant-vessel, which had received damage in beating off an American privateer, and incurred expenses in healing the wounded seamen, Chief Justice Gibbs said: "It was the duty of the sailors to defend the ship. By so doing all parties have been benefited. But in what respect have the captain and crew exceeded their proper duty? What sacrifice have they made which they were not bound to make? The expense of medical and surgical aid must be borne by the parties themselves. I am of opinion that it does not fall within the principle of general average." [6] Mr. Holt gives reasons in support of this opinion.[7]

The reason given by the Chief Justice would exclude many of the subjects which are acknowledged universally to belong to general average; since it is doubtless the duty of the captain to make a jettison of goods, or cut away the mast, if it is requisite for the general safety. If an armed ship attack another ship with the hope of making prize, and not as a measure of defence, the proceeding is rather of a warlike than of a mercantile character. But *where the crew engage another vessel for the mere purpose of defending their own* from capture, *there seems to be* quite as *good*

[1] Disc. 46, n. 43, 44.

[2] London ed. 1824, p. 231; Benecke & Stevens by Phil. 154.

[3] See Benecke, London ed. 1824, pp. 232, 233, and Benecke & Stevens by Phil. 156.

[4] Taylor *v.* Curtis, 6 Taunt. 608.

[5] Pothier, tit. Insurance, n. 144; Le Guidon, c. 5, a. 4.

[6] Taylor *v.* Curtis, 1 Holt, 192; 6 Taunt. 608; 2 Marsh. R. 309; 4 Camp. 337.

[7] 1 Holt's R. 194, n.

reason for assessing upon what may be thereby saved the expense of the ammunition, and that of healing the wounds received in the engagement, and the amount of rewards given to those who distinguish themselves, as can possibly exist in any case *for a general contribution.* The damage sustained by the ship in the engagement is very similar, in principle, to the loss of goods put into lighters to prevent a ship from stranding, since in both cases the loss, though not directly and immediately intended, is yet the direct consequence of voluntarily exposing property to damage for the general safety. The voluntary stranding of the ship is a case still more similar.

1311. *Damage by purposely injuring or destroying the property of others, for preservation and safety of a ship and cargo, is to be contributed for.*

Casaregis says, if a number of ships lie near each other in port, and one of them takes fire, and a ship near is sunk by the crews of the other ships, to prevent the fire from being communicated to them, the loss of the ship sunk must be contributed for by those saved.[1] The general principle upon which all contributions in general average are made seems to comprehend the case put by Casaregis; since there appears to be as good reason why the ship and cargo saved by the captain's sacrificing the property of a third party for this purpose should contribute to make compensation for the loss, as that what survives a jettison should be brought into contribution.

Upon the same principle, if the crew, for the safety of their own ship and cargo, cut the cable of another ship, the loss ought to be made good by a general average on the ship and cargo for the safety of which the damage was done. The foreign marine ordinances contain particular regulations upon this subject, but it does not appear to have been brought under the consideration of either the British or American judicial tribunals.

1312. *Under what circumstances, and to what extent, the expense of getting off an accidentally stranded ship is to be contributed for.*

[1] Disc. 46, n. 45, 63.

The ordinance of Hamburg makes the expense a subject of general average, "when the ship runs aground, and in order to get her off again is forced to have assistance of strangers; or be unloaded."[1]

The French ordinance provided that the expense of putting the vessel afloat should be general average,[2] but the new code restricts this provision to the case of "stranding with the intention of avoiding a total loss."[3]

Valin[4] and Emerigon[5] evidently understand the provision of the ordinance of 1681 to apply to a case other than that of an intentional stranding. It could not apply to the damage done to the ship, since the same ordinance provided[6] that such damage should be particular average when the vessel was not stranded on purpose.

The expense of discharging the cargo for the purpose of floating a vessel which has been accidentally stranded, and that of reloading the cargo, and the other expenses requisite to enable the vessel to proceed on the voyage, except those of making repairs, are in practice brought into general average, where the vessel, after being got off, proceeds with the same cargo.[7] But in case the lightening of the vessel does not make her float, and other means are necessarily resorted to for this purpose, such as buoying the vessel with casks, or making a channel, the expenses incurred on the vessel after the cargo is landed are incurred for the benefit of the vessel, that she may be able to earn freight, and are not any more properly the subjects of general contribution than the repairs of the vessel. Accordingly, Mr. Jacobsen says, that "the clearing away, if the ship cannot be brought up by mere lightening, and raising, are particular average."[8]

1313. *Damage by intentional stranding, to avoid shipwreck, or loss, is a subject for general contribution.*

[1] Title 21, s. 9, n. 3; 2 Magens, 287, No. 983. See Ord. Wisbuy, a. 55; Weskett, tit. General Average, n. 2; Langenbeck's Annot. p. 198, cited 1 Magens, 65.

[2] Des Average, a. 6.

[3] Code de Com. l. 2, tit. 11, a. 211.

[4] Tome II. p. 167.

[5] Tome I. p. 614.

[6] Des Average, a. 5.

[7] See Fireman Ins. Co. *v.* Fitzhugh, 4 B. Monroe, (Ky.) 160.

[8] Book 4, c. 2, p. 348, American ed. 1818.

Casaregis says, if the ship might pass over a shoal by a jettison of a part of the cargo, but the captain chooses to strand the ship, all the damage, whether it be loss of the ship, or the expense of getting her afloat, is a subject of contribution.[1]

Mr. Stevens[2] considers it to be doubtful whether contribution is to be made for the damage sustained by a ship, and the expense of getting her afloat, in case of her being intentionally stranded to escape from an enemy, or when she is in danger of foundering at sea, or driving against rocks, or running foul of other ships. But in the very elaborate investigations of this question made in the American courts, it has been generally admitted by the parties, and assumed by the judges, that, according to the maritime codes and the treatises on marine law,[3] and also upon general principles, this proceeding comes within the reasons for contribution.[4]

One objection was made, indeed, to considering damage of this sort a subject of contribution in any case, since, it was said, the ship and cargo were exposed to a common danger by an intentional stranding; whereas it was alleged, that in general average a part is sacrificed or exposed for the general safety. Respecting this objection to contribution, Mr. Justice Washington said: "It cannot be said that the loss of the anchor, by cutting the cable, may not expose the whole to danger. A certain injury, with a probability of a total loss, is incurred by the ship for the common safety, and therefore she is entitled to contribution."[5]

A question much considered in relation to an intentional stranding is whether the event is such as to subject the property saved to contribution. This question will be considered subsequently.[6]

[1] Disc. 46, n. 32; De Vinecq. ad Q. Weyt. de Average, n. 45.

[2] Part I. c. 1, a. 2.

[3] Dig. de Leg. Rhod. l. 3; Cons. del Mar. c. 192, 193; Roc. de Nav. c. lx. n. 164; 1 Magens, 308, Cas. xxvi.; 2 Magens, 200, 332; Casar. Disc. 19, n. 18; Bynk. Q. Jur. Priv. l. 4, c. 24; Ord. de la Marine, tit. Des Average, a. 6; Code de Commerce, l. 2, tit. 11, a. 211; Pothier, Contr. de Louage, a. 150; 2 Valin, 168, Des Average, a. 6; Voet. ad Pandect. l. 4, c. 24, tit. De Jactu.

[4] 9 Johns. 9; 2 Serg. & Rawle, 229, 237, n.

[5] Gray *v.* Waln, 2 Serg. & Rawle, 229.

[6] Infra, s. 3.

Another and very difficult question relates to the circumstances under which a stranding can be considered voluntary, or the direct and unavoidable consequence of the action of the elements. The perils of the seas and human agency concur in producing the result, and it may be doubtful to which cause the loss is to be attributed. It does not follow, because a stranding at some place is inevitable, that the actual intended stranding is the same that was impending from the force of the elements. A ship may be within the headlands of a large bay, and driven irresistibly by the winds and currents towards a distant coast, and yet the course be so much within the control of the pilot, that it may be steered towards a safer stranding-place than that towards which it is driven by the elements. This, though a stranding, is not the same stranding as that which was impending.

The question, then, in these cases of voluntary stranding, is whether the stranding is the same that was pending. If this is admitted to be the question, it is one of fact and not of doctrine, and one not easily answered in some cases, and it is not surprising to find some discrepancy in the decisions.

In a Pennsylvania case, where a vessel, having parted her cables in a gale, was steered towards Cape May as "the most convenient place to save the ship, crew, and property," being supposed to be most in the way of obtaining help from on shore, and there stranded, it was held to be a case of general average.[1]

Some doubt has been intimated of that decision in a subsequent case in the same State, where a vessel, which, being drifted towards a lee shore at Tampico within one mile of land, in not over four fathoms of water, the weather being such that she could not carry sail, and stranding being inevitable, was intentionally run ashore, for the purpose of giving the best chance of saving the crew. This was decided not to be a case for contribution for loss on the ship and cargo by stranding, though the expense of salvage was apportioned on the property saved in the proportion of its value.[2]

[1] Sims *v.* Gurney, 4 Binn. 513. [2] Meech *v.* Robinson, 4 Whart. R. 360.

In another case in the same State, a schooner on a voyage from Fredericksburg to Cadiz, with a load of corn, having been captured and taken to Gibraltar, and there released, was soon afterwards there exposed to a violent storm, the sea making a breach over her, so that she began to start her anchors, and was driving stern foremost upon a reef of rocks. It was found impracticable to make sail, and she became unmanageable, when the master cut the cable and put the helm hard up in order to run her ashore in the least dangerous place to vessel and cargo and crew. She struck at a place about a quarter of a mile from where she would have struck if left wholly to the elements. The vessel was bilged, and could not be got off, but at an expense exceeding its value. The masts were cut away from the wreck to prevent their working a hole through the bottom of the vessel. A part of the cargo was saved. This was decided to be a case of general average for the loss of "the cables and anchors and masts, but for nothing else, as nothing else was deliberately sacrificed."[1]

A case has been decided on the same question in the Supreme Court of the United States. It was that of a vessel which, having come to anchor near Sewell's Point, in Chesapeake Bay, in tempestuous weather, dragged her anchors from time to time, until she began to strike on the shoals, and, her head swinging round, her broadside was brought to the wind and a heavy sea. The captain, as the most probable way of saving the ship, cargo, and crew, slipped his cables, and left her to the wind and sea, and she was driven so far up on the shore, that, when the storm subsided, she was high and dry, and could not be got off. It was held that the

[1] Walker *v.* United States Ins. Co., 11 Serg. & R. 51. In this case Mr. C. J. Gibson remarked, that, to give place to general average, the thing must be purposely exposed to greater danger than it would otherwise have been in; differing in this from Tilghman, C. J., who had said, in Sims *v.* Gurney, that "it is not necessary that the ship should be exposed to greater danger than she would otherwise have been, to make a case of general average." But Mr. C. J. Tilghman was plainly right in this proposition, for the most usual case of average for jettison is a sacrifice where the thing sacrificed is in imminent danger of total destruction, with both ship and cargo, and the more certain the destruction would be without the sacrifice, the stronger is the claim for contribution.

loss of the ship and freight was a subject of contribution in general average.[1]

One reason for deciding this to be a case of general average was, that, if the cables had not been slipped, the ship might have thumped itself to pieces on the shoal, and gone ashore only in fragments, and the cargo have been totally destroyed. This reason applies to some of the preceding cases.

In cases of voluntary stranding, all the interests at risk are purposely exposed to damage, but, usually at least, the ship most so, which gives the case some resemblance to putting goods into lighters for the purpose of floating the ship, where all the goods are in danger, but those in the lighters may be most so.

On the whole, then, *if the intentional stranding is, under* the particular circumstances, *the* direct *result of voluntary agency rather than of the action of the elements, and the actual stranding is another than the one impending*, and not merely an incidental and inconsiderable modification of it, *the case is one for general average.*

1314. *Damage by voluntary stranding is not the less to be contributed for by the cargo, although it is not carried on:*

As in case of a vessel which, being at anchor, was in imminent danger of sinking, to avoid which the cable was cut as the best means of escape; where it was decided that the cargo, though not carried on, was liable to contribute for the expense of getting off the vessel.[2]

1315. *Voluntary stranding may be the occasion of general average, though it is a case of total loss.*[3]

[1] Columbian Ins. Co. *v.* Ashby, 13 Peters's Sup. Ct. R. 343. Mr. Justice Story, giving the opinion of the court in this case, goes into a very elaborate investigation of the subject of voluntary stranding.

[2] Reynolds *v.* Ocean Ins. Co., 22 Pick. 191.

[3] Mutual Safety Ins. Co. *v.* Cargo of the Ship George, in the Dist. Ct. South. Dist. of New York, 8 Law Reporter, 361; S. C., New York Legal Observer, (1845) 260, cited Arnould on Insurance, Perkins's ed. 902, n. (a.) See also Walker *v.* United States Ins. Co., 11 Serg. & R. 61; and Meech *v.* Robinson, 4 Wharton, R. 360. Mr. Stevens is of opinion, that damage occasioned by intentional running aground on account of perils of the

1316. *Where the cargo is in effect irretrievably lost* although subsisting in specie, *before a voluntary stranding or scuttling of the ship, it is not contributed for*, notwithstanding that, in consequence of the measure, it ceases longer to subsist in specie ; where the object is not to arrest its destruction, but solely to save the ship from being also destroyed :

As in the case of a ship being scuttled and sunk on account of its cargo, consisting of lime, being on fire, not with the expectation of saving any part of the lime, which would inevitably have been destroyed by fire if the ship had continued to float, no less than by water on its being sunk.[1] The case is not one of sacrifice, but merely of rescuing the vessel from the fire, not unlike removing goods from a building or ship that is on fire.

But in this case the damage to the ship by scuttling it, and also the expense of raising it, are in the nature of general average, the whole of which is recoverable against the underwriters on the ship, where no other interest is benefited, or intended to be so.

So damage voluntarily done to the ship to come at and extinguish an accidental fire, whereby both the ship and cargo are endangered, is unquestionably to be contributed for by ship, cargo, and freight.[2]

SECTION III. WHETHER CONTRIBUTION IS MADE UNLESS THE IMPENDING PERIL IS AVOIDED.

1317. As a contribution on account of a jettison, or any sacrifice of a part of the general interest at risk, is made by what

seas is not a subject of contribution, but he acknowledges that his opinion is not supported by either custom or authority. Part I. c. 1, a. 2, s. [a.]; Benecke & Stevens by Phil. 1833, p. 81. In respect of damage from this cause, and also by voluntary stranding to avoid an enemy, he says: "Both these cases require great consideration before they are admitted under the head of undisputed general average claims." Ibid. s. [b.] See Benecke, London ed. 1824, p. 218; Benecke & Stevens by Phil. 143.

[1] Crockett *v.* Dodge, 3 Fairfield's (Maine) R. 190.

[2] Stevens on Average, 42, 5th London edition; Benecke, Prin. of Ind. 243.

survives, it follows that, *if nothing is saved, no contribution is to be made.*

1318. *Whatever is eventually saved must contribute for what has been purposely sacrificed.*

It has not, however, been uniformly held that, wherever, after a sacrifice of a part for the general safety, anything is finally saved and comes to the use of the proprietor, it must contribute for the loss by jettison. The rule formerly laid down most usually, in the treatises and marine ordinances on this subject, was, that there is to be a contribution only in case the impending peril, on account of which the jettison is made, has been avoided; that is, if a jettison is made to prevent shipwreck or capture, and, notwithstanding the jettison, the ship is wrecked or captured, there is no contribution.

Valin says, the ship ought to be effectually saved, so that she may continue her voyage; for if after the jettison the tempest abate for a short time and then recommence, and the vessel is wrecked, although it should be some days after the jettison was made, it is not a case of contribution on account of any goods that may be saved from the wreck.[1]

The right to contribution has been restricted, by authorities both ancient and modern, within still narrower limits, and it has been asserted, not only that the impending peril must be avoided, but also that it must be so by means of the sacrifice.

The French Code provides, that, "if the jettison does not save the ship, there is no ground of contribution."[2] This doctrine is borrowed from the Roman law.[3] Valin says, that, to constitute a ground of contribution, it is requisite that the jettison should be made for the common safety, and that the common safety should be effected by it;[4] the ship must have been saved by the jettison.[5] Beawes says, that, to make a case of contribution for jettison, it

[1] Tome II. p. 207, Du Jettison, a. 16.

[2] Code de Commerce, l. 2, tit. 12, a. 234; Ord. tit. Du Jettison, a. 15.

[3] Dig. 14. 2. 4. 1. Eorum enim merces non possunt videri servandæ navis causa jactæ esse, quæ periit.

[4] Vol. II. p. 205, Du Jettison, a. 15.

[5] Ibid. p. 207, a. 16; and see Magens, Vol. I. p. 56.

must appear "that the ship and cargo, or a part of them, has been saved by that means." [1]

Mr. Chief Justice Tilghman, of Pennsylvania, says, that, to make a case for contribution, the sacrifice of a part "should be conducive to the saving of the rest." [2]

In a Massachusetts case, a vessel dragging her anchors and being drifting towards Cohasset rocks, in a heavy swell, her masts were cut away, and she thereupon brought up. About an hour after, she again drifted until she struck, whereupon her cables were cut, and she was carried high upon the rocks, where her bottom was stove. The cargo was landed. A contribution for the masts being claimed, Mr. Justice Putnam, giving the opinion of the Supreme Court, said, that, to give a right to make the claim for a sacrifice, "it must appear that the property was thereby rescued from the peril;" and the claim was accordingly rejected.[3]

Mr. Chief Justice Kent, in giving the opinion of the court, takes the position, in reference to a voluntary stranding, that if the vessel is wrecked, there is to be no general average; and such was the decision in the case of a vessel in the Texel, which dragged her anchors, whereupon her cables were cut, and she was purposely stranded, and could not be got off, though the cargo was saved.[4]

It is stated in this case, that the object was to save the vessel and cargo, and in this the master failed, for though the cargo was saved, the vessel was lost, and therefore there was to be no general average. But this way of stating the subject does not seem

[1] Tit. Salvage, Average, &c.; and see Scudder v. Bradford, 14 Pick. R. 13.

[2] Sims v. Gurney, 4 Binn. 524.

[3] Scudder v. Bradford, 14 Pick. R. 13.

[4] Columbian Ins. Co. v. Bradhurst, 9 Johns. 9, where are cited Dig. 14. 2. 5; Voet. ad Pand. l. 14, tit. 2, s. 5; Bynk. Quæst. Jur. Priv. l. 4, c. 24, De Jactu; Ord. Konigsburg, 2 Magens, 200, Cleirac sur Jug. Oleron, p. 42; Le Guidon, c. 5, s. 28; Ord. Louis XIV. Des Average, art. 16; Des Contrib. art. 15, 16; 2 Valin, 168; Hub. Præl. ad Pand. l. 14, tit. 2, s. 4; 1 Emerigon, 614, 616; Roc. de Nav. n. 60; Ord. Rotterdam, art. 101; Ord. Copenhagen, tit. Average, art. 5; Malynes, 110; Molloy, b. 2, c. 6, s. 12; Beawes, tit. Salvage, &c.

to be accurate, for the intention may be to sacrifice the vessel in order to save the cargo, or it may be to expose the vessel and cargo to equal danger by stranding, in order to save something of both, or to expose the vessel to greater danger than the cargo. Whichever is the intention, the right to contribution will stand upon precisely the same footing as in the ordinary case of jettison, for the contribution is made whether the goods thrown overboard are intended to be destroyed, or only to be exposed to great peril of being so, as they most frequently are by being put into lighters, and in either case the damage to the goods, or their whole value, as the case may be, is a subject of contribution.

It would follow from the above jurisprudence and authorities, that where goods are thrown overboard when the ship and cargo are in imminent danger, and the only probable means of saving any thing is by making a jettison, which is not only justified but required by the occasion, and it would be a neglect and fault in the master not to resort to this measure, and, by the shifting of the wind, or some fortunate accident, it turns out that the jettison did not conduce to the general safety, but that the ship and cargo would have sustained no damage whatever though no jettison had been made, no contribution can be claimed by the party who has lost his goods. Mr. Marshall says, "This is quite unreasonable and unjust." [1]

But the doctrine stated above, namely, that whatever is eventually saved must contribute, though the impending peril, as capture or shipwreck, on account of which the sacrifice was made, is not "THEREBY" avoided, or is not avoided at all, is well supported by authority and on principle.[2]

Pothier is of opinion, that, if a part of the property is sacrificed for the common benefit, whatever is eventually saved must contribute for the loss, whether the impending danger is avoided or not.[3]

Mr. Hughes leans to the same doctrine,[4] and gives the reason,

[1] Page 537.

[2] Q. Weyt. 237; Le Guidon, c. 133; Caze *v.* Richards, 2 Serg. & R. 237, n.

[3] Ins. n. 128., 414.

[4] Insurance, 288, n., 294.

that, "if a vessel should be in danger, and after goods have been sacrificed in order to lighten her should nevertheless be wrecked, the goods saved or picked up must contribute for the jettison, because it has been resorted to with a view to save the ship and the rest of the goods, and because, if those goods had not been sacrificed, their owner might have saved or recovered them all, or in part, as the other owners have done, but of which possibility he was deprived by the jettison."

Benecke is decidedly of the same opinion.[1] And this doctrine seems to predominate in the more recent jurisprudence, and is assented to by many experienced underwriters.

The doctrine of Pothier and Quintin van Weytsen stated above is adopted and ably vindicated by Mr. Justice Washington, in the case of a vessel that was chased by the enemy in Delaware Bay, and, as the only means of escape, purposely stranded. The crew had taken out part of the cargo, when they were compelled to leave the vessel by the enemy, who set fire to her, and she was burnt down to the water's edge. The crew afterwards recovered other parts of the cargo, and some articles belonging to the vessel. Upon the question whether a contribution should be made, Mr. Justice Washington said: "To constitute a claim for contribution, the jettison must be successful in part at least; for if the ship was lost by the peril which it was intended to avert, there is no contribution due. The principle fairly to be extracted from the maritime law is, that the part saved shall contribute, provided the object for which the sacrifice was made was attained."[2]

It was objected to a contribution in this case, that the loss of the vessel was not intended. The judge said this was not necessary; if it were, the loss of goods put into lighters, to lighten the ship, would not be contributed for, since "the probability is, that they will be saved. The motive for the act in relation to the rest of the property, and not the intention in relation to the thing sacrificed or exposed to danger, gives rise to contribution."[3]

[1] London ed. 1824, p. 178; Benecke & Stevens by Phil. 105.

[2] Caze v. Reilly, 3 Wash. C. C. R. 298.

[3] S. C.

Another reason urged against contribution in this case was, that the principle on which contribution is allowed is the safety and prosecution of the voyage, which cannot be effected if the vessel is totally lost. The judge said: "This reason appears to be entirely fanciful. It has no authority to stand upon; it is inconsistent with other cases, where the vessel is lost, and yet contribution is allowed. It can scarcely be denied, that, in cases of such imminent danger as to justify the desperate remedy of stranding the vessel, the object must be the preservation of the lives of those on board, and the safety of the cargo, and perhaps of the vessel. All hopes of further prosecution of the voyage must in general be abandoned, though there may be a possibility that it may be resumed. But if this reason be a sound one, what will be said of the case where a jettison is made of the whole cargo, or so great a part of it, as to render the voyage not worth pursuing? But what seems to be conclusive is, that, if the ship survive the danger which the jettison was made to avert, and is totally lost the next day, the goods saved contribute." [1] This opinion was adopted in Pennsylvania.[2]

The subject of the ultimate safety of ship, cargo, or freight, requisite to entitle the party whose property has been sacrificed to a contribution, has been elaborately discussed in the Supreme Court of the United States, in a case of voluntary stranding. The reasoning in the case will apply equally to cases of jettison.

It was the case of the brig Hope, which sailed from Alexandria for Barbadoes, and, as she was going down Chesapeake Bay, the captain, thinking it imprudent, on account of the state of the weather to proceed to sea, bore away for Sewell's Point, and there anchored. On the same and the following days, the gale increasing, the vessel dragged her anchors from time to time, until finally she struck on the shoals, and her head swinging round, brought her, broadside to the wind and a heavy sea. The captain, in this situation, slipped his cables, and ran her ashore, for the safety of the crew and preservation of vessel and cargo. The vessel was

[1] Caze *v.* Reilly, 3 Wash. C. C. R. 298; Abbott on Shipp. by Story, 369.

[2] Gray *v.* Waln, 2 Serg. & Rawle, 229; Caze *v.* Richards, id. 237, n.

driven far up the bank, where she was, after the storm, left high and dry, and could not be got off.

The case was considered by the court as presenting the question, whether a voluntary stranding for the preservation of the crew, ship, and cargo, followed by a total loss of the ship, constitutes a case for contribution. Upon this question, says Mr. Justice Story, "the maritime jurists of Continental Europe are not entirely agreed in opinion, and our own jurisprudence presents conflicting adjudications;" and he proceeds to examine the whole body of regulations and jurisprudence on the subject, from the Rhodian Law in the Digest downward, and cites divers authorities.[1]

Judge Story remarks: "The intention is not to destroy the ship, but to place her in less peril, if possible, as well as the cargo. The act is done for the common safety, and if the salvation of the cargo is accomplished thereby, it is difficult to perceive why, because, from inevitable calamity, the damage has exceeded the intention or expectation of the parties, the whole sacrifice should be borne by the ship-owner, when it has thereby accomplished the safety of the cargo. If, in the opening of the hatches and the jettison of some goods, other goods are accidentally injured or destroyed, it has never been doubted that the latter were to be brought into contribution."

The judgment, accordingly, was in favor of a contribution for the loss of the ship.[2]

The doctrine of this case is adhered to in one before Mr. Justice Story in the Circuit Court, of a ship on a voyage from Ha-

[1] The citations are, Dig. lib. 14, tit. 2, c. 1, and c. 2, s. 1, 2, c. 3, c. 4, s. 1, c. 5, s. 2, c. 7; Abbott on Shipp. Part IV. c. 10, s. 4; Emerigon, c. 12, s. 13, 39, a. 7, and s. 40, 41; Bynker. Quæst. Priv. Jur. lib. 4, c. 24, introd.; Boucher, Instit. au Droit Mar. (1805,) p. 449; 2 Val. Com. 167, 205, 207, 209; 1 Bell's Com. p. 589, 5th ed. (1826); Consolato del Mer, c. 192, 193; Boucher, Consolato del Mer, c. 195, 196, s. 487, 494; Roc. de Nav. et Naut. n. 60; Vin. Pece. ad Legem Rhodiam, lex 5; Voet. ad Pand. lib. 14, tit. 2, s. 5; Cleirac, Us et Coutumes de la Mer, a. 21, 23; 2 Magens, 200; Benecke, Prin. of Ind. 219, 221; Stevens on Average, 33, 34, 35, ed. 1824; 2 Browne's Civ. & Adm. L. 199.

[2] Columbian Ins. Co. *v.* Ashby, 13 Peters's Sup. Ct. R. 343.

vana to St. Petersburg, by way of Boston, which, having been accidentally stranded on Nantucket Shoals, and remaining fast, notwithstanding the jettison of a large quantity of sugars, was deserted by the crew. She afterwards floated, and was picked up adrift and brought into port. The sugars jettisoned, and the freight of them, were contributed for in general average.[1]

1319. There is a distinction between jettisons and authorized advances or expenses for the benefit of the ship, cargo and freight, or either of them.

The well-established doctrine is, that *disbursements for the common safety must be reimbursed in general average, whether the ship and cargo are eventually saved or not.*[2]

SECTION IV. EXPENSE OF DELAY TO REFIT ON ACCOUNT OF SEA-PERILS.

1320. *If in consequence of some disaster it become necessary to the safety of the ship and cargo to put into a port out of the course of the voyage to refit, it is generally held that more or less of the expense is to be defrayed by contribution.*

It is intimated, in some instances, that the expense of putting into port is a subject of general contribution only where the "master puts in to repair that which he has voluntarily sacrificed."[3] An article of the French Code favors this doctrine.[4]

But Lord Ellenborough said, in case of a vessel's putting back to repair sea-damage: "If the return to port was necessary for the general safety, it seems that the expenses unavoidably incurred by such necessity may be considered as the subject of general average. It is not so much a question, whether the first cause of the damage was owing to this or that accident, as whether the

[1] The Nathaniel Hooper, 3 Sumner's R. 542.

[2] See Spafford *v.* Dodge, 14 Mass. R. 66; Hassam *v.* St. Louis Perpetual Ins. Co., La. Supreme Court, 1852.

[3] Plummer *v.* Wildman, 3 M. & S. 482; Abbott on Shipp., Part III. c. 8, s. 8; Remarks of Kent, C. J., in Walden *v.* Le Roy, 2 Caines, 263.

[4] Code de Commerce, l. 2, tit. xi., a. 211.

effect produced was such as to incapacitate the ship, without endangering the whole concern, from further prosecuting her voyage, unless she returned to port and removed the impediment." [1] This is the doctrine adopted in the United States, as will appear by the cases subsequently cited.

Mr. Justice Washington says: "If the injury to the ship result from gradual and ordinary decay," and not "from some extraordinary violence or peril, the expenses incurred by going in to repair will not be a subject of general average." [2] The ship in question was seaworthy at the commencement of the voyage, and no fault is imputed to the owner or master. The necessity of going into port arose from a damage or loss which it belonged to the owner to repair at his own expense; but so it does when the vessel puts into port on account of sea-damage. Where the decay or injury is such as could not have been foreseen and prevented, it seems difficult to make a distinction in regard to allowing contribution for the expenses of going in to refit, whether the necessity arise from those extraordinary accidents for which insurers on the ship are answerable, or from unexpected decay, damage by rats or worms, wear and tear, or failure of provisions or water on account of the unusual length of the passage, or any other defect or injury which the owner must supply at his own expense, but which he could not have anticipated.

1321. *The expense of delay is not contributed for* in general average, *except where the voyage, having commenced and being in progress, is suspended* in order to refit, or on account of some extraordinary circumstance.

A ship being detained at Liverpool, her port of destination, after the cargo was delivered, to repair damage sustained before it was unloaded, Mr. Chief Justice Thompson, of New York, said: "The expenses during the time the vessel was detained at Liverpool cannot be brought into general average. They were not incurred for the benefit of cargo or freight. The cargo had been delivered,

[1] Plummer *v.* Wildman, 3 M. & S. 482. See also Williams *v.* London Ass. Co., 1 M. & S. 318.

[2] Ross *v.* Sloop Active, 2 Wash. C. C. R. 226.

and the freight earned, before the expenses in question were incurred."[1]

Bynkershoek[2] mentions three remarkable cases of claims made in Holland for contribution, on account of a delay of the voyage; one of which was in the courts seven, another ten, and the third sixteen years. In one, the vessel sailed from Holland, during a war between that country and France, on a voyage to Italy, under convoy of a ship-of-war for Portsmouth, where she delayed a year for another convoy, under which she proceeded to Cadiz, whence, after waiting a year for other convoy, she proceeded to Italy. Respecting a claim for contribution on account of the expense of these delays, different opinions were entertained in the courts, but the claim was finally allowed. Bynkershoek, who was a member of one of the courts before which the claim was brought, was of opinion that no contribution ought to have been made. Mr. Abbott, since Lord Tenterden, concurs in his opinion.[3] In the second case, which was similar to this, the claim was rejected in the Dutch courts.

The third case was that of a ship freighted from Amsterdam to Cadiz, with a stipulation to sail with convoy at least as far as Lisbon. The vessel put into Lisbon on account of danger from a fleet of privateers, where she waited six months before she could safely proceed to Cadiz. This case came before the same courts successively, in all of which the decision was in favor of a general average, and Bynkershoek approved of the decision; with whom Mr. Abbott concurs,[4] because "the master put into port to avoid an extraordinary and impending peril."

1322. *Extraordinary delay at sea for the purpose of making repairs is a subject of average.*

A vessel bound on a voyage from Smyrna to Boston met with sea-damage, to repair which she took on board two carpenters from a public ship, and delayed a few days at sea to make repairs, instead of putting into port for this purpose. The underwriters

[1] Dunham *v.* Commercial Ins. Co., 11 Johns. 315.

[2] Quæst. Jur. Priv. l. 4, c. 25.

[3] Page 340.

[4] Page 341.

in Boston made no objection to paying the expenses of this delay.

Such a case is not at all distinguishable in principle from going off the course to seek a port of necessity.

1323. *Delay at quarantine in the regular course of the voyage*, whether for the usual or for an unusual time, *is not contributed for.*[1]

1324. Delay by the vessel's being frozen up in the regular course of the voyage is not a case of general average.[2]

But *if a vessel is frozen up* in a port *where the master put in voluntarily to repair, the expenses* of detention during the time of her being frozen up *are* a part of the *general average.*[3]

1325. *Where the voyage is broken up by a peril insured against, and the vessel is under the necessity of returning home, and is sold for salvage*, and the voyage could not be resumed without an entirely new fitting out, *and* the vessel is *abandoned* to the insurers, *it is a case of total loss and not merely of contribution* in general average for the expense of returning home and refitting.

It was so held by Mr. Justice Story, in the case of a fishing vessel insured for the voyage, which was seized at the Falkland Islands by the governor acting there under the authority of Buenos Ayres, and a part of her men and outfits requisite for prosecuting her voyage taken out, and was then rescued by the remainder of her crew on board, and brought home to Stonington, in Connecticut, and libelled and sold for salvage. Mr. Justice Story said: "The question of general average, which might arise if the voyage to Stonington were a voyage to a port of necessity to refit and resume the original voyage, does not become material to be considered."[4]

[1] Emerigon, tom. 1, p. 633; 1 Magens, 67, s. 57.

[2] 1 Magens, 67. See also Bynk. Q. Jur. Priv. l. 4, c. 25.

[3] 1 Magens, 67, s. 57.

[4] Williams *v.* Suffolk Ins. Co., 3 Sumner's R. 510. The court remarks also, that "general average can only arise where the sacrifice has been made for the common benefit, and has accomplished the object." This latter proposition is questionable, as already stated, supra, No. 1318. In this case the voyage insured had

1326. *The following is a list of subjects which are included among those to be contributed for.*

Towing the vessel into port.[1]

Pilotage.

Light money.

Cutting a passage in the ice for the vessel.

Port charges.

Health officers' fees.[2]

Dockage.

Wharfage.

Discharging and reloading the cargo.

Surveyor's bill so far as the damage is a subject of general contribution.[3]

Coopering casks, as far as rendered necessary by unloading and reloading.

Storage of the cargo.

Hire of anchors, cables, and boats, for temporary purposes.

Wages to people hired to guard the property:

Or to pump the ship.[4]

Brokerage.

Temporary repairs.[5]

Wages of men employed, in order *to promote the prosecution of the voyage*, otherwise than in repairs belonging to particular average.

In a case in the English Court of King's Bench, before Justices Ashhurst, Buller, and Grose, while Lord Mansfield appears to have ceased to take part in the business of the court, but before his resignation, on a policy on a ship from Leghorn to London,

terminated by reason of the disaster, and could not be resumed; but this circumstance would not have prevented a general average for the salvage, if the assured had not abandoned.

[1] This charge was allowed in a London adjustment of an average in case of an American vessel putting into that port.

[2] Wightman *v.* M'Adams, 2 Brevard's S. Car. R. 230.

[3] Lowell *v.* Columbia Ins. Co., 3 Cranch, C. C. R. 83.

[4] Orrok *v.* Commercial Ins. Co., 21 Pick. 456.

[5] See supra, No. 1300.

the ship, in consequence of an accident, had been compelled to put into Nice as a port of necessity, where it was necessary to discharge the cargo and make repairs of the vessel before it could proceed. It seems that some delay occurred after arriving at Nice, until the master could receive instructions from the assured, before the repairs were begun; and in the mean time the men were discharged. The vessel was repaired and proceeded to London. "Several of the crew were hired at different times at so much per diem, to assist in the work." It does not appear that the master had intended to employ the men in the work at the time of discharging them. A question occurred in the case, whether the wages of the men so employed should be included in the general average; and it was held that they should be included.[1] It was remarked by Buller, J., that it was not settled that their wages would not have been allowed if they had not been discharged; but having been so, this charge was on the same footing as that of any other workmen.

Postages.

Fees of notaries.

Surveys, so far as the same relate to damage which is the subject of contribution, whether the surveyors are appointed judicially or by the master;[2] and beyond this limit, as far as such expense is not chargeable in particular average or total loss, if the expense is incurred under circumstances rendering the survey requisite for the instruction of the master as to the measures to be pursued, or for his vindication, or for proof in support of the claims of the parties respectively interested, in respect of each other or against their underwriters.[3]

The despacheur's charge, or a proportional part of it, for making up the loss.

Commissions on advances by commission merchants or agents, as far as the same are for general average purposes.[4]

Interest, whether ordinary or marine.

[1] Da Costa *v.* Newnham, 2 T. R. 407.

[2] Potter *v.* Ocean Ins. Co., 3 Sumner's R. 27.

[3] See S. C.

[4] Peters *v.* Warren Ins. Co., 1 Story's R. 463.

1327. *The repairs of damage to the ship are brought into the general average only in case of its being incurred voluntarily.*

If it is not so incurred, though the expense of delay and seeking the port of necessity to refit and make repairs is to be contributed for, the repairs are particular average, or to be made at the expense of the ship-owner, excepting temporary repairs as above mentioned.[1]

1328. *The expense of wages and provisions during delay and departure from the course, until the ship is again proceeding for the port of destination, are* by the law and the general practice in the United States *included in the* amount to be contributed for in *general average*, whether the damage which occasions the departure or delay is general or particular average.

It seems formerly to have been a question in England, whether the expense of wages and provisions during a delay, and going out of the course of the voyage to refit, were to be contributed for.[2] It has, however, been very distinctly settled there that this expense is not to be contributed for, in case of the repairs being particular average.[3]

And in a case where part, at least, of the requisite repairs in a port of necessity were on account of a general average loss, Lord Ellenborough and his associates rejected the expense for wages and provisions from the amount to be contributed.[4] Lord Tenterden, however, says in his Treatise on Shipping: "If a ship should necessarily go into an intermediate port for the purpose of repairing such damage as is in itself a proper object of general contribution, possibly the wages, &c., may also be held to be general average, on the ground that the accessory should follow the nature of the principal."[5]

[1] See supra, No. 1300 and 1326.

[2] 1 Magens, p. 64, 69, s. 57; Beawes, tit. Salvage, Average, &c.; Abbott on Merchant Ships, Part III. c. 8, s. 8; 2 T. R. 40; Da Costa *v.* Newnham, 2 T. R. 407.

[3] Fletcher *v.* Poole, Park, Ins. 89; S. C., Marsh. Ins. 2d ed. 721; Latewood *v.* Curling, Park, 207; S. C., Marsh. Ins., 2d ed. 539; Eden *v.* Poole, Park, Ins. 91; S. C., Marsh. Ins., 2d ed. 721; Power *v.* Whitmore, 4 M. & S. 141; Devaux *v.* Salvador, 4 Ad. & El. 420; S. C., 6 Nev. & Mann. 713.

[4] Plummer *v.* Wildman, 3 M. & S. 482.

[5] Abbott on Shipp., Part III. c. 8,

Mr. Arnould remarks, that where the repairs are general average, the expense of wages and provisions should, on principle, be brought into general average.[1] It does not, however, appear that this expense has, by any judicial decision or in practice, been brought into the general average in England, though the repairs were so.

One reason for the doctrine as given by Mr. Justice Sewall is, that "A liberal construction in this respect appears conducive to the interest of insurers, in the benefit they derive from every reasonable precaution against impending and extraordinary risks, such as the continuing at sea with a vessel disabled in her sails and rigging."[2]

Under a policy partly on cargo and partly on the vessel for a voyage from Boston to a port or ports in the island of St. Domingo, and thence to the port of discharge in the United States, after sustaining damage in a storm, the vessel arrived at Paix in that island, the first convenient port; but the master, not finding there the means of repairing her, proceeded to Maragoane. There, too, the means requisite for that purpose could not be had, and it was not practicable to make any port to the eastward of that, whereupon he discharged his cargo, and proceeded to Wilmington, in North Carolina, as the most convenient port for procuring repairs; which being made, he returned with a cargo to Maragoane, and there took a return cargo for the United States. The Supreme Court of Massachusetts held that the expense at Maragoane on the first arrival there, and that of going to Wilmington and while there, were in the nature of general average, and accordingly that the insurers were liable for the same as such. The taking of a cargo at Wilmington was considered to be a new voyage.[3]

1329. *Whether the expense of repairs is excluded from general*

s. 7, p. 350, 5th ed. Poth., Des Chart. Partn., No. 85, and Benecke, Prin. of Indem., p. 206, are of the same opinion.

[1] Arnould's Mar. Ins. 911. "Sont avaries communes les loyer, etc., pendant les reparations des dommages volontierement soufferts," etc. Code de Commerce, l. 2, tit. xi., a. 400.

[2] Padelford *v.* Boardman, 4 Mass. R. 548; and see Clark *v.* United Fire & Mar. Ins. Co., 7 Mass. R. 365; Walden *v.* Le Roy, 2 Caines's R. 263; Henshaw *v.* Marine Ins. Co., 2 id. 274; Saltus *v.* Commercial Ins. Co., 10 Johns. 487; Barker *v.* Phœnix Ins. Co., 8 id. 307; Breed *v.* Ship Venus, Abbott on Shipp. by Story, ed. 1829, 330, n.; Sage *v.* Middletown Ins. Co., 1 Conn. R. 239.

[3] Bixby *v.* Franklin Ins. Co., 8 Pick. 86; 3 Sumner, 46, n.

average, on the ground merely that they are made by the crew of the vessel?

It is assumed by Mr. Justice Buller, in a case before referred to,[1] that the same repairs made, or labor done, at a port of necessity, by men hired for the purpose, and not belonging to the ship, may be general average, which might not be so if only the crew had been employed. The decision of a question presented in a Massachusetts case on a time policy rests wholly upon that suggestion.[2] It was the case of a Gloucester fishing vessel, which was stranded in Chitecamp Harbor, where it had taken shelter during a storm. The crew, and divers other men hired for the purpose, were employed for thirteen days in getting off the vessel and making the repairs requisite to enable it to return to Gloucester for thorough repairs. The wages of the other men were allowed in general average, but the wages and provisions of the crew were excluded. The distinction between this case and the English case referred to, in which the wages of some of the crew employed a part of the time on the repairs were allowed, was, as stated by Mr. Justice Putnam, speaking for the court, that in the English case the men had been discharged, whereas in this case they had not been so. This distinction might be made in England, where the wages and provisions of the crew are not allowed in general average, but seems to be quite inapplicable in our jurisprudence, where they are allowed. The decision of this point, therefore seems to be in conflict with our settled doctrine and practice, which leads to the result that

The expense of repairs and services is not excluded from general average, because they are done by the crew of the vessel.

1330. *Wages paid unnecessarily, and through mistake, are not a subject of contribution.*

[1] Da Costa *v.* Newnham, 2 T. R. 407; supra, No. 1328, p. 108.

[2] Giles *v.* Eagle Ins. Co., 2 Metc. 140. Other English cases are cited, where the wages and provisions of the crew were not allowed during delay and going off the course to refit, but those are, as we have seen above, under the English rule on this subject, differing from that which prevails in the American jurisprudence and practice, and so of no weight whatever in reference to the same matter with us.

A ship being wrecked at the Isle of France, where she had put in for the purpose of refitting, the American consul there, under a mistaken construction of law,[1] directed the captain to pay three months' extra wages to a part of the crew. It was insisted on the part of the assured on ship and cargo, that this expense was a proper subject of contribution. Mr. Justice Wilde, giving the opinion of the court, said: "This loss arose partly from the mistake of the consul, and partly from the loss of the vessel. It was not the necessary consequence of putting into the Isle of France; it is not therefore a charge of general average."[2]

SECTION V. EXPENSE OF SALVAGE AND OF CLAIMING OR RECOVERING PROPERTY ON CAPTURE OR OTHER DISASTER.

1331. *The expenses attending the delay, and making claim for the vessel and cargo, in case of capture, are a subject of general contribution.*[3]

1332. *If the crew are detained during delay to claim a captured ship and cargo, for the purpose of prosecuting the voyage on a decree for release, the expense of their wages and provisions during such detention is to be contributed for.*

The contribution in this case seems to rest upon the same grounds as in case of delay, and seeking a port of necessity, to refit.

In 1748, the officers of the London Assurance Company said, respecting a case of detention for reclaiming the property: "In law it is not made out yet in England, that men's wages and victuals, by such detentions, are to be admitted into general average; but the custom rather is for the owners of the ship to bear them."[4] Magens, however, thinks they ought to be a part of the general

[1] United States Laws, 7th Congress, 2d Session, c. 62, s. 3.

[2] Dodge *v.* Union Mar. Ins. Co., 17 Mass. R. 471.

[3] Beawes, tit. Salvage, Average, &c., p. 157; Emerigon, tom. 1, p. 631; Code de Commerce, l. 2, tit. 11, a. 211, n. 6; Speyer *v.* New York Ins. Co., 3 Johns. 88; Jumel *v.* Marine Ins. Co., 7 id. 412; Kingston *v.* Girard, 4 Dall. 274; Dorr *v.* Union Ins. Co., 8 Mass. R. 494.

[4] 1 Magens, 344, Case xxvii. No. N.

average.[1] Ricard,[2] Adrian Verwer,[3] Weskett,[4] and Beawes,[5] all express, or strongly imply, the same opinion.

It seems, from a decision in England, on a case of detention with a hostile purpose, though not a capture, that there is no distinction between these expenses and those incident to a detention by capture.[6]

A ship bound on a voyage from New York to Havre was captured and carried into Ramsgate, in England, and detained from the 4th of September to the 4th of January following, when the property was restored. The expense for wages and provisions, during this detention, was claimed as general average. Mr. Justice Livingston, giving the opinion of the court, said: "The expenses here in dispute are incurred for the common benefit, in consequence of a vis major. It was said in the argument, that the master was not obliged to detain his crew. It is sufficient that he has done it in the present case; that he has acted with good faith, and that such detention was manifestly for the general weal." These expenses were accordingly included in the average.[7]

A similar opinion of the same court was subsequently given by the same judge, it being assumed that the charter-party had been dissolved by the capture.[8]

The same question has occurred in Massachusetts, upon a charter-party at a certain rate per month, for a voyage from the United States to Spain and St. Ubes and back, during which voyage the vessel was captured and carried into Gibraltar, where she was detained under admiralty proceedings from the 6th of January until the 10th of May, when she was acquitted, and finally arrived in the United States. Mr. Justice Jackson, giving the opinion of the court, said: "The necessary costs and charges incurred in claiming and obtaining the restoration of the ship and cargo are undoubtedly to be allowed as a general average. As to

[1] Vol. I. p. 69, s. 57, p. 345, n. (a.)
[2] Page 297.
[3] Weskett, tit. Wages, n. 11.
[4] Ibid.
[5] Title, Salvage, &c., p. 160.
[6] Sharp *v.* Gladstone, 7 East, 24.
[7] Leavenworth *v.* Delafield, 1 Caines, 573.
[8] Penny *v.* New York Ins. Co., 3 Caines, 155.

the wages and provisions of the crew, we are unable to see any ground on which we can allow them." The court considered this case to be distinguished from making a port of necessity to refit, by the latter being voluntary, and rejected the claim on the ground that the charter-party was not dissolved by the capture, and that the services of the master and crew were rendered in pursuance of, and due by virtue of their previous contract. But the court were of opinion, that if the time of service of the crew had expired, and a crew had been shipped again at the port to which the vessel was taken by the captors, then the expense of their wages and provisions would have been general average.[1]

If the retaining of the crew is necessary or expedient in attempting to avert a total loss, for which the insurers would be answerable, it does not appear on what ground it is material whether they are retained in virtue of a previous contract, or one made at the time when the detention commences. The wages of the crew during delay by going out of the course of the voyage to refit, are due in consequence of a previous contract; and yet those wages are allowed in general average. If, in case of detention by capture, the crew were retained merely because the master thought himself obliged by his contract to retain them, and not because the retaining of them was thought to be of any importance in regard to the safety of the ship and cargo, or the preventing of a total loss by the breaking up of the voyage, the charges of their maintenance and their wages would not seem to be a proper subject of contribution. But this does not appear to be the case contemplated by the court.

Accordingly, the doctrine on this question is stated as above, notwithstanding the decision last cited.[2]

[1] Spafford *v.* Dodge, 14 Mass. R. 66.

[2] The French Ordinance (tit. Des Average, a. 7) and Code (liv. 2, tit. xi. Des Average, a. 211) provide that the expenses of detention by a sovereign authority, including wages and provisions, are to be contributed for when the vessel is chartered by the month, but not otherwise. Pothier attempts to give the reason of this distinction (Traité des Charte-parties, n. 85,) in which Emerigon thinks he has succeeded (Tom. I. p. 539.) Valin (Tom. II. p. 156, &c.) says it is not possible to assign any good reason, and that the ordinance contradicts itself. The

1333. *If, in case of capture, any part of the expense is incurred on the separate account of the ship or cargo, such part is not a subject of general contribution.*

A vessel was seized by the French, under the Milan Decree, and after the seizure the cargo was discharged and delivered to the consignees, upon their giving security to abide the event of the trial; the court was of opinion that the expenses incurred by the captain, "before he ceased to have charge of the cargo," were general average. But the subsequent expenses, being incurred expressly on account of the cargo, were considered to be particular average.[1]

Mr. Stevens[2] intimates the opinion, that when a vessel and cargo are captured, and on examination released, but the expenses are decreed against the cargo by the Admiralty Court, they ought to be apportioned upon ship, cargo, and freight. But Mr. Hughes[3] doubts the correctness of Mr. Stevens's opinion.

This should seem to depend upon the facts of the case and the grounds of such a decree. If it were for a cause for which the shipper of the cargo ought to be answerable, and by which the owner of the ship ought not to be affected, it would surely not be a subject for contribution by the latter.

1334. *The expense of the salvage allowed for recovering property captured is contributed for in general average*, where different parties and interests are concerned, upon the principle on which that of claiming captured property is so settled.[4]

1335. *Goods or money, given to pirates* or plunderers, *by way of composition, must be contributed for* by the property thereby rescued.[5] But if they seize a part from choice or casualty, and without any composition, and the rest is not saved by the sacrifice of what is taken, it is a particular average.[6]

same distinction was proposed to the Supreme Court of New York, but not adopted by that court. Penny *v.* New York Ins. Co., 3 Caines, 155.

[1] Watson *v.* Mar. Ins. Co., 7 Johns. 57.

[2] Page 30, London ed. 1822; Benecke & Stevens by Phil. 79.

[3] Page 289, n.

[4] Williams *v.* Suffolk Ins. Co., 3 Sumner's R. 270 and 510; Heylyger *v.* N. Y. Firemens' Ins. Co., 11 Johns. 85.

[5] Abbott, 331; 1 Mag. 64; Beawes, c. 1, tit. Salvage, &c.

[6] Nesbitt *v.* Lushington, 4 T. R. 783.

1336. It was formerly the practice to ransom vessels captured by the public enemy, and to give hostages as security for the payment of the ransom, in which case the amount of the ransom, as well as the expenses of the hostage during his detention, were settled by general contribution.[1] But, more recently, *laws have been enacted prohibiting compositions with a public enemy,*[2] *and such compositions have been considered illegal, though not prohibited by specific laws.*

The purchase of the captured vessel or cargo at a sale, under a condemnation in a court of the enemy, is considered to be no less a trading with the enemy than an agreement made directly with the captors at sea.[3]

1337. *If the compromise be lawful, as in the case between neutrals and belligerent captors, the amount must be contributed by the property* on account of which it is made.

"When the progress of the voyage is interrupted by capture or other casualties, the master of the vessel becomes of necessity an authorized agent for the owners, freighters, insurers, and all concerned, and whatever he undertakes, and whatever expenses he may incur, fairly directed to the benefit of all concerned, become a charge upon them respectively, as much as when recovered under a special authority and license, and pursuant to an immediate request. The request and authority are necessarily implied, when the master exercises his discretion and judgment fairly. When his proceedings are within the usual course of business, as in the event of sea-damage, where he provides suitable repairs necessary for the prosecution of the voyage, the expense may be more readily acquiesced in; but the case is not stronger than a provision fairly made in a case of unusual and unforeseen casualties. The implied authority and duty of the master enable him in both cases to engage the personal responsibility of his employers on every

[1] Emerigon, tom. 1, pp. 474, 629, 630; Lopes *v.* Winter, Postlethwaite, Dict., tit. Average.

[2] 22 Geo. III. c. 35; 35 Geo. III. c. 66, s. 37–39.

[3] Havelock *v.* Rockwood, 8 T. R. 268. In France it was formerly allowed to give, but not to take, a ransom. Emerigon, tom. 1, pp. 465, 630.

occasion where his discretion is necessarily exercised to secure the purposes of the voyage."[1]

In case of a capture of a neutral by a belligerent, on suspicion of there being enemy's goods on board, it was held, that the amount paid by way of compromise should be contributed in general average; for though it did not appear that there were any goods of the other belligerent on board, or that there was any ground for a condemnation of the vessel, or any part of the cargo, "yet they were under detention, and there was some danger that the voyage might be defeated; and it was certain that it would be retarded by admiralty proceedings, if an adjudication had been insisted on."[2]

Where two thirds of the property was given up to the captors, though the other third sold at Naples, whither the vessel was carried by the captors, for more than the whole would have sold for at Messina, to which port the vessel was destined, yet it was held that a reasonable compromise so made was binding upon the insurers, and the state of the markets did not affect their liability, since they are not bound to make indemnity on account of a bad market, nor entitled to the advantage of a good one, unless they become owners of the property by abandonment.[3]

If the property is given up to the captors, and a sum is received by the master, instead of being paid, by way of composition, the transaction will be no less binding upon those concerned and upon the underwriters.[4]

1338. *The captain's being a part-owner will not render a compromise, that is prudently and honestly made, the less binding upon the other part-owners.*

In making the composition, his acts are considered to be done in his character of master and agent of all concerned.[5]

[1] Douglas *v.* Moody, 9 Mass. R. 548; and see Leavenworth *v.* Delafield, 1 Caines, 573.

[2] Ibid. The rule of the French Ordinance on this subject gives the underwriters a choice, on notice of a compromise, either to pay the composition-money and continue the risk, or pay a total loss and discharge themselves from it. Ord., tit. Assurance, a. 67.

[3] Welles *v.* Gray, 10 Mass. R. 42.

[4] Clarkson *v.* Phœnix Ins. Co., 9 Johns. 1.

[5] Waddell *v.* Columbian Ins. Co., 10 Johns. 61.

1339. *The expense of compromising* for or reclaiming captured property *is a subject of contribution* in general average in the proportion of the value, *only to the extent of the property endangered by the peril,* for if only the cargo, or a part of it, or only the ship, be the subject of an arrest, it is unreasonable that the other interests should be assessed on account of the expenses thus occasioned.[1]

1340. *In case of accidental stranding, the expenses incurred for getting off the vessel, as far as they are incurred for the purpose of saving the ship, cargo, and freight, and are common to all those interests, are a subject of contribution by all,* but the expenses incurred for either interest separately, or any two interests only, are chargeable wholly to it or them.

If the ship is got off without discharging the cargo, or by discharging only a part of it, then the whole expense for the purpose *may be general average in case of the vessel not needing repairs; if it needs repairs, those are particular average.*

If, the whole cargo being discharged, the vessel does not float, the subsequent expenses do not concern the cargo, but are particular average on the vessel, in the same manner as the repairs.

Goods being landed from a stranded ship, and delivered to the consignee, cease to be liable for contribution to *expenses subsequently occasioned.*[2]

Mr. Benecke[3] says: "When a vessel strikes by accident upon a shore, a rock, or a shoal, the damage thereby occasioned to the vessel or cargo is particular average. But a stranded vessel is, in most cases, in danger of being lost unless speedy measures be taken for her preservation. These measures are general average, so far as they serve to avert a danger threatening the whole concern. The charges, thereupon, of heaving the vessel off without discharging her, are general average, and so is jettison resorted to for the purpose of lightening and floating the vessel. Charges and

[1] See Hughes, Ins. 289, n.; Stevens on Average, p. 30; Benecke, London ed. 1824, p. 238; Vandenheuvel *v.* United Ins. Co., 2 Johns. Cas. 451; Benecke & Stevens by Phil. 161.

[2] See Remarks upon Bevan *v.* Bank of the United States, 4 Whart. 301; infra, s. 12.

[3] London ed. 1824, p. 215; Benecke & Stevens by Phil. 138.

damages occasioned by unloading a stranded vessel are general average, if the discharge was for the purpose of getting the vessel afloat, and that object be accomplished. But should the stranded vessel be lost, or subsequently saved as a mere wreck, no contribution can take place." That is, the damage and expense of discharging and landing the goods is general average, where they are discharged and landed as well for the purpose of lightening and getting off the ship as for their own safety.

Where a fishing vessel had been driven ashore by a storm in a foreign harbor, the expense of getting her off and making temporary repairs in order to proceed to the home port for thorough repairs was held in Massachusetts to be general average.[1] It does not, however, appear why the cargo and freight should contribute to the expense of floating the vessel incurred after the cargo was landed.[2]

1341. *The expense of forwarding a wrecked cargo by another conveyance to the port of destination is not included in the contribution.*[3]

This expense upon the cargo, like that in getting off the vessel after the cargo is discharged without floating it, is chargeable to the separate interest.

1342. *In case of* there being *a right to proceed against* wrongdoers or any *third parties, for indemnity* on account of a loss by general average, *the different parties interested contribute ratably* for the expense, unless they waive their claims.

1343. *Either party whose property has been jettisoned or sacrificed for the general safety, or who is entitled to salvage, has a lien on the interests saved* for contribution,[4] which may be enforced

[1] Giles *v.* Eagle Ins. Co., 2 Metc. 140. See supra, No. 1329, p. 110, as to the exclusion of the wages and board of the crew from the average.

[2] It being a fishing vessel, and all the interests belonging to the assured, and being covered by the policy, it was probably considered not to be material that the interests should be treated distinctly.

[3] Heylyger *v.* N. Y. Firemens' Ins. Co., 11 Johns. R. 85. The small expense of transporting the cargo from Shrewsbury to New York was included in the adjustment in this case; but the court seems to admit that it could not properly be included.

[4] United States *v.* Wilder, 3 Sumner, 308.

by application to the proper tribunal, or by retaining possession, where the party entitled to the lien is in possession.

1344. *In respect of claims for advances made, expenses paid, or liabilities assumed for the preservation and safety of ship, cargo, and freight, or any of those interests, it depends on the kind of agency or authority under which the claim arises, or the fact of the claimant being in possession, whether he has a lien.*[1]

1345. *The mere fact of a shipment being the property of the government does not exempt it from lien for contribution on account of a jettison.*

It was so held by Mr. Justice Story, in respect of a shipment of slop clothing, the property of the United States, in time of peace, on board of a merchant-vessel on a passage from Boston to New York, in an action of trover in the name of the government by the public officer who had shipped the slops and claimed the delivery of them without paying or securing the contribution to which they were subject according to the ordinary rules for the adjustment of general average for jettisons and sacrifices for the common safety.[2] That is to say, the rule is in favor of the lien, and if the government claims the delivery of the property without first settling the contribution, the burden is on them to show the particular case to be an exception.

SECTION VI. EXPENSE OF DETENTION BY EMBARGO.

1346. An embargo is an arrest which is one of the risks usually insured against. Any extraordinary loss or expense occasioned thereby is accordingly covered by the insurance. *All the extraordinary expense which it becomes necessary to incur for the ship, freight, and cargo, in common, by reason of an embargo, is to be contributed for by a proportionable assessment on those respective interests*, in the same manner as in respect to claiming captured, or recovering shipwrecked property.

1347. *In detention by an embargo, the wages and provisions of the crew are not subjects of general contribution.*

[1] See Abbott on Shipp. Part III. c. 3.

[2] United States *v.* Wilder, 3 Sumner, 308.

It has been decided in Pennsylvania, in a very elaborate case, that wages and provisions, with other expenses, during detention by embargo, are general average.[1] But the current of authorities is decidedly against this doctrine, and the reason assigned by Beawes [2] for the distinction between this case and that of capture, for which he cites Ricardo and Adrian Verwer, is, "that in case of capture the crew remained on board to take care of the vessel whilst they were endeavoring to reclaim her, and those expenses were occasioned with the sole view of preserving the ship and cargo for the proprietors; but in the case of mere detention, there is no room for such a pretence, as the embargoing sovereign would not have either ship or cargo, but only hinder their departure for some particular reasons." But he adds: "Nevertheless, it seems that both reason and justice require that the expense and wages of a ship's company detained in port by a prince's order should be brought into a general average; for if, on one side, the merchants who have laden her, are considerable sufferers by the delay, the owners of the ship are not less so, more especially if the crew is large and the detention long."

It was decided in the time of Lord Mansfield, that the expenses of detention by embargo are not the subject of general average. The reasons given were, that there was no authority in favor of an average in this case; that wages and provisions are never allowed in settling a policy on the ship, and that the insurance is on the body of the ship, the tackle, and furniture, and not on the voyage or crew; and accordingly, Mr. Justice Buller said, the ship and tackle being safe, the court look no farther. Lord Mansfield stated that the allowance of this claim would be "contrary to the constant practice." [3] This doctrine has been pretty ge-

[1] Ins. Co. of North America *v.* Jones, 2 Binn. 547; 4 Dall. 246.

[2] Title, Salvage, Average, &c., p. 160. See Benecke, p. 234, ed. 1824; Benecke & Stevens by Phil. 158.

[3] Robertson *v.* Ewer, 1 T. R. 127. A different opinion is incidentally intimated, but not deliberately given, by Lord Ellenborough, Sharp *v.* Gladstone, 7 East, 24, at page 36. In this case the defendant, Gladstone, who was the original assured on ship and freight, had made an abandonment to the underwriters on those two subjects, and been paid for a total loss, and afterwards had received the home-

nerally adopted, but it must, as it should seem, depend upon reasons different from those above stated, since those reasons apply to other cases of detention no less than to a detention by embargo.

In respect to a claim of this description, including the possible earnings of the vessel during the time of detention, the court in Massachusetts said: "If provisions may be taken to be included in an insurance upon the vessel and her appurtenances, yet such insurance is understood to be against accidents by which the vessel's provisions are destroyed or taken specifically from their proper use; but not against an expenditure of them, even an extraordinary expenditure." These expenses were put upon the same ground with the decay of the vessel.[1]

A ship insured in New York for a voyage thence to North Carolina, and thence to Dublin, was arrested by an American embargo in the course of the voyage, and, after a long detention, abandoned, and the expense of wages was claimed in addition to the amount of a total loss. The court said: "In addition to a total loss the insurer is answerable only for the necessary expenses incurred in laboring for the safety and recovery of the subject insured." The detention of the crew was not necessary for that purpose.[2]

SECTION VII. WHETHER CONTRIBUTION MUST BE CLAIMED IN THE FIRST INSTANCE FROM THE PARTIES CONCERNED.

1348. *It is not a condition that the assured on goods must claim contribution by the other parties for a jettison before he can de-*

ward freight, and this suit was brought by one of the insurers on freight for his share of the salvage, and the question was, how the net salvage was to be accounted for to the two sets of insurers on ship and freight. It was accordingly not a case of general average between ship, freight, and cargo, no question being made as to any charge to the cargo, and Lord Ellenborough probably had reference merely to the apportionment between ship and freight.

[1] Mantin *v.* Salem Mar. Ins. Co., 2 Mass. R. 420.

[2] M'Bride *v.* Marine Ins. Co., 7 Johns. 431. See also Penny *v.* New York Ins. Co., 3 Caines, 155.

mand indemnity from his underwriters. He may demand it of them in the first instance.

It has been decided in Pennsylvania, that a shipper, whose goods are thrown overboard for the general safety, must, in the first instance, claim a contribution of the other shippers, and the owners of the ship and freight; but if, without any fault on the part of the assured, he fail to recover a contribution of these parties, he may recover of the insurers the whole value of the goods thrown overboard.[1]

A different opinion has been given in New York, in the case of damage to corn by cutting away the mast. It was held that the assured might recover the whole damage of his insurers in the first instance, and leave them to claim a contribution from the other shippers and the owners of the ship.[2] The assured could not have recovered for the damage to the corn as a particular average, this being one of the memorandum articles.

1349. *If a part of the subject insured, as cargo, is jettisoned, the assured* on that subject *cannot recover* of his insurers *what he would be liable to refund* to them himself *as owner of the ship* or freight.

Where the assured on the ship was owner of the cargo, and there was a general average loss, for cutting away masts and rigging, and subsequently a total loss of the ship, by its being disabled, whereby it was rendered necessary to sell it at a port of necessity, it was held that the underwriters were entitled to deduct, in the adjustment of the total loss, the amount which the assured was liable to contribute towards the general average on account of the cargo. But if the cargo had belonged to another person, they could not have made such a deduction, or in other words, he would not have been obliged first to claim contribution from the cargo.[3]

[1] Lapsley *v.* Pleasants, President of United States Ins. Co., 4 Binn. 502; Marsh. Ins. 544, 546; Emerigon, tom. 1, p. 659, c. 12, s. 44, who cites Pothier Ins. n. 52, that claim may be first made against the insurers; but he cites Roccus, n. 62, Marquardus, l. 2, c. 13, n. 60, and Loccenius, lib. 2, c. 5, n. 11, to the doctrine that claim must be first made upon the other contributors.

[2] Maggrath *v.* Church, 1 Caines, 196.

[3] Potter *v.* Washington Ins. Co. of Providence, 4 Mason, 298.

1350. *In a general average for expenses paid by the assured, he can recover of his underwriters only the proportion belonging to the subject or subjects insured to contribute.*[1]

1351. In case of a general average being demandable, especially if due at a foreign port of delivery, as it often is, *if the contribution from other parties* than an assured, who has made advances, or whose property has been jettisoned, *is lost by his neglect*, or that of his agents imputable to him, *to claim it*, there can hardly be a doubt that *he thereby so far forfeits his right to indemnity from his underwriters.*[2]

1352. *Where the subject-matter liable for contribution and reimbursement of advances, or expenses, is before a court of admiralty having jurisdiction to decree the disposition of the same, it will decree the adjustment and satisfaction of the respective claims upon it.*

In case of the proceeds of the sale of ship, cargo, and freight having been paid into court, subject to its jurisdiction to decree the disposition of the same, Mr. Justice Story decreed reimbursement to a shipper for a forced sale which had been made of his goods, to raise funds for the benefit of the parties interested, notwithstanding that he had a remedy against the other parties personally. The court remarked, that the claim was analogous to that of a shipper whose goods had been jettisoned.[3]

SECTION VIII. AMOUNT OF THE CONTRIBUTION.

1353. Underwriters are liable to make indemnity by payment of either a particular or general average, or total loss, only in case of its being caused by the perils insured against. The constituent parts of a general average have already been enumerated.[4]

1354. *In case of a sacrifice of a part* of the ship or cargo, for the general safety, if the property escapes the impending peril and

[1] Jumel *v.* Marine Ins. Co., 7 Johns. 412; and see Williams *v.* London Ass. Co., 1 M. & S. 318.

[2] See 1 Magens, p. 76, s. 63.

[3] The Ship Packet, Barker, master, 3 Mason's R. 255.

[4] Supra, s. 4.

is saved, a *contribution is to be made by what is finally saved* of the ship, cargo, and freight.[1] But if the goods thrown overboard, or put into boats, for the general safety, are saved, and the ship and rest of the cargo are lost, no contribution is to be made.[2] If, however, the ship escapes the peril on account of which a jettison is made, and is afterwards wrecked, still, whatever is saved from the wreck must contribute for the jettison.[3]

1355. A distinction is to be observed between a jettison and expenses incurred for the general concern. Contribution for jettison is made only in case something is finally saved; but *actual expenditures* in making a port to refit, or claiming captured property, or in repairing damages done to the ship for the general safety, *are to be contributed for* in general average, *though both the ship and cargo are subsequently lost*, and nothing of either finally comes to the use of the owner.[4] No reason can be given why such expenditures should be borne by one party rather than another. An exception is, however, made in practice to this rule. If the funds to meet the expenditures are raised by hypothecation, upon the security merely of the ship, or cargo, or both, nothing is considered to be due to the party whose property is hypothecated to raise the funds, unless the property arrives under such circumstances that the bond may be enforced.

1356. *In case of funds to meet expenditures being raised merely by hypothecation*, the claim for *contribution* for the expenditures *becomes subject to the same conditions as* a claim for *contribution for jettison;* it depends upon the property being finally saved.

One reason for this practice is, that the party whose property has been hypothecated has lost nothing, since the bond of hypothecation has not been enforced. Another reason is, that the lender, in consideration of the marine interest, takes the risk of

[1] Valin, tom. 2, pp. 181, 191; Emerigon, tom. 1, p. 216; Code de Commerce, l. 2, tit. 12, Du Jettison, a. 228, 233; 1 Magens, 57.

[2] Dig. 14. 2, l. 4 and 5; Q. Weyts. s. 19.

[3] Dig. 14. 2. 4; Code de Commerce, l. 2, tit. 12, Du Jettison, a. 235; Q. Weyts. s. 20.

[4] Supra, s. 3.

the arrival of the property to the amount lent, for which all the parties concerned engage to pay him a premium, in case of the arrival of the property, since, in that case, they must contribute the amount of the marine interest. But, upon these reasons, if a part of the ship or goods hypothecated is finally saved, and goes in part satisfaction of the bond, the owner of what is saved would be entitled to contribution for the amount saved, and thus appropriated towards the discharge of the bond.

1357. In regard to disbursements which come into general average, the amount expended is, of course, the amount to be contributed.

The sacrifice for raising funds is a part of the average; as in case of the master's drawing bills at a discount, or selling goods at less than their market price at the port of destination.

If it is necessary to hypothecate the ship, or cargo, to raise funds, the marine interest is included in the contribution; but this charge is not allowed if there are any other means of raising funds.[1]

Sir William Scott says: "The first and most obvious fund for raising the money is the hypothecation of the ship. The master not being able to raise money on that alone, what is he to do? I conceive, one of two things, — to sell a part of the cargo for the purpose of applying the proceeds to the prosecution of the voyage, or to hypothecate the whole for the same purpose."[2]

The same necessity which authorizes the master to hypothecate imposes upon the parties concerned the obligation of paying the marine interest.[3]

1358. It may happen, where the several interests, or more interests than one, are hypothecated for general expenses, *one party* may be *compelled to pay more than his just proportion;* in which case he undoubtedly *has a claim against the others* for reimbursement.[4]

[1] Jumel *v.* Marine Ins. Co., 7 Johns. 412. Same in England, 1 Holt on Shipp., 455, cited Benecke, 247. In France, the master can only give his own responsibility or hypothecation, (Benecke, 247,) or sell goods (ibid.)

[2] The Gratitudine, 3 Rob. 240.

[3] See Reade *v.* Commercial Ins. Co., 3 Johns. 352.

[4] Benecke, London ed. 1824, p. 281; Benecke & Stevens by Phil. 199.

1359. *The expense of raising money abroad* for the purposes of general average *depends partly upon the rate of exchange.*

In regard to this, Mr. Justice Story says, the assured, and for the same reason the party who raises money to be applied to purposes of general average, "ought to be paid exactly what they have been charged, and no more, and any nominal value or current estimate differing from the real value ought not to be charged upon the underwriters."[1] The rules on this subject are the same in general and particular average, and are more fully stated under the latter.

1360. Where *a party* advances money for expenses that are general average, there is no doubt that, *so far as he* himself *pays interest for money advanced by him,* he *is entitled to bring it into the average.* But *in what cases a party advancing money for purposes of general average, for which he does not pay interest, can charge interest, is not clearly settled.*

In a Pennsylvania case interest on the advances of one party for the general benefit was allowed in general average.[2] It is the usual mode of adjustment in Philadelphia to allow interest on advances of money for purposes of general average. *There does not seem to be any reason for exempting this case from the general rules for payment of interest* according to the law of merchants.

The laws of Oleron provide that, "if a merchant freights and loads a ship, and despatches her upon a voyage, and that ship enters a port, and is delayed there until her moneys are spent, the master may well take and sell a part of the freighter's wine or merchandise. And when the said ship comes to her place of discharge, the wines which the master took ought to be paid for at the same price for which the other wines are sold."[3]

1361. *If the master cannot otherwise raise the funds requisite* for the emergency arising on casualties, on his own credit or that of his owner, or by the sale of the goods of his owner, at a rate

[1] Humphreys *v.* Union Ins. Co., 3 Mason, 429.

[2] Sims *v.* Willing, 8 Serg. & Rawle, 103.

[3] Article 22. See also Laws Wisb., a. 35, 68, 69; Cons. del Mare, c. 106; Ord. d'Anvers, a. 19; Code de Commerce, l. 1, tit. 3, Du Jettison, a. 109.

making the sale reasonable and justifiable, or by pledge or hypothecation of the ship only, or that and the owner's goods, or the ship and whole cargo, upon such terms as may be deemed reasonable and justifiable under the circumstances, *he may resort to a sale of such part of the cargo belonging to other shippers as can be sold to best advantage, or with least sacrifice, to a sufficient amount to answer the necessities of the emergency.*

In respect to selling a part of the cargo for the purpose of applying the proceeds to the prosecution of the voyage, Sir William Scott (Lord Stowell) says: "The books overflow with authorities. They all admit that he may sell a part; some ancient regulations have attempted to define what part. The general laws do not define what aliquot part; and indeed it is not consistent with good sense to fix a limitation to measure a state of things which is to arise only from necessity. The power of selling cannot extend to the whole, because it can never be for the benefit of the cargo that the whole should be sold."[1]

But there may be instances where it is for the interest of all concerned, the owner of the cargo as well as the owner of the ship and freight, that the whole cargo should be jettisoned,[2] as it is for the general interest in other cases, that the whole ship and freight should be sacrificed. It is precisely as if all the interests belonged to the same proprietor, and he should sacrifice one to save one or more of the others.

The authority of the master to sell a part of the cargo implies an obligation on the part of those interested, and on whose account the sale becomes necessary, to pay for the goods at the price at which they would have been sold at the port of discharge. The expense of raising funds in this case, as in other modes of raising them, falls upon the parties liable to make reimbursement, as far as the funds are raised on their account; and it most frequently happens that reimbursement is to be made for goods at a higher price than that for which they are sold at the intermediate port.

But the parties, though liable to make reimbursement of moneys raised for their benefit, are not jointly liable or mutually sureties

[1] The Gratitudine, 3 Rob. 240. [2] Tudor *v.* Macomber, 14 Pick. 34.

for each other, each one being severally liable for his proportion only.[1]

1362. *If*, as in case of jettison, *the claim of the party entitled to reimbursement is only on the ship and freight and goods*, or either, and not an absolute personal demand, his security being a lien on the contributory interests, then he has an insurable interest in such property to the amount of his claim; but if it is an absolute debt, as in case of money advanced merely on personal responsibility, he then has an insurable interest only against the risk of the insolvency of the other parties. The question then arises, *whether*, in either case, *he can insure* against the risks, whatever they may be, *and charge the premium* in the adjustment of the average?

If his claim is contingent, depending on the eventual safety of a part of the property which is liable to reimburse him for his sacrifice, as in case of jettison, *he* evidently *cannot charge the other parties with the premium* paid by him for diminishing or providing against such contingency, and rendering the repayment more certain by such insurance.

Mr. Benecke[2] is of opinion that he may include such premium for insuring money advanced by him, in case of his actually making such insurance. But it does not appear from any decided case that he can include such premium, and from analogy to the ordinary case of debtor and creditor, in which the debtor is not liable to reimburse the premium paid by the creditor to insure the debtor's life, or the property mortgaged as collateral security for the debt, without some special agreement to this effect, the better doctrine seems to be, that

A party to a general average whose claim is absolute, as in this case, *cannot include the premium as a subject of contribution* by the other parties interested.

1363. *Goods sold by the master* at an intermediate port *to raise funds* to pay for the repairs of the ship, *must be paid for at their net value at the port of destination* or delivery, deducting

[1] See Benecke, London ed. 1824; Benecke & Stevens by Phil. p. 270, n. (a.)

[2] London ed. 1824, p. 283; Benecke & Stevens by Phil, 202.

freight, duty, and all other charges to which they would be subject.[1] But this rule of estimating the value is predicated upon the supposed arrival of the ship, or upon the supposition that the goods would have arrived at that port if they had not been sold. If the ship and rest of the cargo are subsequently lost (since, according to a decision in England,[2] the underwriters on the goods are not liable to the owner for their value, for which, indeed, there seems to be a good reason, as they are not lost by perils of the seas) the owner of the goods ought to be entitled to recover their value, either at the port of departure or place of sale.

1364. It sometimes happens that *goods sold* in a port of necessity *to pay expenses bring a higher price than* they would have sold for *at the port of destination.* This raises the question whether the owner of the goods is to be paid the price at which they were actually sold, or that which they would have brought at the port of destination. Mr. Benecke[3] says: "It is reasonable that those who bear the loss in one case should receive the benefit in the other." A reason sometimes given why the party or parties answerable for the value of the goods sold in such case, whether the occasion be that of general or particular average, or both, should account for them at the same value, namely, that at the port of destination, whether they are sold higher or lower than that rate at the intermediate port, is, that in some ports goods, of which the importation is otherwise prohibited, are permitted to be sold for the purpose of repairing ships that put into port in distress, and sell for a higher price in consequence of such prohibition. In a case, however, before the King's Bench, in England, in which the arbitrators had allowed the owners of the goods the whole value at which they were sold, though higher than the price they would have brought at the port of destination, Lord Chief Justice Abbott, since Lord Tenterden, said: "I cannot say that their decision was wrong; for, by holding that the owner of the ship may lose, but that he never can gain, by such a sale as this, we shall

[1] Depau *v.* Ocean Ins. Co., 5 Cowen, 63.

[2] Powell *v.* Gudgeon, 5 M. & S. 431.

[3] London ed. 1824, p. 274; Benecke & Stevens by Phil. 193.

furnish the strongest possible inducement to him to take care that all the goods are conveyed to their port of destination." Mr. Justice Holroyd said: "There is strong ground for contending that the owner of the goods should receive compensation for the goods sold, according to their highest value. The ship-owner, in the event that has happened, ought not to be allowed to make any profit by such sale."[1] That is, the sale of goods in such case being a forced loan, the borrowers shall pay at least as much as they borrow, having no right to say to the involuntary lender, that, had they not taken his property, he would himself have made much less of it. There certainly seem to be very strong reasons in favor of the opinion of the Court of King's Bench in opposition to the doctrine of Mr. Benecke.[2]

1365. A vessel loaded with ice shipped at Boston for Charleston, while on the voyage met with a disaster on the south side of Cape Cod, near to Chatham, when she had performed about one eighth part of her voyage. In consequence of the disaster, it became *necessary to throw the cargo* of ice *overboard, and the voyage* was *broken up;* and the question arose as to the value at which it should be contributed for in general average, whether at the value in Boston, which was the expense of cutting, storing, and transporting to the vessel and shipping, or at the port of distress, where it could not have been sold, and was in fact of little or no value, or at Charleston, where, if it had arrived safely, it would have been of much greater value. Mr. Justice Putnam, giving the opinion of the court, said, the value at which this cargo must be contributed for was certainly that at the port of loading or of destination, "and not according to the price at the port of distress, where it could not be sold, and was not probably of any value at all. *Where*, as in the case at the bar, *the voyage is broken up near the port of departure, and the vessel has* not adopted an intermediate port of destination, but has *returned home*, and the freight has not been saved by the jettison, *the contribution* to the

[1] Richardson *v.* Nourse, 3 B. & A. 237.

[2] See, for remarks on this subject, Phillips's Benecke & Stevens, 72, n.

general average *should be*, between the ship and cargo, *upon the* assumed *value* of the cargo *at the port of departure.*" [1]

1366. If *goods thrown overboard* are of a kind *subject to leakage or breakage*, no doubt, in estimating their value on the supposition of their arrival at the port of destination, *the ordinary leakage or breakage* on such goods *is to be deducted.* So if the cargo of ice jettisoned as above mentioned had been contributed for at its market value at the port of destination, it would doubtless have been subject to deduction, for ordinary waste on the voyage.

1367. In case of damage to the rest of the cargo after a jettison, the question arises, *whether it is to be presumed that the goods thrown overboard* for the general benefit *would have arrived at the port of destination in a damaged state*, and, if they would probably have so arrived, whether they are to be contributed for at their value supposing them to have been so damaged, or at their value if they had arrived in the same state as to soundness that they were in when thrown overboard. Mr. Benecke [2] thinks, in this case, they should be contributed for at their value, supposing them to be damaged. *If* it is apparent that *the goods would necessarily have been damaged* had they remained on board, it would certainly be in accordance with the general principle of average contributions, that *they should be contributed for only at the value at which they would have come into the hands of the shipper* on arrival. But it will be readily imagined, that in very many cases it would not very satisfactorily appear whether they would have been damaged had they remained on board, and *if there is any doubt, the construction ought* unquestionably, *to be in favor of the owner* of the goods. The rule is evidently one of some difficulty in application. A case before Lord Ellenborough and his associates [3] is in some measure analogous to the one supposed, though not precisely parallel. In that case the master sold a part of the cargo to pay the expense of repairs, and afterwards the ship and

[1] Tudor *v.* Macomber, 14 Pick. 34.

[2] London ed. 1824, p. 290; Phillips's Benecke & Stevens, 233.

[3] Powell *v.* Gudgeon, 5 M. & S. 431.

remaining part of the cargo were captured. It was an action by the shipper against his underwriters, but in giving an opinion against his claim under the policy, the court say that his remedy is against the ship-owner. That is to say, the capture of the rest of the cargo does not exonerate the ship-owner from his liability to pay for the goods sold by him to defray the expense of repairs. That is, the goods are to be paid for without taking into consideration what might have happened to them had they remained on board. The difficulty in conjecturing what might have happened to the particular goods jettisoned, had they remained on board, affords a very strong objection, in many cases, to the rule laid down by Mr. Benecke.[1]

1368. As far as the loss of freight is to be made good by general average, the amount lost determines that of contribution. *The freight lost is contributed for at its gross amount; but only two thirds, or some other proportion* of the freight saved, which is considered to be equivalent to net freight, *contributes.*

The statement of the average is so made as to include this loss.[2]

1369. *If the subject of contribution is damage to the ship, the amount* of the damage *is determined*, as in case of particular average, *by that of the repairs, deducting a third new for old*, where the repairs are actually made; and where no repairs are made, the damage is a subject of estimate.

Where the value of the ship is to be contributed, in case of its loss by voluntary stranding, the measure of the loss is not the value at the commencement of the risk, as in case of a total loss under a policy upon the ship, but the value at the time when the ship is run aground. The value of the ship at this or that particular place is not the measure, as it is in regard to goods; but the inquiry is, what it would have been worth to the owner at the time of its being run aground, if he could have had it in security, and free from any impending peril.

The rule adopted in one case, in Pennsylvania, was the value of the ship at the commencement of the voyage, deducting one

[1] See remarks on this subject, Phillips's Benecke & Stevens, 231, n.

[2] 1 Magens, 285, Case xxiii., No. N.

fifth for diminution of value, by wear and tear, and decay ;[1] this being the value at which the ship would have contributed, had it been saved, and had a general average been made on some other account. In conformity to a decision in New York,[2] it was held that it should be contributed for at the same value. The reason of adopting this rule was the supposed necessity of some general rule on the subject, but it is a very great objection to it that it would operate very unequally, since the diminution of value would be much greater, as the risk had been of longer continuance. The necessity of a general rule does not seem to be so great as to require the adoption of one that would operate so unequally.

1370. *If goods thrown overboard* for the general safety *are recovered* by the owner before a contribution in general average is made, *the* amount of the *damage* to the goods by the jettison *and the expense of recovering them is to be contributed for ;* and not their entire value.[3]

1371. Where the whole value of the goods is to be contributed, a *distinction* has been made in some codes, and by some writers, *between a case of jettison before, and one after, half of the voyage is performed ;* making the invoice price the amount to be contributed in the former case, and the price at the port of delivery, in the latter.[4] But no such general distinction is made in England or the United States ; the price of the goods contributed for is their value at the time and place in reference to which the other goods contribute ; that is, goods contribute, and are contributed for, in general average, at the same rate. This rate will be subsequently considered.

1372. A question may be made, *whether, if valuable goods are jettisoned, where the master is not known or presumed to have notice of their value, the shipper is entitled to claim contribution for their full value ?*

[1] Gray v. Waln, 2 Serg. & Rawle, 229.

[2] Leavenworth v. Delafield, 1 Caines, 573.

[3] Beawes, tit. Salvage, &c. ; 2 Valin, 212 ; 1 Magens, p. 56, s. 53.

[4] Q. Weytsen. des Average, s. 12 ; Casar. Disc. 46, n. 47 ; Les Us et Cout. de la Mer, p. 21, n. 14.

The laws of Wisbuy provided, that if jettison was made of a box containing gold, precious stones, or other very valuable commodities, and the master had no reason to suppose that such articles were contained in the box, contribution should be made only for the value of the box.[1] A similar doctrine is stated by some of the old writers, who think that only the value of the goods which the master might reasonably suppose to be contained in the box should be contributed for.[2] This question does not appear to have come under consideration in England or the United States.

The equitable rules seems to be, that,

If, under the circumstances, *it is not a fault* or negligence imputable to the shipper *to have omitted giving the master notice of the contents of a box, the contribution should be for their value, otherwise for the value that might be reasonably presumed.*

SECTION IX. IN REFERENCE TO WHAT TIME THE CONTRIBUTORY VALUE IS ESTIMATED.

1373. *The amount of a contribution is assessed upon the different parties, in proportion as they are benefited by the sacrifice, or interested in the expenses contributed for; that is, in the proportion of the value of their several interests.*[3]

1374. Accordingly, *in case of expenditures*, which are *absolutely reimbursable, the value, at the time of incurring them, ought to contribute;* this being the proportion in which the several parties are interested.

"It is most reasonable," says Mr. Justice Sewall, "to estimate the vessel and cargo at their value in the place, and at the time, when and where the expense was incurred,"[4] as in case of port charges and law expenses in proceedings on capture.[5]

[1] Article 43.

[2] Q. Weyts. s. 33; Casar. Disc. 46, n. 49; Les Us et Cout. de la Mer, 22; Jug. Oler. a. 8, n. 22; Valin, tom. 2, p. 202, tit. Du Jettison, a. 12; Code de Commerce, l. 2, tit. Du Jettison, a. 231.

[3] Dig. de Leg. Rhod. l. 2, s. 2.

[4] Douglas *v.* Moody, 9 Mass. R. 548.

[5] Spafford *v.* Dodge, 14 Mass. R. 66.

A vessel having been detained and subjected to expenses by capture, Mr. Justice Jackson, giving the opinion of the court, said: "As contribution is claimed as a recompense for services rendered, and not a compensation for property voluntarily sacrificed, the party who performed or paid for these services was entitled to his recompense, although the ship should have been afterwards totally lost before completing her voyage. The contribution, therefore, must be adjusted according to the value saved, or retrieved, at the time when the expense was incurred."[1]

1375. *In case the claim for contribution is contingent, and depends on the event of the voyage, the value on which the different interests contribute is estimated at the time of arrival at the port of destination; or other port of delivery* where the voyage terminates at an intermediate port, *according to the state of the market there* at that time.[2]

1376. Accordingly, *if parts of the cargo are deliverable at successive ports, and jettisons occur on successive passages* between the different ports of delivery, *distinct adjustments must be made*, since the value of the contributory interests changes, and they must contribute on their value at the successive stages of delivery.

1377. It follows, that *where the average is occasioned partly by expenses, and partly by the sacrifice of a part* for the general safety, *the apportionment should be different for these respective parts*, in case the entire ship and cargo do not arrive at a port of discharge, or in case of a great change in the relative value of the different interests subsequently to the time of incurring the expenses. In such case, that part which is absolutely due and payable at the time of incurring the expenses, and independently of the event of the voyage, should be contributed for on the value of the interest at the time of the expenditure, and the part contin-

[1] S. C.

[2] Dig. de Leg. Rhod. l. 2, s. 4; 1 Magens, 307, Case xxv., No. O; Simonds *v.* White, 2 B. & C. 805; S. C., 8 D. & R. 375; Mutual Safety Ins. Co. *v.* Cargo of Ship George, Dist. Ct. of United States, S. Dist. of New York in Adm., 8 Law Reporter, 361; S. C., N. Y. Legal Observer for 1845, p. 260.

gently contributable on arrival at the port of delivery should be contributed for according to the value of what so arrives.

1378. *If the captain defrays the expenses of putting into a port of necessity, by selling a part of the cargo,* the question occurs, whether the average shall be considered to be due at the place where the expenses are incurred, or at the port of destination; or in other words, *whether, if the ship and the rest of the cargo are subsequently lost, the owner of the goods so sold shall be paid their value?*

According to the laws of Wisbuy, the goods were to be paid for in such case.[1] There is no question of this, unless the ship and cargo are considered in effect to be hypothecated for the value of these goods, and the right of the owner of them to be paid their value at the port of destination is considered to be equivalent to marine interest. But the rule of the law of Wisbuy seems to be preferable, since *the owner of the goods* so sold loses the claim which he might otherwise have against his underwriters, in case of the goods being lost with the rest of the cargo and the ship. But in case of the subsequent loss of the ship and cargo, he *ought to be paid for the goods,* only *at their value in the* intermediate *port where they were sold.*

SECTION X. CONTRIBUTORY VALUE OF THE SHIP.

1379. Since the owner of the vessel is constantly incurring expenses for the purpose of earning freight, he is benefited by a jettison only so far as the value of both the ship and freight, at the time of the apportionment, exceeds the amount of those expenditures. Different rules have been adopted for determining the just value for which the owners of the vessel ought to contribute. By some ordinances and codes, the master has the choice of contributing on the full value of the freight or of the vessel;[2] by others, he must contribute for half of the value of each;[3] and by others,

[1] Article 68.

[2] Jugemens d'Oler., a. 8; Wisb. 40.

[3] Cons. del. Mare, c. 94; Ord. Louis XIV., l. 3, tit. 8, Du Jettison, a. 7; Code de Commerce, l. 2, tit. 12, a. 228.

the ship contributes on its entire value at the time to which the apportionment relates.[1] And this is the more convenient and just rule, since the expense of navigating the ship ought rather to be considered a charge upon the freight, and ought to be deducted from that interest on account of which it is incurred.

In England and the United States the ship contributes on its full value at the time to which the apportionment relates. In determining this value in adjusting an average of the expenses occasioned by capture, the court in New York deducted one fifth from the value at the commencement of the voyage,[2] and the same rule has been adopted in Pennsylvania.[3] But no such rule has been adopted in Massachusetts,[4] and the expediency of any such rule is very questionable, since it is arbitrary, and must necessarily be very unequal in its operation. It seems that this rule is not applied in New York in cases where the true value can be ascertained. In a case of the actual sale of the ship, the contributory interest was held to be the amount for which it was sold.[5]

The value of the ship, as a contributory interest, ought not, however, as Mr. Stevens justly says,[6] to be determined in all cases by the price for which it might be sold at the place where it happens to be at the time when the contribution becomes due; since it might, according to the demand for shipping there, and according to the place where it was built, bear a very low or very high price. These are adventitious circumstances, which ought not to affect the adjustment of the loss.

This rule excludes from the amount to be contributed for, the diminution of the value of the ship by extraordinary sea-damage, and other casualties, which constitute subjects of indemnity under a policy of the usual form upon the ship, and there is no question

[1] Ord. Hamburg, tit. 21, a. 8, 2 Magens, 237; Konigsburg, c. 8, a. 33; 2 Magens, 207; Stockholm, tit. Average, a. 5, 2 Magens, 280. See Q. Weyt. s. 24; Stevens, Part I. c. 1, s. 2, a. 2.

[2] Leavenworth *v.* Delafield, 1 Caines, 573.

[3] Gray *v.* Waln, 2 Serg. & Rawle, 229.

[4] Douglas *v.* Moody, 9 Mass. R. 548; Spafford *v.* Dodge, 14 Mass. R. 66.

[5] Bell *v.* Smith, 2 Johns. 98.

[6] Stevens, Part I. c. 1, s. 2, a. 2.

as to the propriety of making this deduction,[1] since the ship, to the extent of such damage, does not arrive safe; or, a part of the ship to this amount is not finally saved; and contribution is to be made only by what is finally saved.

1380. *If,* however, *a sacrifice of a mast, sail, or any other part of the ship, is contributed for, the value at which it is contributed for is to be included in estimating that of the ship.*

1381. *The part of the ship's value saved by the first jettison,* or other occasion of average, *is the remainder, after deducting the contribution to be made for subsequent general average losses.*

The rule is general, and applies to all interests and all losses, in determining the amount of ship, freight, or cargo which must contribute to any gross average as constituting the property finally saved, that the subsequent general and particular averages on an interest are to be deducted, since they are either so much abstracted from the subject and so not finally saved, or they are so much paid, and constitute a part of the expenses of saving the property.

Upon the same principle, if the ship survives the peril on account of which a jettison is made, and is afterwards wrecked, but a part of its materials are saved; only the value of what is saved, after deducting the expenses of salvage, contributes for the jettison.[2]

1382. The Roman law excepted from contribution the *provisions* and articles intended to be consumed on board.[3] But articles of this kind *remaining on board at the time of the apportionment, which were on board at the time of incurring the loss, constitute a part of the value of the ship saved,* and so ought to contribute. Stores and provisions consumed before the loss was incurred plainly do not form any part of the contributory interest.

1383. *The stores and provisions consumed, and the amount of damage to the ship by wear and tear, and of deterioration by decay, between* the time of *the jettison and* that of the *adjustment,*

[1] Ut supra.

[2] Dodge *v.* Union Ins. Co., 17 Mass. R. 471.

[3] Dig. de Leg. Rhod. l. 2, s. 2; and see Code de Commerce, l. 2, tit. 12, Du Jettison, a. 230.

ought to contribute only so far as they may be considered to be finally saved, and their being so considered depends upon the vessel's earning freight. If freight is eventually earned, the part abstracted from the value of the vessel, in the course of navigation, is saved, and comes to the use of the owner in the form of freight. This part of the value of the vessel ought, therefore, to be had in consideration, in fixing the amount upon which the ship and freight are to contribute.

These elements in calculating the value of the ship and freight are not usually estimated specifically in making adjustments, but are presumed to be included in the allowances and deductions under some general rule, as the deduction of a half, third, fifth, &c., and they are mentioned here for the purpose of showing the principles upon which adjustments are made, rather than the particular practice in making them.

It is intimated in one instance, that, in case the ship is at a foreign port when the contribution accrues, the expense of bringing it home is to be deducted in estimating its contributory value.[1] But this is supposing it to come home empty, which is by no means a necessary supposition.

1384. *Where a contribution is made on account of the sacrifice of a part of any subject, the part contributed for constitutes a part of the contributory value;* since, otherwise, the party whose property is sacrificed would be fully indemnified, while the other parties would pay away in contribution a part of the value of what had been saved. This rule is applicable to all the contributory interests.

SECTION XI. CONTRIBUTORY VALUE OF FREIGHT.

1385. *The freight pending at the time of the jettison, or other sacrifice, contributes for the loss on the amount eventually saved.*[2]

[1] Gray *v.* Waln, 2 Serg. & Rawle, 229.

[2] Williams *v.* London Ass. Co., 1 M. & S. 318; Maggrath *v.* Church, 1 Caines, 196.

In a case of salvage, Sir William Scott said: "Whether salvage is due on the freight will depend on the fact, whether freight was in the course of being earned. If a commencement has taken place and the voyage is afterwards accomplished, the freight is included in the valuation of the property on which salvage is given."[1] The same principle applies to contribution in general average. If the cargo has been delivered before a loss is incurred, and the freight has thus become absolutely due, it does not contribute;[2] and if a part of the cargo has been delivered before the loss, only the freight of what goods remain on board contributes.[3]

Upon the principle that only the freight pending, and in the process of being earned, contributes, Mr. Stevens says, that if the freight is advanced, and not to be recovered back by the shipper, though the voyage should be defeated by perils of the seas or any inevitable accident, the freight, as such, does not contribute, since it was not in danger of being lost by any peril on account of which a jettison or other sacrifice is made.[4]

1386. The circumstances which give a commencement to the interest in freight, and the duration of this interest, have been already considered;[5] and if a general average loss occurs while this interest is at risk, it contributes, so far as it is eventually earned. *If only freight pro rata itineris is earned, that only contributes.*[6] Mr. Stevens says: "On a ship chartered for the voyage, and the average being settled at the port of loading, it is the custom in Lloyd's to make the freight contribute."[7]

It does not appear that there is any difference between freight and ship and cargo as to the liability of either to contribute in an average so adjusted. If the ship, having met with a disaster, puts back to the port of departure, and the voyage is broken up there,

[1] The Dorothy, 6 Rob. 88. See also The Progress, 1 Edw. 210.

[2] Dunham *v.* Commercial Ins. Co., 11 Johns. 315.

[3] Strong *v.* N. Y. Firemens' Ins. Co., 11 Johns. 323.

[4] Part I. c. 1, s. 2, a. 2 and 3; Benecke & Stevens by Phil. 210.

[5] Supra, c. 3, s. 11.

[6] Maggrath *v.* Church, 1 Caines, 196; The Nathaniel Hooper, 3 Sumner's R. 542.

[7] Part I. c. 1, s. 2 a. 3; Benecke & Stevens by Phil. ut supra.

every interest will contribute upon the value saved, for jettisons and sacrifices, in the same manner as at the port of destination, or at any intermediate port of delivery, or termination of the voyage. And the whole freight may be due in such case, where the goods specifically remain, and the ship is in a condition, or can within a reasonable time be put into a condition, to carry them on to the port of destination, and the master is ready to carry them.[1]

So *if expenditures are incurred* on account of the ship, cargo, and freight, for which the owners of these interests are personally absolutely liable in the proportion of the amount of the interests respectively, *these may be apportioned* upon the parties as a general average *at the port of departure, or at any intermediate port*, while the voyage is still in progress, and while it does not appear how much, or whether any thing, will be eventually saved.

The value in contribution will, in such case, as already stated, be estimated at the time and place of making the expenditures. But *it is otherwise of a* contribution for *jettison*, or other sacrifice, for if the voyage is still in progress, the contribution for a jettison or other sacrifice of a part is contingent, and must be delayed until arrival at the port of delivery, unless all the parties, or those acting for them, consent to the adjustment being made at some other.

1387. *Where a ship is chartered for successive ports of delivery* and loading, or goods are shipped on bills of lading stipulating to transport them and their proceeds to successive ports of delivery and loading, *on a stipulation for payment of freight only on delivery of the cargo at the final port*, the question arises, *whether the whole aggregate freight contributes* to any general average that may occur during any of the successive passages?

According to some decided cases the aggregate freight contributes.[2] Mr. Benecke is of opinion, that the freight ought to be apportioned and assessed only on the amount of the particular voyage or passage.[3]

[1] Griswold *v.* New York Ins. Co., 1 Johns. 205; 3 id. 321; Saltus *v.* Ocean Ins. Co., 14 id. 138; Jordan *v.* Warren Ins. Co., 1 Story's R. 342.

[2] Williams *v.* London Ass. Co., 1 M. & S. 318.

[3] London ed. 1824, p. 315; Benecke & Stevens by Phil. 258.

If a vessel is bound on a trading voyage, loading and unloading her cargo in small parcels, at successive ports, it would be difficult to adjust an average without taking aggregate freight, in some respects, or to some degree.

In ordinary voyages it is easy to estimate the freight of distinct passages comprised in the same voyage, by an apportionment of the whole freight agreed upon, or by a reference to the currrent rate. And in general it would not be difficult to make an estimate and apportionment of the freight upon this principle. Where a ship goes out in ballast, to bring back a homeward cargo, one half of the agreed freight for the round voyage might be estimated to be that of each passage. The difficulty of the apportionment is not, then, a reason for assessing the freight in general average on the whole aggregate amount.

The fairer estimate seems to be of the freight to the next port of delivery or loading to which the vessel arrives, whether any freight is to be actually due there or not.

The freight was so estimated in Massachusetts, under a charter-party at a certain rate per month, where the cargo belonged to the charterer.

A vessel chartered by the month, loaded, victualled, and manned by the charterer, sailed from Boston to Alexandria, thence to Lisbon, and thence to St. Ubes, and thence with a cargo of salt for Boston, on which last voyage she was captured and carried into Gibraltar, and detained there about five months, and then released. In deciding on an apportionment of a general average for the expenses of reclaiming the vessel, Mr. Justice Jackson, giving the opinion of the court, said: "The value of the freight will be settled according to the customary rate of freight from St. Ubes to Boston. Where goods are carried on freight, the actual amount of the freight lost is the best evidence, and indeed is generally considered conclusive as to the gross amount of freight. But where the cargo is the property of the same person who owns the ship for the voyage, we know of no other mode of estimating the freight than that above mentioned. In this estimate no freight is included for any preceding passage, because that was all earned."[1]

[1] Spafford *v.* Dodge, 14 Mass. R. 66.

1388. *If the vessel is wrecked or disabled* in the course of the voyage, *and the cargo is transshipped after a jettison* to be contributed for, *the excess, if any, of the* amount of the *freight* to the port of destination *over that to be paid to the other vessel, is the pro rata freight in contribution. If there is no such excess, freight does not contribute.*[1]

The masts and rigging of a vessel being cut away during a storm, on a voyage from Providence to New Orleans, the vessel put into New York as a port of necessity, where she was found to be much damaged, and was sold. It was held, that the masts and rigging must be contributed for by the vessel and cargo; no freight being saved, this interest did not contribute.[2] The freight from New York to New Orleans is the same as from Providence, so that on transshipment no freight pro rata could have been saved.

1389. *The expense necessary to be incurred on account of freight subsequent to the jettison*, in order to earn it, *is to be deducted in estimating its contributory value.*

Freight is earned by the wear and tear and natural decay of the ship, the wages and provisions of the crew, and the port charges, pilotage, and other expenses attending navigation. But only a part of these are allowed in estimating the amount of this contributory interest. If freight is not earned, of course there can be no question in regard to its contribution. If it is earned, the deterioration of the ship by decay, and wear and tear, and the consumption of provisions and stores which were on board at the time of the jettison, are the appropriation of so much of what was the value of the ship at that time to its intended use. Such part of the ship's value is finally saved, if at all, in the form of freight; and unless it is so saved, it ought not to contribute, since only what is saved contributes; and it ought not to be contributed for, since it was not a part of the voluntary sacrifice. In regulating the contributory value of ship and freight, it is to be considered how much of what is consumed reappears in another contributory form.

But the wages of the men for the voyage, the expense of pro-

[1] Searle *v.* Scovel, 4 Johns. Ch. R. 218; Dodge *v.* Union Ins. Co., 17 Mass. R. 471.

[2] Potter *v.* Washington Ins. Co. of Providence, 4 Mason, 298.

visions and stores put on board and consumed after the jettison, and the port charges, pilotage, and in general all the disbursements made by the owner after the jettison and as the means of earning the freight, are to be deducted from the gross amount, the excess being the amount actually saved out of what was at risk when the jettison was made, and accordingly such excess is the true amount of this contributory interest.

Mr. Stevens says: "There may be some doubt whether the master's wages should be deducted;" [1] but there appears to be no satisfactory reason for this distinction. The circumstance that the master may insure his wages, although the men are not permitted to insure theirs, seems not to affect the contribution.

Magens says: "Only so much of the seamen's wages ought to be deducted from the freight, as may be due from the time of beginning to load; for if any remained due on account of their outward bound voyage, it was a debt owing to them, and must have been paid if the ship had been lost in coming home." [2] But it is evident, that, if the freight for the outward and homeward bound voyages was pending, the wages of both voyages ought to be deducted. Freight is said to be the mother of wages, that is, wages are due only in case of freight being earned. Therefore, the whole of the wages accruing during the time of earning the pending freight are a necessary deduction from its gross amount in estimating its real value; and at whatever stage of the voyage a jettison is made, this deduction is the same.

Mr. Stevens says: "Where the seamen were not only paid, but hired by the month also, the case might admit of discussion;" [3] that is, if the wages did not depend upon earning freight, but were payable absolutely at the end of each month, the deduction from gross freight on this account might be different. If the men are so hired, and the ship is freighted for the voyage, the wages paid before the jettison are upon precisely the same footing as the provisions and stores consumed before that time, in the ordinary mode of hiring the men, as well as freighting the ship, for the voyage.

[1] Part I. c. 1, s. 2, a. 3; Benecke & Stevens by Phil. p. 210, &c.

[2] Vol. I. p. 72, s. 58.

[3] Part I. c. 1, s. 2, a. 3.

That is, in estimating the amount of the contributory interest of freight in such case, no deduction ought to be made on account of wages absolutely due before the jettison or other occasion of contribution.

1390. *Although the seamen are interested in a jettison, since they are not entitled to wages unless the voyage is performed, yet their wages are not subject to contribution.*[1]

1391. *All contributions to general average, and other expenditures on account of the freight, subsequent to the jettison, and all subsequent particular averages upon it, are to be deducted.*

Partial losses on freight abstract from it a certain part, and therefore lessen the amount earned, and thus diminish the amount of the contributory interest. Accordingly, in case of a loss of a part of the cargo, whereby the ship fails of earning a part of the freight, the contributory interest is diminished. But as the freight of goods thrown overboard in jettison is allowed to the port of delivery where the apportionment is made, this part of the freight is always included in finding the amount on which this interest contributes.

It accordingly appears, that, to determine the true amount for which freight strictly ought to contribute, in any particular case, a variety of circumstances must be considered. The calculation is not, however, attended with any great difficulty, since the facts upon which it must proceed may, generally, be pretty easily and satisfactorily ascertained at the time of the apportionment.

1392. *Some ordinances provide,*[2] *and the custom is in most places, that freight shall contribute on a certain part of the gross amount earned.*

It is customary in Massachusetts[3] and Maryland to estimate

[1] Cons. del Mare, c. 281, 293. But the mariners have been held liable to contribute for the ransom of the ship and crew. 1 Emerigon, 642, c. 12, s. 42; Valin, tit. Des Loyers, a. 20, who cites Dig. de Leg. Rhod. l. 2, s. 3: "Si navis a piratis redempta sit," &c. Mr. Abbott seems to consider the rule to be in force in England (page 346, Part I. c. 8, s. 14.) But it can be applicable there, or in the United States, if at all so, only to a case of ransom from pirates.

[2] Supra, No. 1383.

[3] Bedford Commercial Ins. Co. *v.* Parker, 2 Pick. 1.

freight, in the apportionment of general average, at two thirds of the gross amount earned. This rule is said to be most generally adopted in the United States. But in New York the freight contributes upon one half of the amount earned.[1]

In an adjustment of a general average at Bourdeaux, in 1829, freight was assessed on half of its gross amount; in an adjustment at St. Petersburg, in 1830, on two thirds of its gross value; in one made at Liverpool, the same year, it was assessed at its net amount, ascertained by deducting only the wages. This last is the rule in England.[2]

In regard to average for expenditures occasioned by detention on capture, where the property was released, it was decided in one case, in Massachusetts, that the freight did not contribute.[3] But this decision has been overruled, and the freight held to be liable to contribute;[4] and there seems to be no distinction between this case and others in regard to the mode of estimating the amount on which it contributes, since the whole freight taken to be pending at the time is considered to be saved as to the purpose of such a contribution, and it therefore contributes on its entire net value, that is, upon two thirds or one half of the gross amount, according to the usage of the place.

SECTION XII. WHAT GOODS CONTRIBUTE, AND AT WHAT VALUE.

1393. *Goods, as well as ship and freight, contribute in general average for* EXPENSES *authorized and incurred on the interests at risk generally, according to their value at the time* of the expenses being incurred, *whether the whole,* or a part, *or no part of the interests is eventually saved.*

1394. *As much of the cargo at risk at the time of making a jettison, or other sacrifice of a part of any interest for the general safety, as finally arrives at the port of delivery, or otherwise comes to the use of the owner, contributes in general average.*

[1] Leavenworth *v.* Delafield, 1 Caines, 573; Heyliger *v.* N. Y. Firemens' Ins. Co., 11 Johns. 85.

[2] Hughes's Insurance, 299.

[3] Douglas *v.* Moody, 9 Mass. R. 548.

[4] Spafford *v.* Dodge, 14 Mass. R. 66.

Magens says: "What pays no freight pays no average." [1] But Mr. Stevens says: "It would be very unjust that the master, or any other person, who had goods on board, should not contribute because he pays no freight." [2]

Lord Ellenborough considers this contributory interest to consist of "the wares or cargo for sale, laden on board;" [3] and Mr. Abbott (Lord Tenterden) says: "The articles to contribute are all merchandise conveyed in the ship for the purpose of traffic, whether belonging to merchants, to passengers, to the owner, or to the master." [4]

But it does not appear upon what principle the circumstance of the goods being intended for sale is of any importance in respect to their being liable to contribute.

The Roman law made all the goods on board, including those belonging to passengers, and also their baggage, wearing-apparel, rings, and other ornaments worn upon the person, liable to contribute.[5]

It seems that Magens, in saying that "what pays no freight pays no average," means to exclude from contribution only the wearing-apparel and ornaments belonging to the person, since he says: "If a passenger should conceal in his trunk, or about his body, any such considerable sum of money or jewels as would not be suffered without paying freight, he must contribute to jettison." [6]

Mr. Benecke says: "Passengers ought to contribute for their trunks and luggage, because, if cast overboard, their value is allowed for." [7]

This reason does not appear to be satisfactory; a plainer one seems to be, that the baggage is benefited by the jettison in proportion to its value in comparison with the whole value at risk, precisely as any other property is so.

[1] Vol. I. p. 62, s. 56.

[2] Part I. c. 1, s. 2, a. 1.

[3] 8 East, 375.

[4] Page 344. See also Marsh. 543.

[5] Dig. de Leg. Rhod. l. 2, s. 2. See also Les Us et Cout. de la Mer, p. 23, n. 26; Molloy, book 2, c. 6, s. 14.

[6] Vol. I. p. 63, s. 55. See Les Us et Cout. de la Mer; Jug. Oler. a. 8, n. 24.

[7] London ed. 1824, p. 308; Benecke & Stevens by Phil. 251.

Emerigon cites the different ordinances and other authorities upon this subject, and concludes, that of right, and upon general principles, every thing belonging to the passengers, even to their wearing-apparel, is liable to contribute. He adds, however, that he has never known an instance of contribution on account of the clothes or jewels worn by a passenger, his trunks, or baggage, or the money in his purse. Yet he thinks that a court would be bound to allow such a claim; for, says he, "The trunks of a passenger thrown overboard for the general safety must be contributed for; and why, if they are preserved, should they be exempted from contribution?" [1]

Valin [2] considers the wearing-apparel, jewels, rings, ornaments, and in general whatever a passenger habitually wears, uses, or carries about his person during the voyage, including his change of linen, to be exempted from contribution by the concurrent authority of the ordinances and writers. And this seems to be the general practice. But in regard to any other part of his baggage, the exemption of it, in any case, seems rather to be a matter of favor than of right. If it is of sufficient value to be worth bringing into contribution, no reason has been given why it should not constitute a part of the contributory interest. The reason for excepting wearing-apparel, and the like, seems to be, that the persons of those on board are not brought into contribution, and the exception extends to things which are merely accessory to the person.

The attempt has been made, in one case, to bring provisions for passengers into contribution, as constituting a part of the cargo. A ship was taken upon charter, by the commissioners for victualling the British navy, to transport convicts, and their stores, provisions, and necessary attendants, to New South Wales. A general average loss occurred in the Downs to the amount of £280, on account of the sacrifice of articles belonging to the ship, the value of the ship being £5,000, freight £866, and the stores and provisions supplied by government for one hundred and fifty-six convicts and their attendants, £1,162. In a suit by the owners of the ship against the commissioners for a proportion of the gen-

[1] Tome I. p. 645, c. 12, s. 42. [2] Title, Du Jettison, a. 11, n.

eral average according to the value of the stores and provisions, the counsel for the plaintiff admitted, that, in general, no part of the general average can be assessed on the apparel or food of passengers, but insisted, that, as in this case the convicts were, in effect, the cargo, their supplies ought to contribute. It was held by Best, C. J., and his associates, Park, Burrough, and Gaselee, of the English C. P., that those provisions were not subject to be brought into contribution, on the ground that only merchandise, or "merces," as expressed by Mr. C. J. Best, is by custom liable to contribute, and that provisions, whether for the crew or passengers, had been specifically exempted.[1]

The custom and those authorities do not, however, seem to be applicable, since they refer to the provisions supplied by the owner of the ship, either for the crew or for passengers, and which, as before suggested,[2] are supposed to be represented in the contributory values of the ship and freight so far as they are eventually saved; and if neither is eventually saved, the provisions consumed in endeavoring to earn freight are lost, and therefore should not be contributed for.

1395. It is held in Louisiana, Mr. Justice Eustis giving the opinion of the court, that *slaves* on board of a vessel for transportation *are liable to contribute* in general average.[3]

Emerigon[4] thinks that slaves accompanying their masters as domestic servants should not be subject to contribution.

1396. *Goods on deck contribute* in general average, though, if jettisoned, they are not contributed for;[5] and so also do goods carried by the mariners in their privilege,[6] and so do the goods thrown overboard.

1397. *Gold, silver, jewels, and precious stones, and other arti-*

[1] Brown *v.* Stapyleton, 4 Bing. 119.

[2] Supra, p. 144, s. 11, No. 1389.

[3] Barrelli *v.* Hagan, 13 Curry's (La.) R. 480; Emerigon, c. 12, s. 42, s. 9. See Hughb *v.* New Orleans and Carrolton Railroad Co., Sup. Ct. of La., May, 1851, for a learned and able opinion, delivered by Eustis, C. J., on the question of the valuation and remedy for an injury to a slave as distinguished from a freeman.

[4] Chap. 12, s. 42.

[5] Code de Commerce, l. 2, tit. 12, Du Jettison, a. 232.

[6] Emerigon, tom. 1, p. 648.

cles of any value, of however small bulk, contribute to general average.[1]

Weskett even seems to think that bank-notes ought to constitute a part of the amount upon which the average is assessed;[2] but as these are not so properly actual property, to the amount promised to be paid, as the evidence of demands, which evidence may be supplied by other, in case of their being lost, if sufficient precautions are taken by the holder to prove what particular notes they were, this circumstance sufficiently distinguishes them from specie or other property, which is usually made to contribute.

1398. It was formerly a maxim, that *goods of* the king, that is, of the *government*, should not *contribute* to general average.[3] But Valin thinks there is no reason for this exception.[4]

It is impliedly taken for granted, in a case before the English Court of Common Pleas, by Best, C. J., and Park, Burrough, and Gaselee, Justices, in respect of a claim by the owner of a merchant-ship for contribution by provisions shipped by the government for the support of convicts put on board for transportation, that the government property on board is liable for contribution; for the ground on which the court puts the rejection of the claim is, not that the property belonged to the government, but that provisions for the crew and passengers were not liable to contribute in any case.[5] This proposition, is, however, questionable.[6]

1399. *Whether, and under what circumstances, provisions on board for passengers, or provender for animals, and consumed on the voyage, contribute to general average?*

One ground on which the exemption of provisions from contribution is put by Best, C. J., in the above case, was, that provisions are not merchandise (*merces*,) which, as he assumes, is the only contributory interest besides ship and freight; but this, as we have seen, is an erroneous assumption, or at least a very question-

[1] Peters *v.* Milligan, Park, 211; Millar, 244; Q. Weyt. s. 13.

[2] Title, Contribution, n. 1.

[3] Les Us et Cout. de la Mer, p. 20; Jug. Oler. c. 8, n. 8.

[4] Tome II. p. 184, tit. Des Average, a. 11. n.

[5] Brown *v.* Stapyleton, 4 Bing. 119.

[6] See infra, No. 1399.

able one.[1] The provisions for men and provender for animals, to be consumed on the voyage, may, it is true, not be covered under the description of "merchandise," or "cargo;"[2] but though not so, they may still be liable to contribute.

Another ground of the decision in the same case was, that by custom, and according to the books, provisions do not contribute. The case does not, however, appear to come within the custom referred to in the books, which have reference to provisions put on board by the ship-owner for the crew and for passengers. The question is, whether there is a ground to distinguish provisions supplied by the ship-owner for the crew or for passengers, from those of a shipper, to be consumed by passengers or animals transported for him. There seems, however, to be a plain distinction, for the value of the provisions supplied by the ship-owner, whether for the crew or for passengers, and of provender supplied by him for animals and consumed by them on board, reappears in the freight payable for the cargo generally in case of the crew, or for that of the passengers or animals in the other, and, as before remarked, is, or ought to be, contributed for in the value of the ship, or in that of freight at the port of delivery.[3]

The case is different if the passengers supply their own provisions, or if the provisions for passengers or provender for animals are supplied by the party for whom they are transported. In the case of animals, the value of the feed may reappear in their value at the port of delivery, but in the case of passengers, who are freemen, who support themselves, or are supported by a party for whom they are transported, the value consumed by them on the passage does not reappear at all, since they are themselves not subjects of valuation.

Another reason suggested, but not strenuously urged, by Mr. C. J. Best, against contribution by the provisions put on board for the convicts, was, that the contribution for a jettison is not due until the ship arrives; and since the provisions intended for consumption will not arrive, they are not to be brought into contribution. This reason seems, however, to be fallacious, for the arrival

[1] Supra, No. 1395. [2] Supra, Vol. I. p. 247, No. 452. [3] See supra, No. 1389.

of an article is immaterial, unless it is of value or available for use, and the value and availableness of the provisions to the owner of them depend, not upon their arriving, but upon their being consumed on board on the voyage, and so not arriving, provided the passengers or animals arrive. The value of the provender consumed by animals contributes in their marketable value at the port of delivery. The circumstance that the value of the provisions supplied by passengers who support themselves, or are supported by those who contract for their transportation, does not continue to subsist on arrival in any form subject to valuation, plainly should not affect the ship-owner and other shippers, who are liable in contribution, being a matter with which they evidently have no concern.

The better doctrine, accordingly, seems to be, that

Provisions supplied by the shipper of passengers or animals, and consumed on the voyage, when the passengers or animals arrive at the port of adjustment, contribute to the general average, except those for animals going to a market.

1400. *Goods contribute according to their value, however small their bulk may be in proportion* to their value;[1] for a first principle of general average is an apportionment of the contribution upon the value saved, this being the proportion in which the parties are benefited.[2]

1401. *Goods, as well as ship and freight, contribute upon their value to the owner at the time to which the apportionment relates;* and this value necessarily depends upon the place where they are considered to be finally saved, since that is their value at the time to which the apportionment relates. If they are sold at such place, the amount of the proceeds is the basis on which that of their contributory value is calculated; but if they are not sold, the inquiry is, of what value they are at such place to the proprietor, after the deduction of all charges.

If the same kind of goods bears a price current at the place in question, that is the basis of the calculation of the contributory interest; but if there is no price current, the value is a subject of estimation, or they contribute upon the invoice prices.

[1] Peters *v.* Milligan, Park, 211. [2] Dig. de Leg. Rhod. l. 2, s. 2.

If the average is adjusted at the port of destination of the goods, the market price is usually the basis of the calculation of their value; but if at any other port, as it must be in respect of some of the goods in case of the cargo being delivered at different ports successively, the invoice price is often considered to be the contributory value.

In case of contribution for EXPENDITURES, the amount contributed by each party is the same, whether the whole contributory interest is put at a high or low rate, provided it is all put at a rate equally high or low. But in this case it may be of importance, as to the amount to be recovered of the insurers, whether the valuation is high or low.

In case of jettison, a high valuation of the whole contributory interest evidently operates in favor of the party to whom the contribution is due, whatever part of the contribution may be assessed upon his own property, and a low valuation operates against him; and vice versâ as to the other parties. The contribution ought, therefore, to be apportioned upon the true value.

1402. *The goods contribute for the value saved of what was at risk at the time of a jettison.*

All subsequent averages, whether particular or general, and all expenses of salvage, are deductions from the contributory interest, since they abstract something of the subject, or constitute charges upon it, and accordingly so much of the value of the goods as these amount to is not finally saved, and therefore does not contribute.[1]

If the adjustment is made upon the value at the port of delivery, the apportionment is made upon the net proceeds, after deducting the freight that becomes due in consequence of delivering the goods, also the duties, wharfage, storage, commissions paid on the sales, and all other expenses; since the value received by the owner, or that which is eventually saved by coming to his use, is the true amount of his contributory interest.

Where the advance upon the invoice price of the goods is just equal to the freight and charges, it is the same thing whether the goods contribute upon that value, or upon the net proceeds. Since,

[1] Pothier, Cont. de Louage, n. 132; Casar. Disc. 46, n. 11; 17 Mass. R. 471.

in many instances, the result of each mode of computation is very nearly the same, and also, on account of the facility of adjustment, the apportionment is often made upon the invoice value. Either party may, however, require an apportionment to be made according to the value at the time and place to which it relates; the invoice value being assumed only for convenience.

1403. *Where an adjustment of an average for expenditures, or compromise, in case of capture, is made on the value at the port where the detention takes place, a question occurs whether the freight is to be deducted in estimating the value of the goods.*[1]

The inquiry in such case should be, what the owner of the goods would lose by their condemnation. And it is plain that he would lose the amount for which they could be sold at such port, deducting expenses and the freight to that port; or he would lose the proceeds at the port of destination, deducting the expenses and entire freight for the whole voyage. This last mode of computing the value is liable to one objection, since, if the goods subsequently arrive at the port of destination, the market may have changed; and as the goods may never arrive there, it involves a great inconvenience in computing the value. The real value is the proceeds at the time and place in reference to which the average is adjusted, which is the net proceeds at that place, or what would be the net proceeds in case of a sale, after deducting expenses and freight to that place.

This mode of adjustment is conformable to the principles upon which general averages are settled in other instances; it is always practicable, is the most convenient, and effects an apportionment upon the real value. It regulates the contribution by the market price at the time and place to which the adjustment has reference, and adjustments are generally made in pursuance of this principle.

The goods usually contribute on their full net value. In an adjustment made in Philadelphia, however, by an experienced despacheur, I observed that he deducts three per cent. from the gross value of the cargo, according to the invoice or market price, whichever is referred to, as the basis of contribution by the goods.

[1] Douglas *v.* Moody, 9 Mass. R. 548.

1404. *Whether, in an adjustment at the port of departure, freight advanced is to be included in the contributory value of the goods?*

Mr. Benecke[1] says, that, where a general average is adjusted on the value at the port of departure, freight advanced by the shipper is included in the value of the goods on which he contributes. But such a rule must be confined at least to the case of an advance of freight not to be recovered back in any event; but it is questionable whether it will apply in such case, since such advance has been held not to constitute a part of the amount of insurable interest in the adjustment of a total loss.[2]

The case is one of an absolute purchase of a part of the freight; and the purchaser, namely the shipper, is to that extent put into the place of the ship-owner, in a manner not unlike that in which the charterer of the whole ship may be substituted for the ship-owner, in respect of the whole freight.

The question then arises, whether the shipper ought to contribute to general average on this proportion of the freight, where the freight is liable to contribute to general average, just as the charterer of the whole ship may stand in the place of the ship-owner as to the contributions on this interest.

Why ought the shipper who has advanced his freight unconditionally to contribute more than he would otherwise be assessed on the same goods? Certainly not because the goods are of any greater value; but, if for any reason, because the freight of his goods is at his risk, as well as the goods themselves. It is then in his character of owner of the freight to this extent, that he ought to make an additional contribution, if indeed he ought to make any such additional contribution at all.

But an objection to this mode of adjustment, is, that freight is not usually advanced upon the understanding that the shipper thereby takes any additional responsibility in respect to contributions in general average. If, then, no part of the contribution can in such case be assessed upon the party advancing freight without giving an effect to such advance different from what was

[1] London ed. 1824, p. 314; Benecke & Stevens by Phil. 257.

[2] Winter *v.* Haldiman, 2 B. & Ald. 649.

intended by the parties, in the ordinary circumstances and understanding in case of such an advance, it suggests what seems to be the safest and most just and practicable rule in such case, namely, that *the contribution should not be affected in the least by any particular unusual stipulations as to the time of payment of freight*, but should be made precisely as if the goods had been shipped on the usual bill of lading, stipulating to pay the freight on delivery of the goods, estimating the freight on each passage distinctly, whether the parties agree for freight on the termination of successive passages, or partly in advance, or however otherwise they may agree. This rule would operate more equally in a great majority of cases, and save third parties from being affected by unusual stipulations of which they could not be apprised.

1405. *In case of an adjustment upon the invoice value*, a question occurs *whether the premium of insurance is to be included.*

It seems that no general rule can be laid down in this respect, since, if the premium is to be considered a part of the cost of the goods at the port of shipment, (which indeed it hardly can be,) the other parties to the contribution have no concern with the actual cost of the goods, which may have been purchased at a very high or low price, and this is the owner's gain or loss, by which the other parties ought not to suffer, or be benefited. They are strangers to the invoice; their rights depend on the actual value. The cost of the goods is adopted as the contributory amount only for convenience, and by implicit consent.

1406. *The rule of including the premium* in the value *does not apply to general average*, for the ship, cargo, and freight are to contribute respectively according to the actual value of each, and the owner of one of these subjects of contribution is not bound by the agreement which the owner of another of them may have made with the insurer.[1] Besides, if the premium is included on one interest, it should be so on the others, at the same rate, which being done, the apportionment of the contribution will be the same as if the premium had not been added.

1407. *Goods or any interest are not liable to contribution for*

[1] Brooks *v.* Oriental Ins. Co., 7 Pick. 259.

any general average or expenses incurred subsequently to their ceasing to be at risk.[1]

A ship having been driven aground near Reedy Island, in the Delaware, and blocked up by the ice, the specie on board was taken ashore in sledges, and carried up to Philadelphia, and delivered to the consignees. The remainder of the cargo was landed, and subsequently put on board of the same vessel, and taken to Philadelphia, the port of destination. In apportioning the expense of salvage of the ship and cargo, it was adjudged in Pennsylvania, that the specie was liable to contribute its proportion, not merely of the expenses up to the time of its being landed, but also of those subsequently incurred for the same purpose down to the time of the arrival of the vessel with the remainder of the cargo at Philadelphia.[2]

The decision is put upon the authority of a passage in Benecke,[3] where he says jettisoned goods continue liable to contribution until the risk terminates, because, being entitled to a contribution for their whole value on the arrival of the ship, their whole value is at risk until such arrival. He also speaks in the same place of the claims and liability of goods put into lighters for the purpose of lightening the ship. Neither of the instances seem, however, to be parallel, or analogous, to the case in question, for the specie was not jettisoned, nor was it put into the sledges for the purpose of lightening the ship, but merely to be forwarded separately, and delivered to the consignees, as it in fact was. The case, therefore, in reference to the specie, does not seem to be distinguishable from that of a part of the cargo being landed after arrival at the port of destination, and a subsequent general average loss on the ship and remainder of the cargo still on board, to which the part delivered would, unquestionably, not be liable to contribute. The remainder of the cargo in the case in question not having been delivered to the consignees, but landed and reloaded on the

[1] Dunham *v.* Commercial Ins. Co., 11 Johns. 315.

[2] Bevan *v.* Bank of United States, 4 Whart. R. 301.

[3] Prin. of Indem. p. 306, London ed. 1824.

ship being afloat again, continued to be within the ordinary category of contributory interests.

1408. *Sometimes parties stipulate against claims for general average* contributions.

The charter-party of vessels employed by the East India Company exempts, or heretofore did exempt, the cargo from contribution to the ship-owners in general average.[1]

SECTION XIII. LIABILITY OF INSURERS TO PAY CONTRIBUTIONS.

1409. *So far as a general average is occasioned by perils insured against, the insurers are liable for it in proportion to the amount insured.*

1410. *Since the value of the ship, as between the parties to a policy, is its* actual *value at the commencement of the risk* or port of departure, *and that of the cargo is the* actual or agreed *value at the time of the shipment,* it is evident that *the insurers cannot be affected by their value as contributory interests* in general average, for the respective values in the two cases have reference to different times and places.[2]

Though the value of freight is less liable to vary in the course of the voyage, yet the insurers of this interest are not bound by the estimate which determines its amount in contribution.[3]

Mr. Justice Sewall said: "The insurer is liable in the proportion which the sum insured bears to the actual value,"[4] at the time in reference to which the apportionment is made. But he was speaking of a case of the contributory value exceeding the value in the policy, for the proposition is not correct where it is less. There is no difference, in this respect, between a valued and an open policy, for though the whole amount at which the interest is valued in the policy is covered, yet the parties have agreed that,

[1] Benecke, London ed. 1824, p. 309; Benecke & Stevens by Phil. 252.

[2] Benecke, London ed. 1824, p. 328; Benecke & Stevens by Phil. 271; Bedford Ins. Co. *v.* Parker, 2 Pick. 1.

[3] 1 Magens, 167, Case ix., No. 1; 2 Magens, 339, No. 1286, n.

[4] Clarke *v.* United Mar. & Fire Ins. Co., 7 Mass. R. 365.

as between them, the value shall be of a certain amount, and accordingly the insurer is not liable to refund a contribution made upon a greater amount. This is not setting aside the valuation, but adhering to it.

If the value of the property, as between the parties to the policy, is $1,000, and half of that amount is covered by the policy, and the same property contributes to general average on the amount of $1,500, the insurer is liable to refund 33⅓ per cent. only of the contribution, though 50 per cent. of the value of the property, as between the parties to the policy, is insured. But if the property contributes on $500, the insurer is liable to refund half of the contribution, since this indemnifies the assured for half of the amount contributed, and he can ask no more. Whatever is paid in contribution by the excess of the contributory value over the value in the policy, is paid by the assured, but for whatever is paid on the contributory value not exceeding the value in the policy, the assured is indemnified on the proportion insured.[1]

In applying this rule to a case of insurance on freight from Boston to St. Petersburg, valued at $2,000, the computation was made as follows. The gross freight was $2,423; freight contributed in an adjustment at St. Petersburg on $1,615, that is, on two thirds of the gross amount. In reimbursing this average to the assured, the insurers in Boston paid $\frac{2000}{2423}$ parts of the amount assessed on freight at St. Petersburg; that is, the same amount as if the policy had been an open one, and the general average originally adjusted in Boston.

The practice is different in New York, where, under a valued policy in which the whole value as fixed in the policy is insured, the underwriters contribute the whole amount assessed upon the subject in general average, whether it contributes on a value greater or less than that at which it is fixed in the policy, and so proportionally, if one half, one quarter, or any other proportion of the valuation is insured.

This is a very material difference in the practice of the two places, as to the mode of adjustment. There is nothing in the

[1] 1 Magens, 245, Case xix.

policy that favors one of these modes of construction in preference to the other, each being equally consistent with the language of the instrument, and the preference of one or the other being merely a matter of construction, and the application of the general principles of insurance. The cases seem, however, to be on the side of the adjustment as stated in Boston. In a multitude of decisions, the doctrine is laid down that in losses, other than total, the valuation is to be opened,[1] by which is meant, so far as a contribution to general average is concerned, an adjustment as made in Boston; that is, as if the policy were an open one.

1411. *The respective parties interested in the ship, cargo, and freight are severally, and not jointly, liable for their proportions of the contribution.*

The joint owners of the ship, or freight, or any part of the cargo, as where any part of the cargo is shipped by copartners, are, of course, jointly liable for their proportion of the contribution.[2]

If one of such joint owners has insured his interest separately, and, in consequence of his joint liability, is obliged to pay his partner's share of the contribution, as well as his own, his underwriters are evidently not liable to reimburse to him the proportion paid by him for his copartner.

1411 a. *In case of hypothecation the lender is liable for the whole contribution, or he and the borrower are liable to a proportional part, each according to their interests.*[3]

1412. *The underwriters on a ship that, having no cargo on board, incurs expenses, or makes sacrifices, in the nature of general average*, and which would be contributed for as such by the cargo and freight, if any had been at risk, *are liable for the whole of such expenses in the proportion in which the value of the ship is insured by the policy.*[4]

[1] Supra, No. 1203.

[2] Sims *v.* Willing, 8 Serg. & Rawle, 103.

[3] See supra, No. 124.

[4] Potter *v.* Ocean Ins. Co., 3 Sumner's R. 27.

SECTION XIV. ADJUSTMENTS ABROAD, OR BY COMPETENT COURTS.

1413. *The parties interested are liable to contribution in general average, according to the rules of the place to which the jurisdiction of the adjustment belongs.*

Where different parties are concerned in a general average, the jurisdiction of the adjustment is at that port of delivery at which their interests are to be separated.

1414. *Underwriters are liable to reimburse to the assured the contributions made by him* in general average losses, *in conformity to the laws of the place to which the jurisdiction of the adjustment belongs, and where it is made, and could have been enforced, so far and in proportion as the contributory value is insured by the policy, and the peril whereby the average is occasioned is insured against.*

It has been made a question, whether the insurers are bound by an adjustment of a general average made in a foreign port. Two reasons have been given why they should be bound by such an adjustment; firstly, the master is obliged to adjust the average at a foreign port of delivery, and since the insurers have the advantage of its being adjusted more favorably to themselves than it would have been in the place where the policy is made, they ought to be subject to the risk of its being adjusted more unfavorably; secondly, where the adjustment is made under an order of court, the decree of a court, on a subject of which it properly has jurisdiction, ought to be conclusive upon the parties. Insurers accordingly, in some instances, agree to refund contributions legally made in a foreign port.[1] And it is the more general practice to settle losses in conformity to adjustments made in a foreign port of delivery, according to the usages and laws of such port, so far as the occasion of the contribution is a peril insured against.

A general average was adjusted at Pisa, under the decree of the court there, in which the estimate of the ship and freight was different from what it would have been in England, and the wages

[1] Rules of the Patapsco Ins. Co. of Baltimore.

and provisions were included, which, according to the decisions of the English courts, constitute no part of the average. In an action brought upon a policy on the cargo, Mr. Justice Buller said: "I do not like these foreign settlements of average, which make the underwriters liable for more than the standard English law." But he told the jury, if they were satisfied that it had been the usage to settle according to the foreign adjustment, the usage "ought not to be shaken." [1]

In respect to an average adjusted at Lisbon, in which wages and provisions were included, contrary to the practice in England, Lord Ellenborough, giving the opinion of the court, said: "This contract must be governed, in point of construction, by the laws of England, unless the parties are to be understood as having contracted on the foot of some other known general usage among merchants and shown to have obtained in the country where, by the terms of the contract, the adventure is to terminate, and where the average would come to be demandable." [2]

But as it did not appear that the adjustment had been made in conformity to the laws and usages at Lisbon, the court did not consider the parties to be bound by it.

In a New York case of jettison of staves carried on deck, under a policy made in New York on "pipe-staves on deck and in the hold," from that place to Lisbon, where, in an average adjusted by arbitrators, according to the usage of that place, the jettison of the deck-load was brought into contribution, the Supreme Court of New York, consisting of Lewis, C. J., and Kent, Radcliff, Livingston, and Thompson, Justices, held that the underwriters were not liable to reimburse the contribution. The court said: "It was adjusted differently at Lisbon, and the law there is stated to be otherwise, but the parties to this contract must be considered to have in view the laws of this State." [3]

In a subsequent case in the same State, the court, consisting of

[1] Newman *v.* Cazalet, Park, 900. See Walpole *v.* Ewer, Park, 629.

[2] Power *v.* Whitmore, 4 M. & S. 141.

[3] Lenox *v.* United Ins. Co., 3 Johns. Cas. 178.

Thompson, C. J., and Spencer, Van Ness, Yates, and Platt, Justices, made a different decision. It was an insurance upon rice, flour, and pease, for a voyage to Lisbon, and while the vessel lay in that port, after a part of the cargo had been discharged, it became necessary during a storm to cut away most of her rigging and spars, on account of which an average was adjusted there, and a contribution at the rate of about 10½ per cent. was apportioned to the ship and the part of the cargo remaining on board, and the freight of such part, according to the usages of that place; and the master refused to deliver the remainder of the cargo until the contribution assessed upon it had been paid. Under an adjustment in New York, the contribution would have been something over 14 per cent. on a lower valuation of the contributory value of the different interests, making a less amount contributable by the cargo. The question was, whether the underwriters were liable to the assured for the larger amount actually contributed by the cargo at Lisbon, or only that which it would have been liable to contribute by the rule in New York. Van Ness, J., in giving the opinion of the court, said: "There is no principle more firmly established, than that the insurers are bound to return the money which the assured has been obliged to advance in consequence of any peril within the policy, provided it be fairly paid, and does not exceed the amount of the subscription." And the judgment was accordingly for the larger amount which had been actually paid at Lisbon.[1]

The doctrine stated above, and recognized in this case, is no doubt the law upon the subject, notwithstanding the contrary decisions already noticed. This doctrine is not peculiar to insurance, but is an axiom in jurisprudence generally, and is illustrated and confirmed by divers adjudications:

As in case of a payment, by the consignee of an English ship, of an assessment on the cargo at St. Petersburg, the port of delivery, according to the usage there, and contrary to that in England, on the master's refusing to deliver the cargo until it was paid, in which Lord Tenterden (then Mr. C. J. Abbott,) gave his de-

[1] Strong *v.* N. Y. Firemens' Ins. Co., 11 Johns. 323.

cided opinion, and that of his associates, Bayley, Holroyd, and Littledale, against the claim of the shipper to recover back the amount so paid.[1]

The same doctrine reappears in the case of a charter-party made in Scotland, of a British vessel, to carry a cargo from Scotland to St. Petersburg, at a gross sum for the whole tonnage of the vessel. On the voyage the ship was compelled by stress of weather to put into Erdholm, where a part of the cargo was sold to pay for repairs of the ship, and on arrival at St. Petersburg, an average was there stated by a despacheur for the expense of putting into Erdholm, including wages and provisions, in conformity to the usage at St. Petersburg, and contrary to the rule in Great Britain, and only the excess of the proceeds of the goods sold at Erdholm over the assessment on the cargo for contribution, according to that statement, was accounted for by the master. A suit being brought by the shippers in England against the owner of the ship, to recover the remainder of the proceeds of the goods so sold, a verdict was given in favor of the plaintiffs in a trial before C. J. Abbott. On the case coming before the other three judges, Bayley, J., said: "I am of opinion that so much only (of the proceeds of the goods) could have been replaced to the plaintiffs' account, as the law of the country, a port of which was the ship's place of ultimate delivery, would warrant," in which Holroyd and Littledale, Justices, concurred; and a nonsuit was thereupon entered.[2]

The same doctrine governs the decision of Savage, C. J., and Sutherland and Woodworth, Justices, in New York, in case of a general average stated at Rotterdam, the port of destination, in an action on a policy upon the cargo, a part of which had been sold to pay for the repairs of the vessel at Halifax, where the vessel had put in from necessity, and one of the questions raised in the case related to the settlement of the average. Mr. C. J. Savage, speaking for the court, said: "When a general average is fairly settled in a foreign port, and the assured is obliged to pay his

[1] Simonds *v.* White, 2 B. & C. 805; S. C., 4 D. & R. 375.

[2] Dalgleish *v.* Davidson, 5 D. & R. 61.

proportion of it, he may recover the amount from the insurer, though the average may have been settled differently from what it would have been at the home port."[1]

There is a diversity in the effect of a foreign adjustment in respect to the parties interested in the respective subjects; first, in merely varying the proportions of the contribution by different interests, for losses or expenses that are equally the subject of general average, both in the place of destination and in that of making the policy; or, second, by bringing into general average what by the laws of the place where the policy is made is particular average, and vice versâ; or, third, by bringing into general average losses or expenses which are neither general nor particular average in the place where the policy or bills of lading or charter-party were made.

In respect to either of these predicaments, it is plain, upon the general principles of law, that, as far as either interest is affected by an actual adjustment, settled in a country having jurisdiction of the subject-matter, and according to the laws or a judicial decree in such country, all parties ought to be bound. In regard to the first case, for example, where the foreign adjustment merely varies the proportions of the contributions by the several interests for a loss which is equally the subject of general contribution in both countries, the several interests ought to be bound; as, for instance, contributions by the ship and the freight, which vary exceedingly in different countries, since, in respect of the cargo, the foreign adjustment is usually final and irrevocable, and so it frequently is in respect of the freight; and from the admission of its conclusiveness in respect of either one or both of those interests, it will follow that it must be so in respect of the others.[2]

In respect to the second case, where a loss is general average under one jurisdiction and particular average under another, as the general average only will ordinarily come under adjudication and adjustment in the foreign country, it is sufficient if the foreign adjustment is considered final as far as the parties are affected by it.

[1] Depau *v.* Ocean Ins. Co., 5 Cowen, 63.

[2] Loring *v.* Neptune Ins. Co., 20 Pick. R. 411.

Take, for instance, the case of an American ship, in respect of which, and its cargo and freight, an adjustment of a loss is made at the port of destination, in which a loss that is particular average in the United States is contributed for as general average in the foreign port; supposing the ship to be insured in the United States, it could not be pretended that the owner of the ship, after being partially indemnified in the foreign port, should recover against his underwriters just as if no such foreign average had been settled, since this would give him a twofold indemnity. On the other hand, there seems to be no reason why he should be in a worse situation because such a foreign adjustment had been made, as he might be, if it were held to be conclusive as to his claim upon his underwriters. If in such case a particular average is adjusted according to the laws of the place where the policy was made, and the amount received under the foreign adjustment is allowed in part or full satisfaction of the claim on the underwriters, as the case may be, this will be giving sufficient effect to the foreign adjustment, as it makes it final to the extent to which it affects the contract.

In respect to the third case, namely, where a loss is included in a general average in one country which is not insured against in the policies of another, the underwriters in the latter certainly ought not to be liable to indemnify the assured against the proportion of a foreign adjustment of such a loss. The construction of the policy, as of any other instrument, is undoubtedly regulated by the laws of the place where it is made. If a kind of loss included in a general average is expressly excluded from the risks assumed by the underwriters, they certainly are not liable for it; and if it is excluded by the legal construction put upon the instrument, it does not appear why the same consequence should not follow.

Accordingly, in a Louisiana case, where, under a policy upon a vessel from New Orleans to Hamburg, the assured claimed a loss by carrying a press of sail to keep off a lee shore, alleging that it was a subject of general average by the usage at Hamburg, the port of destination, the claim was rejected, on the ground that by the law of Louisiana, according to which the contract must

be construed, such a loss was not recoverable, either as general or particular average.[1]

Though it be admitted that the contract is to be construed according to the laws and usages of the place where it is made, it does not follow that no regard is to be had to the laws and usages of any other place. The reasons given by Lord Tenterden[2] are conclusive to the contrary. The lex loci is, that underwriters shall reimburse general averages, if within the perils insured against, according to the apportionments made and contributions exacted abroad at the port of destination. But it would not follow that, because the assured, in a policy on the ship underwritten in New Orleans, was enabled to recover against the shippers at Hamburg, the port of destination, a contribution of a part of the value of sails blown away in keeping off a lee-shore, he might therefore come back upon his underwriters at New Orleans for the rest of the damage. This claim did not come within the Hamburg jurisdiction, where it would only be decided what he should recover against the cargo. Had he been there compelled to contribute for damage to the cargo, and claimed reimbursement from his underwriters, the case would be different, and like the two others above stated.

1415. *If, in the statement of a general average at the foreign port of destination in the case of an American ship, a charge by the ship-owner is excluded, which would have been included at the home port, the insurers of the ship at the home port are liable for the ship's proportion of the excluded item.*

Thus in an adjustment of a general average at Bremen, the port of destination, on a ship belonging to Maine, its cargo and freight, for a loss by putting, from necessity, into Cuxhaven to refit, on the passage from Richmond, in Virginia, the expense of wages and provisions during the detention was not included, which would have been according to the usage in Maine. It was held in that State, that the assured must account for what had been received under the adjustment at Bremen, and that the deficiency,

[1] Shiff *v.* Louisiana State Ins. Co., 6 Martin, N. S. 629.

[2] In Dalgleish *v.* Davidson, cited supra, in this No.

according to the usage in Maine, should be made up by the insurers.[1]

1416. *The underwriter on a vessel in the common form of policy is not liable for the amount paid under an apportionment decreed by a court of competent jurisdiction for damage to another by collision.*[2]

It has been held in England, on elaborate discussion, that underwriters there are not liable to reimburse payments made abroad by ship-owners for such damage.

The ship La Valeur, insured in England, was assessed at Calcutta, according to the usage there, for half of the aggregate damage by accidental collision with a steamer in the river Hoogly. No objection was made by the insurers to the claim for the damage to the La Valeur, but they resisted the claim for what was paid on account of the excess of the damage to the steamer. Lord Denman, C. J., and Littledale, Williams, and Coleridge, Justices, decided, in 1836, that the assured should recover for the damage to his own vessel, but not for what was paid on account of the excess of the damage to the other. Lord Denman remarked, that there was no precedent in favor of such a claim. The main ground of the decision was, that such a loss is not a direct consequence of the perils of the seas, whether the collision is with or without the fault of either or both of the vessels.[3]

[1] Thornton *v.* United States Ins. Co., 3 Fairfield's (Maine) R. 150.

[2] See Code de Commerce, a. 407; Boulay Paty, Cours de Droit Com., tom. 4, p. 14, ed. 1823.

[3] Devaux *v.* Salvador, 4 Ad. & El. 420, cited supra, Vol. I. p. 678, No. 1137. Lord Denman cites the maxim of Lord Bacon: "It were infinite for the law to judge of the causes of causes, and their impulsions one on another, therefore it contenteth itself with the immediate cause, and judgeth of the act without looking to any further degree." Law Tracts, 1837, p. 35. But what cause is immediate, and what remote, is, as we have seen, (Supra, Vol. I. c. 13, s. 14,) often a question of much difficulty. Mr. Maule cited, in support of the claim for reimbursement of the amount paid on account of the damage to the steamer, Blackett *v.* Royal Exchange Ass. Co., 2 Cr. & J. 244; S. C., 2 Tyrwh. 266; The Woodrop Sims, 2 Dods. Ad. R. 83; Vin. Abr., tit. Master of Ship, (A.) 279, p. 340; Emerigon, vol. i. p. 413, ed. 1827, c. 12, s. 14; Les Jugemens d'Oleron, a. 14, 15; Ord. Wisb. a. 26, 27, 50, 70; Le Droit Hanséatique, tit.

The same question was differently decided by Mr. Justice Story in the case of the ship Paragon, insured in Boston, on time, which, in descending the Elbe in ballast, during 1836, came in collision with a galiot, and sunk it, no fault being imputable to the pilot or crew of either vessel. The Paragon put into Cuxhaven for repairs, where she was libelled in the marine court for one half of the amount of the entire loss on the two vessels, and of the cargo and freight of the galiot, amounting, in the aggregate, to $6,000, and the decree was in favor of the claim, for $2,600, being half of the excess of loss on the galiot, and its cargo and freight, and the master took up on bottomry the sum of $3,000, to pay for the repairs of his own vessel, and the amount decreed to the other. The insurers admitted themselves to be answerable for the damage to The Paragon, but objected to the reimbursement of the $2,600 paid on account of the excess of the loss on the galiot and its freight and cargo. Mr. Justice Story decided that the underwriters in a policy made in Boston were liable to reimburse the whole $3,000,[1] and his judgment was confirmed in the Supreme Court,[2] and followed by Justices Nelson and Betts, in the Circuit Court of the United States in New York.[3]

It was admitted that collision was a peril of the seas, and covered by the policy; that the collision occurred under the jurisdiction of the city of Hamburg; that the court at Cuxhaven was under the same jurisdiction, and the decree was in conformity to the marine ordinance of that city; that the underwriters were not liable for this loss as a general average; and that according to the laws of the United States, where the policy was made, the ship would not have been liable, either in admiralty or at common law, for a similar claim for excess of damage to another by inevitable collision.

10; Boulay Paty, Cours de Droit Com. Mar., tit. x., s. 16, tom. 4, p. 16; Pothier, Ins., c. i., s. ii., a. 2, sub-s. 2, 49; Traités sur Différentes Matières de Droit Civil, tom. 3, p. 18, ed. 1781.

[1] Peters *v.* Warren Ins. Co., 3 Sumner's R. 389.

[2] S. C., 14 Peters's Sup. Ct. R. 99. A similar decision was subsequently made by Judge Story. Hale *v.* Washington Ins. Co., 2 Story's R. 176.

[3] Sherwood *v.* The General Mutual Ins. Co., 1 Blatchford's R. 251. Judgment reversed, see infra this No.

The question was, whether the amount so decreed by a foreign judicatory to be paid to a third party was a direct consequence of a peril of the seas, as insured against under a policy made in Boston.

One alleged ground for holding it to be such a direct effect of the collision in respect to the insured ship was, that it had been so considered according to the general doctrines of commercial law by eminent jurists on the continent of Europe, for which Emerigon[1] and Pothier[2] are cited, both of whom are, however, speaking of averages made under and according to their own laws, not by foreign judicatories under foreign laws contrary to their own. If we take the authority of the Roman law,[3] Emerigon,[4] Boulay Paty,[5] and the French Code of Commerce,[6] as the best authorities for the prevailing usage and legislation on the continent of Europe, damage by inevitable collision is not a subject of average between the vessels. These citations certainly, therefore, do not bear out the decision of the court.

The utmost stretch to which the citations seem to be applicable is to the doctrine, that where, by the laws under which the policy is made, the aggregate damage by collision is contributed for by the two ships, and their cargoes and freights, in the proportion of their values respectively, or by the two ships only, in equal portions, or proportionally, (for the ordinances, usages, and responses of the jurists, differ in these respects,) the underwriters are liable to make good the loss to the assured. Even to this extent Boulay Paty[7] merely gives his own opinion, apparently not considering the rule to be established.[8]

[1] Tome I. pp. 414–417, c. 12, s. 14, and note by Estrangin.

[2] Traité d'Assurance, n. 49. In the Circuit Court, Judge Story cited also the commercial ordinances and sea laws largely, but their provisions are diverse and multifarious, and none of them seem to come to the point in issue in the case, and the French Code de Commerce, lib. 2, tit. 11, art. 407, and with it Boulay Paty, Cours de Droit Com., tom. 4, p. 14, as far as they have any bearing, seem to be against the conclusion to which the court arrived.

[3] Dig. Lib. 9, tit. 2, l. 29, s. 4.

[4] Chap. 12, s. 14.

[5] Tome IV. p. 14.

[6] Lib. 2, tit. 11, art. 407.

[7] Cours de Droit Com., tom. 4, p. 15.

[8] His words are, "Nous sommes de l'avis.

Another ground of the decision is its analogy to foreign adjustments of general average, in respect of which Mr. Justice Story, in giving the opinion of the Supreme Court, confirming his own in the court below, says: "General average is only payable where it is a consequence, or result, or incident, of some peril insured against;" meaning, of course, only so far as it is such consequence, result, or incident.[1] To determine the construction of the phrase "peril of the seas" in the policy, we must resort to the lex loci where the policy is made. By the ordinary construction put upon that phrase in Boston, where the policy in question was made, the phrase "peril of the seas" does unquestionably mean general averages in the ordinary sense, and the common form of policies covers such losses by the implication of some of its express provisions, which specifically mention general average as a species of loss for which the insurers are liable. Applying the same test in the present case, the phrase "peril of the seas" unquestionably is construed, and, indeed, in this very case is expressly admitted by the court to mean the general or particular averages directly consequent upon the perils enumerated. If the insurance is against capture only, the underwriter is not liable for average by jettison to avoid shipwreck.

The court say that charges coming into general average, as commonly adjusted and admitted to be comprehended in "perils

[1] It is always admitted, and is not subject to doubt, that, in order to render the underwriter liable to reimburse any foreign contribution, it must be for a peril and species of loss insured against. Simonds *v.* White, 2 B. & P. 805. Under a foreign adjustment, where it is greater than it would be by the law of the place where the policy is made, the liability to reimburse it was put by Lord Kenyon in one case upon the fact, that, the insurance being on the interest in a respondentia bond on goods by a Danish ship, and the contribution being made under an adjustment in a Danish port according to the Danish law, to which port the interest had been insured, the underwriter had notice, whereby the policy, by construction, included the liability for such a contribution. Walpole *v.* Ewer, Marsh. Ins., 2d ed. 762. Buller, J., put the liability, in another case, upon a usage in England, where the policy was made, to settle according to adjustments at Pisa, similar to the one in question. Newman *v.* Cazalet, Marsh. Ins., 2d ed. 763, n.

of the seas" in our policies, are as far from the purport of that phrase as the contribution for the destruction of the galiot in this case. Admit it to be so, (which I think it is not,) the difference is that those charges, by the usage in Boston where the policy was made, come within the known construction ordinarily put upon the phrase in that place; whereas the charge for damage done to third parties at home or abroad, whether unwittingly or by mistake, or maliciously, in the course of the voyage, is notoriously, as is admitted in the case, not included by usage in the construction of that phrase. We cannot resort to usage for a construction of what is included in the policy, and thence conclude that something else is included which has no sanction of usage, and which, as in this case, is admitted to be directly inconsistent with our own usage. This would be to piece out a usage by tacking to it a case which the court might deem analogous, and which is, as far as our usage goes, admitted to be excluded. Besides, the analogy in the case in question is somewhat forced, for it is the analogy of what is a matter of contribution among divers interests and subjects, in some foreign jurisdictions, to what the court classes as a particular average under our own.

The whole question is as to the force of a foreign law or adjudication between the assured and a third party, in putting a construction upon the contract between the assured and insurer. And I cannot see how it can have any force whatever. I am not aware of any instance in the range of the jurisprudence on this subject, where underwriters have been held to be liable for the reimbursement of any payment or penalty for damage done to other parties by the assured or the master and crew, except voluntary sacrifices of the property of others for the safety of the insured subject, or liable for any damage whatever done by the elements to a third party, as in the case in consideration, without any agency of the assured or the master and crew of his vessel.

The foreign rule may include the cargoes and freights in the apportionment of the damage, as that of Hamburg seems to do; which renders the consequences tacked to the collision still more remote than where the apportionment is confined to the ships.

M. Doubousquié[1] supplies us an illustration of the extent to which the doctrine would carry us. He considers that the French Civil Code,[2] which renders a party liable to others for damage by his own fault or that of his servants or agents, renders the owner of a building that takes fire in consequence of his negligence, or that of his domestics, whereby a neighboring building is burnt, liable, and his building is subject to a lien for the loss of such other building. Suppose such owner to insure his house with a company in New York, can it be supposed that his insurers are liable for the amount which he is liable to pay in France for the destruction of the neighboring building? And I cannot see that the case is not precisely parallel to the one in question, except that it is a stronger one in favor of the liability, for the insurers have a more positive notice of the case being under foreign jurisdiction.[3]

The now prevailing doctrine in England and the United States, that underwriters are liable for loss by the perils insured against, occasioned by the negligence or mistake of the mariners at sea,[4] and domestics on land,[5] renders the extent to which the liability of underwriters would be stretched by the above decisions still more questionable than it would be under the old rule, excluding that enhancement of the risks.

The rule for dividing equally the aggregate loss by collision, even in cases where there is fault, is considered by the jurists as without principle and anomalous (judicium rusticorum,) and it is still more objectionable to carry it to cases of inevitable loss, which in other cases is left where it falls.

There is some reason why parties should agree that the policy shall cover such apportionment, because the underwriter has the benefit of it where the excessive damage is sustained by the subject which he insures, and, accordingly, it is not inequitable to agree that he shall make indemnity where the operation of the

[1] De la Assurance, s. 29.

[2] Articles 1382, 1383, and 1384.

[3] Emerigon, tom. 1, p. 417, c. 12, s. 14, states a similar actual decree of the Parliament of Paris in case of two mills being burnt.

[4] Supra, Vol. I. p. 591, No. 1049.

[5] Supra, Vol. I. p. 623, No. 1096.

foreign usage is unfavorable to the assured. But there is a great difference between the introduction of the rule by contract or by statute or in virtue of a usage, and introducing it by construction contrary to usage. In the former cases, the rule may be confined to collision, but such a rule cannot be introduced by construction without apparently departing from the well-established doctrine that only the direct consequences of a peril insured against are covered by the policy.

The question respecting the liability of underwriters in a policy against perils of the seas, to indemnify the assured for loss by his liability by our own law to the owners of another vessel for damage to such other by collision with the insured vessel through the fault of the persons in charge of the latter, has, subsequently to the precedents above cited, come before the Supreme Court of the United States, and, after thorough discussion, the judgment of the court elaborately given by Mr. Justice Curtis, was against the claim for such a loss.[1]

1417. The result then is that, first, *Damage to an insured vessel by collision entirely through the fault of those having charge of another vessel, is a loss by perils of the seas, for which insurers are liable.*[2]

1418. Second. *Damage to an insured vessel by collision through the negligence or mistake of the master and crew of such vessel, is, according to our prevailing jurisprudence, at the risk of the insurers.*[3]

1419. Third. *The underwriters on a ship are not bound to indemnify the assured for* the *loss* to which he may be subject *through the liability of his vessel,* whether under the law of the country to which the vessel belongs or a foreign law, *for damage to other vessels* and their cargoes by collision *through the fault of*

[1] General Mutual Ins. Co. *v.* Sherwood, 14 Howard's R., Sup. Ct. of the United States, 352. See supra, No. 1137 a.

[2] In such case the owners of the other vessel are liable for the damage. Story on Bailments, 3d ed., p. 599, s. 608 *c*, and the insurers who have paid the loss are entitled to the benefit of this remedy over.

[3] See supra, Vol. I. No. 1049, 1099.

the master and mariners *of his own ship*, and without any fault on the part of the mariners of the other ship.

Collision is a peril of the seas, and since, by our prevailing jurisprudence, underwriters against perils of the seas are liable for loss by those perils through the negligence or mistake of the master and mariners, it follows that, according to the decision in the case of collision by the ship Paragon in the Elbe, above stated, they are liable for loss to the assured on the ship insured by them, by reason of its running down another, through the carelessness or mistake of the master and mariners of the insured ship. And so it has, accordingly, been held by Mr. Justice Story,[1] and by Justices Nelson and Betts in the Circuit Court of the United States in New York.[2]

This question is similar in principle to that stated below, where the collision is through the fault of both parties, the question in that case, as well as this, being, whether the underwriters on ship A are liable for damage to which its owner, the assured, is subject by its running down the ship B; the only difference being, that the case of both parties being in fault is, in the European continental jurisprudence, one for contribution in common average between the two ships, whereas they do not make a common average where only one party is in fault.

1420. The aggregate damage to two vessels by collision through the fault of the people having charge of them on both sides, is, by the French law,[3] and by the admiralty law as administered in England,[4] apportioned upon the two vessels. The

[1] Hale *v.* Washington Ins. Co., 2 Story's R. 176.

[2] Sherwood *v.* The General Mutual Ins. Co., 1 Blatchford's R. 251.

[3] Ord. 1681, lib. 3, tit. 7, Des Average, art. 10; Valin, tom. 2, p. 165; Code de Commerce, art. 407; Boulay Paty, tom. 4, p. 15.

[4] Le Neve *v.* The Edinburgh and London Shipping Co., in the House of Lords, June, 1824, 1 Bell's Comm. p. 581, 5th ed. (in this case indemnity was made for the cargo); Hay *v.* Le Neve, 2 Shaw's Scotch Appeal Cases, 395; S. C., 3 Hagg. Ad. R. 328, n.; S. C., Abbott on Shipp., 7th ed. 230, n.; The Seringapatam, 2 W. Rob. Ad. R. 38; S. C., 6 Notes of Admiralty Cases, 165; The Clarence, 3 W. Rob. Ad. R. 283; The Montreal, Eng. Law & Eq. R. (Press of Little, Brown & Co.); S. C., Eng. Jurist, 538.

same rule has been stated to be the law as administered in admiralty in the United States by Mr. Justice Ware, of the District Court of the United States in Maine,[1] and by Judge Hopkinson, of the District Court of the United States in Pennsylvania.[2]

Remedy to a party in such case has been refused in the English courts of common law.[3]

Assuming this admiralty doctrine to be our law, we have a case different from that above considered,[4] namely, one of common average between the two ships, or of general average, if the cargoes and freights of the vessels are brought into apportionment under our own law, and not under foreign law, as before. Should it be so decided in any cases actually brought before our courts, and within their jurisdiction, their decrees must be considered to be rightly made.

The question would then arise,

Whether, in case of collision by fault on both sides, the underwriters on each ship are liable to make indemnity for the damage to the ship insured by them, be it more or less; or for the proportion of the aggregate damage on both sides apportioned to the ship insured by them, be it more or less?

In the first place, does the admiralty decision determine any thing materially affecting the question? It only decides that, where two parties act in concert in doing damage, they shall mutually make reparation, though they are themselves the parties injuring and injured, and, consequently, it is a case where each is precluded from demanding reparation from the other at the common law. The decision is not that the damage was caused by

[1] The Scioto, Davies's R. 352.

[2] Reeves *v.* The Ship Constitution, Gilpin's R. 579.

[3] Kent *v.* Elstob, 3 East, 18; Vanderplank *v.* Miller, 1 Moody & M. 169, where Lord Tenterden remarked to the jury, that, to enable the plaintiffs to recover, the act whereby the damage was occasioned must be entirely attributable to the defendants; Lack *v.* Seward, 4 C. & P. 106, also before Lord Tenterden; Vennell *v.* Garner, 1 Cromp. & M. 21; Luxford *v.* Large, 5 C. & P. 421, per Lord Denman, in a case of injury to the person; and the ruling by Coleridge, J., in case of injury to the person by a cabriolet was similar; Woolf *v.* Beard, 8 C. & P. 373.

[4] Supra, No. 1416.

any extraordinary action of the elements, for which underwriters are liable under the general doctrine on the subject, or that it was caused otherwise than by the misfeasance of the parties. No indemnity for loss by misfeasance, whether direct or remote, can be claimed by the assured against the insurers, excepting under barratry. The utmost extent of their liability in respect to other perils is for loss by negligence or mistake, without malice or fraud. It would be an extraordinary construction, to consider a policy including the risk of barratry to be a stipulation of indemnity to the assured against all loss, direct or indirect, by the fraudulent acts of the master and crew against third parties. And such is a necessary result, for, whether barratry is a peril of the seas or not, it is specifically insured against in a great part of marine policies no less than perils of the seas; and the running down, by the master and crew, of all vessels that they can meet, or any vessel, purposely and maliciously or fraudulently, is unquestionably barratry, and the admiralty law of all countries holds the ship to be liable as decidedly at least as in case of mistake or negligence, and the shipowner could not extricate his vessel from the lien for indemnity to the injured vessels without paying the damage. The loss in this case is, therefore, precisely as direct a consequence of the peril insured against, as in either of the cases above cited, in which the underwriters were held to be liable.

The result accordingly is, that, under the doctrine in question, the underwriter on a ship not only insures that ship against the damage it may itself sustain by collision, but also all the other ships on the ocean, against the damage that they may sustain from it, by reason of the barratry or other faults of its captain and crew.

Admitting that the admiralty decision decrees the damage by collision through the fault of the parties to be by a peril of the seas, this is no more than is assumed in the outset on all hands, and by a familiar construction of that phrase. The only question is, To which ship is the damage an effect of the peril of the seas? Is it so to the ship that is injured, or to the one that does the injury? The answer is too plain for discussion, and yet the answer, as plain as it is, amounts to a decision of the question, and leads to the conclusion, that,

In collision by fault of both parties, the damage to either ship is the direct effect of the perils of the sea in respect of that ship, for which the underwriters upon such ship are liable, except where they are exonerated by reason of the loss being occasioned by barratry or some other act that is not insured against.

The inconvenience of this doctrine is, that the liabilities of the insurers under their respective policies, if made in the common form, supposing the ships, cargoes, and freights to be insured on both sides, does not correspond to that of the different assureds as regulated by the admiralty law. This inconvenience is, however, a proper subject of remedy by a modification of the contract by the parties, and seems to be quite beyond the reach of judicial construction and discretion, without disturbing the foundations of this branch of jurisprudence, and letting in consequences of much greater inconvenience.

Where the collision is by fault of both parties, the case is treated in the same manner, whether both parties are equally in fault or not.[1]

1421. *Whether, if a collision is occasioned by fault, but it does not appear whether of one or both of the parties, the construction is, that it was by the fault of both, or that it is to be treated as an accidental collision.*

The ordinances, and codes, and commentators, more usually put this case in the same predicament with one where both parties are in fault.[2] Boulay Paty [3] understands that, by the French Code of Commerce,[4] *this case is classed with fortuitous collisions*, which he approves on the seemingly good ground, that a fault is not to be imputed without proof, or, in other words, if it is not proved who is in fault, a fault is not to be imputed to any one.

There is some diversity among the ordinances and the opinions

[1] Valin, tom. 2, p. 290, under art. 11 of tit. 11, Des Average, Ord. 1681, citing Grotius and Loccenius, and no suggestion is anywhere made of an apportionment in the ratio of the degree of culpability on the respective sides.

[2] Ord. 1681, tit. Des Average, a. 10; Laws of Oleron, a. 14; Ord. of Wisbuy, a. 26, 27, 50, and 70; Le Droit Hanséatique, tit. 10.

[3] Cours de Droit Com., vol. 4, p. 14.

[4] Liv. 2, tit. 11, art. 407.

of jurists as to bringing the cargoes and freights into the apportionment where one is made. We will, however, pass this inquiry.

The above questions, as already remarked,[1] belong to the inquiry, what risks are covered, and also to the subjects of general average and particular average, but have been introduced here more at length as properly belonging to general average, if the underwriters are to be affected by any apportionment between the parties concerned in the collision.

[1] Supra, Vol. I. No. 1137.

CHAPTER XVI.

PARTICULAR AVERAGE AND PARTIAL LOSS.

SECT. 1. Particular average in general.
2. On the ship.
3. On freight.
4. On goods, profits, and commissions.
5. The amount payable. Salvage loss.
6. Under fire policies, life policies, and on the interest in an hypothecated subject.

SECTION I. PARTICULAR AVERAGE IN GENERAL.

1422. *A* PARTICULAR AVERAGE *is a loss borne wholly by the party upon whose property it takes place, and is so called in distinction from a general average for which divers parties contribute.*[1]

A PARTIAL LOSS is one in which the insurers are liable to pay an amount less than that insured for damage happening to the subject, or expense incurred and occasioned by the perils insured against, in distinction from a TOTAL LOSS, in which the insurer is liable to pay the entire value at which the subject is insured, so far as it is covered by the policy, as the price of the whole or such proportion of it.

Mr. Benecke[2] proposes to apply the expression "particular average" to cases of damage or deterioration in value, or loss by expense, to be borne, in either case, by the owner of the subject or his underwriters, and not to the case of a total destruction of a

[1] A question has been made as to the propriety of the above use of the word *average*. Park, 160; Stevens, Part I. c. 2, p. 73. But it seems to be a sufficient reason for using the term in the above sense, that it has been so used ever since insurance came into practice; that its meaning is definite; and that this mode of expression is often very convenient. For definitions and specifications of particular average, see Code de Commerce, lib. 2, tit. 11, art. 403; Marsh. Ins. 486; Pothier, des Ass. No. 115; 2 Arnould's Mar. Ins. 953.

[2] Chap. 9; Benecke & Stevens by Phil. 341.

part of the subject, which he would denominate a "partial loss." He does not, however, propose to restrict the expression "partial loss" to that case, but would extend it to all those cases comprehended under particular average. This distinction seems to be in conformity to the customary use of the terms.

1423. *The insured does not charge* in particular, any more than in general average, *a commission on his disbursements*, or a compensation for his own services in superintending and managing the business relative to the voyage:

As in case of his settling a bottomry bond given for money taken up by the master to defray the expense of repairs and contribution.[1]

SECTION II. ON THE SHIP.

1424. It has already been considered *for what losses, and for what effects of the perils insured against on the ship, the underwriters are answerable.*[2]

Of these *losses*, those *which do not belong to general average are*, of course, *particular average, or partial loss.*

Sails split or blown away by the extraordinary force of the winds are usually particular average,[3] though claims for this loss are allowed not without hesitation and scrutiny as to the strength of the sail and the degree of violence, since it is the ordinary ultimate result of exposure and wear and tear.[4]

Also *cables parted* in like manner, or washed from the deck, if properly kept there; but not if improperly there;[5]

Masts sprung;

Spars carried away;

Planks started;

Damage by the vessel being so strained that its shape is dis-

[1] Peters *v.* Warren Ins. Co., 3 Sumner's R. 389.

[2] Supra, c. 18.

[3] By one of the rules of a London association for mutual insurance on ships, no sails lost, except those going with the masts, were allowed in average. Strong *v.* Harvey, 3 Bing. 304.

[4] See supra, Vol. I. No. 1087, 1105.

[5] See supra, Vol. I. 460, 985.

torted, and its value materially diminished, as in case of its being hogged,[1] though indefinite strain, not subject to be estimated, is not included ;[2]

Loss of boats ;[3]

Tearing off the sheathing ;

Breaking of the upper works ;

Or timbers ;

Or any part of the ship ;

Damage by accidental stranding ;

Or by lightning ;

Or by fire ;

Or by collision ;[4]

Or in a justifiable engagement ;[5]

And *loss by plunder with force, or while the ship is in possession of captors or pirates ;*

And all other loss and expense upon the ship, directly occasioned by the perils insured against, *not* purposely incurred and so belonging to *general average, and not* amounting to a *total loss.*

1424 a. *Damage by collision is, under the law of England, and that of the United States,* in respect to insurance, *particular average,* as distinguished from general average.[6]

1425. *The repairing or replacing of parts of the ship injured or destroyed, by the perils insured against, is particular average, though such parts may have previously become deteriorated by age and use, provided the ship was seaworthy* at the commencement of the risk.

The burden is on the assured to prove the loss, and the seaworthiness of the ship being one condition of his recovering, in case of any doubt arising, from the circumstances, respecting its

[1] Giles *v.* Eagle Ins. Co., 2 Metc. 140.

[2] Orrok *v.* Commonwealth Ins. Co., 21 Pick. 456; Crofts *v.* Marshall, 7 C. & P. 597; Sage *v.* Middletown Ins. Co., 1 Conn. R. 239. See supra, Vol. I. No. 1087; Sewall *v.* United States Ins. Co., 11 Pick. 90.

[3] See supra, Vol. I. No. 465.

[4] See supra, Vol. I. No. 1099, and Vol. II. No. 1416 et seq.

[5] Buller *v.* Fisher, 3 Esp. 67.

[6] See supra, No. 1416–1421.

soundness and sufficiency, he must, as a preliminary step, make out his compliance with that condition. This being done, his claim is not subject to be defeated, because time and use have concurred with the action of the perils insured against in producing the loss, provided the action of the peril has been in an extraordinary degree, (if, like most sea-perils, it is subject to degrees,) and its effects are beyond those incident to the ordinary use of the vessel under ordinary circumstances.[1]

1426. *The greater or less expensiveness of the repairs* at the place where it is necessary to make them *is at the risk*, or for the advantage or disadvantage, *of the underwriter*.[2]

A great latitude of discretion must necessarily be allowed to the master in this respect, and, provided his judgment is fairly exercised, the underwriters are bound, even though he may not take the best course. It sometimes happens that only imperfect repairs can be made at the foreign ports visited by the ship after the damage. But in case of a vessel that was at Havana, where full repairs might have been made, but at an expense much greater than would be necessary on her return to the United States, and the captain chose to pursue his homeward voyage with only the imperfect and temporary repairs previously made at the Balize, no objection was made on the part of the underwriters to the master's having so used his discretion, and the temporary repairs and subsequent permanent repairs were both included in the particular average.[3]

The master is not bound to defer making complete repairs until his return home, though the repairs may be more expensive in the foreign port. The Supreme Court in New York say, "The insurers are bound to amend and restore the ship. When and where is this to be done? We answer, at the port of necessity. The insurers have no right to split the repairs into parts, and say the seaworthy portion (that is, sufficient to make the ship seaworthy

[1] Depau *v.* Ocean Ins. Co., 5 Cowen, 63. See also Caines's R. 85.

[2] Waller *v.* La. Ins. Co., 9 Martin, N. S. 276.

[3] Brooks *v.* Oriental Ins. Co., 7 Pick. 159.

for the rest of the voyage) shall be done at that port, and the residue at the port of destination, or elsewhere."[1]

This position is questionable. It is quite enough to say that the master is justified in making full repairs at the port of necessity, if he deems it best in the fair exercise of his judgment, and that the insurers are liable for the same, though the ship might have been made seaworthy by partial or temporary repairs, and the full repairs might have been completed at much less expense at the port of destination. It may be much the better course to defer part of the repairs, as it probably was in the case before cited, (Brooks *v.* The Oriental Ins. Co.) and the parties ought to have the benefit of the master's judgment in such case when he decides judiciously, as well as to be subjected to the disadvantages consequent upon his wrong judgment.

1427. *The extraordinary expense of raising funds for particular average expenses is at the risk of the underwriter in the proportion of his liability for the loss.*

As payment of marine interest on money borrowed by hypothecation of the ship or cargo;

Or by selling goods at an intermediate port at a price less than their market value at the port of destination.[2]

1428. *The underwriter is responsible for the repair* or restoration of the damaged or destroyed part of the ship or article belonging to it, *with materials, workmanship, style, and finish corresponding to its original character.*

Our practice and jurisprudence do not coincide with those of Hamburg, as stated by Mr. Benecke,[3] by which latter the insurer is liable only for the substantial and usefully serviceable character of the repairs as distinguished from the ornamental. Our usage and the English require the restoration of the subject.

The assured may make suitable repairs, and the underwriters

[1] Center *v.* American Ins. Co., 7 Cowen, 564.

[2] See Alers *v.* Tobin, Abbott on Shipp., 3d ed. 245.

[3] London ed. 1824, p. 468, n.; Benecke & Stevens by Phil. 386, n.

will be answerable, whether they approve or not, as where the assured recoppered the vessel notwithstanding the objections of the underwriters.[1]

1429. *Whether the wages and provisions of the crew during detention for repairs are allowed in particular average for the repairs?*

It should seem that this ought to depend upon the men being employed upon the repairs, though there are decisions against the allowance of these charges, notwithstanding their being so employed.[2]

A vessel on a voyage from New York to Liverpool, having received considerable sea damage, afterwards, on the 31st of October, encountered a violent storm, which she attempted to ride out at anchor, but it became necessary to cut her cables and run her ashore at Hoylake. On being lightened, she was got off, and brought up to Liverpool on the 7th of November. All the cargo was discharged by the 31st of December. The vessel could not have its turn to be put into the dry docks for repairs before the 20th of February, and her repairs were not completed until the 24th of March. It was contended that the underwriters on the vessel should pay, not only for the repairs, but also for the wages and provisions of the seamen, and other expenses, during the detention. Mr. Chief Justice Thompson, giving the opinion of the court, said: "The expenses for wages and provisions cannot be brought into general average. They were not incurred for the benefit of cargo or freight. The cargo had been delivered, and the freight was earned, before the expenses were incurred. And if these expenses cannot be brought into general average, I do not see how the underwriters on the ship are to be made liable for them."[3]

It was held in Connecticut, that this expense was not recover-

[1] Waller *v.* La. Ins. Co., 9 Martin, N. S. 276.

[2] See supra, p. 109, No. 1329, as to allowance of wages and provisions during delay in general average; and remarks on Giles *v.* Eagle Ins. Co., p. 110, n. (1.)

[3] Dunham *v.* Commercial Ins. Co., 11 Johns. 315.

able of the insurers on the ship, though the men were employed during the detention in making the repairs.[1]

Expense of delay and wages and provisions of the crew of a steamboat, while detained for repairs, though the crew are employed on the repairs, were held in Ohio not to be part of the partial loss in inland navigation.[2]

So the wages and provisions of the mariners while navigating a disabled vessel into port do not constitute a part of the particular average,[3] though, as we have seen,[4] if the vessel goes off its course for repairs in such case, in order to resume the voyage after the repairs are made, the wages and provisions are allowed in general average.

The wages and provisions of the crew during delay to repair are, it seems, particular average on the ship in France,[5] and also during delay by quarantine.[6]

It does not appear upon what principle the assured is, in some of the cases above cited, precluded from recovering for the labor done by the crew in repairing damage for which the insurers are liable. I apprehend the practice to be to allow this charge.[7] It may be objected, that this will lead to abuse, but any mode of repairing may be subject to abuse. Besides, the contract is too plain to be set aside by so loose an objection, since the underwriter agrees for indemnity, whereas this doctrine denies indemnity, and imposes on the assured the burden of repairing the damage at his own expense. While the men, or any part of them, are employed on repairs, they are employed in doing what the underwriters have stipulated to pay for doing. They certainly, then, ought to pay the expense of their wages and provisions while so employed, if they are properly so employed; that is, if they are competent to the work.

[1] Sage *v.* Middletown Ins. Co., 1 Conn. R. 239.

[2] Perry *v.* Ohio Ins. Co., 5 Hammond's (Ohio) R. 306; Gazzam *v.* Cincinnati Ins. Co., 6 id. 73.

[3] Webb *v.* Protection Ins. Co., 6 Hammond's (Ohio) R. 456.

[4] Supra, No. 1328.

[5] Benecke, London ed. 1824, p. 462; Benecke & Stevens by Phil. 390.

[6] Ibid.; Code de Commerce, a. 403, No. 5.

[7] Benecke, London ed. 1824, p. 463; Benecke & Stevens by Phil. 390.

It has been distinctly held in Massachusetts, and this seems to be the better doctrine, that *the labor of the crew in repairing damage occasioned by the perils insured against is chargeable to the underwriters.*[1] In other words, their wages and provisions while so employed are a part of the particular average if the damage belongs to that description of loss.

1430. *The* expense of the *wages of the crew during detention by embargo* is *not covered by a policy upon the ship.*[2]

The French Ordinance of Marine,[3] and the French Code de Commerce,[4] make a distinction between the cases of charter for the voyage or by the month, the wages and provisions in the former case being particular average on the ship; in the latter, a general average. Pothier [5] attempts an explanation of the reasons of this distinction, but it does not appear very clearly why it should be made. Valin [6] thinks the article should be rejected.

1431. *Where timbers, or other materials, are replaced by new, the vessel,* when repaired, *is considered to be better* than before; *and accordingly the assured must himself bear one third part of the expense of the labor and materials for the repairs, and this deduction is said to be on account of "new for old,"* the insurers being liable for only two thirds of the cost of the labor and materials.[7]

Mr. Justice Story says, if the difference between the value of the vessel when repaired, and its value before the damage, "were to be ascertained in each particular case, by actual inspection and estimates, there would be no end of controversies; and therefore general usage, which the law follows as founded in public convenience, has applied a certain rule to all cases. It is true here, as was observed by Lord Mansfield upon another occasion,[8] that

[1] Hall *v.* Ocean Ins. Co., 21 Pick. R. 472.

[2] M'Bride *v.* Marine Ins. Co., 7 Johns. R. 431.

[3] Lib. 3, tit. 3, art. 7.

[4] Articles 300, 400, 403.

[5] Traité des Chartre-parties, No. 85.

[6] Com. sur l'Ord. 1, 3, tit. 3, art. 7.

[7] Fisk *v.* Commercial Ins. Co., 18 La. R. 77; Sanderson *v.* Marine Ins. Co., 2 Cranch's C. C. R. 218.

[8] This remark of Lord Mansfield is only applicable to a case where it is of no material importance which of several rules is adopted; but in regard to this deduction, it is of great importance to adopt the best rule.

it is of less importance how the rule is settled, than that it should be settled." [1]

Whatever general rule is adopted, it will evidently operate with some inequality; as a new ship may not be so good after being repaired as she was before sustaining any damage; whereas an old one may be better.

Mr. Stevens says: "It is customary to deduct one third from the new materials and labor, unless the ship be perfectly new, that is, on her first voyage, or the materials sacrificed be perfectly new." [2]

The exception of the first voyage seems to have been always made in England.[3] What shall be considered the first voyage, under this exception, seems to be a question of some difficulty. In a trial before Lord Tenterden, in an action against the insurers for an average under a policy on a new ship from England to New York and back, the question was whether the deduction was to be made on the repairs of damage sustained on the return passage. The witnesses examined on the subject stated the usage differently and contradictorily, some saying the first voyage was limited to the first passage; others, that it covered the outward and homeward passages; others, that it was regulated by the charter-party; others, by the policy; others, that it was a question of mere lapse of time. Lord Tenterden was of opinion that the ship was to be considered new during her homeward passage.[4]

In a more recent case before Lord Abinger, under a time policy upon a new ship, chartered by government for Van Diemen's Land, Australia, India, and back to England, the ship delivered convicts at Van Diemen's Land, and proceeded to Madras, and there took a cargo for England, and on her passage thither, having sustained damage off the Cape of Good Hope, a question arose whether a third for new was to be deducted from the repairs, or she was still on her first voyage, and no deduction was to be made. In this case, also, the testimony of the witnesses was equally vari-

[1] Peele *v.* Merchants' Ins. Co., 3 Mason's R. 27.

[2] Part I. c. 3, p. 159; Benecke & Stevens by Phil. 374.

[3] Weskett, tit. Repair, n. 1.

[4] Fenwick *v.* Robinson, 3 Car. & P. 323; S. C., Danson & Lloyd, 8.

ous and contradictory respecting the usage. Lord Abinger does not appear by the report of the trial to have ruled whether the ship was on her first voyage.[1] It seems to be strictly a question for the jury.[2]

It seems, accordingly, that no definite rule has been established on the subject by usage in England. Mr. Arnauld is of opinion, that the weight of authority is in favor of the position, that, except under very special circumstances, a new ship is to be considered on her first voyage during her integral voyage out and home, or from the first time she leaves her port till she comes back to it, if she leaves it cum animo revertendi.

A suggestion was made, in a trial before Best, C. J., of a similar rule being applicable to new repairs. It was the case of a vessel, ten years old, having been thoroughly repaired and then sustaining damage, much of which was in the new part; but a London special jury found that it was not an exception to the rule for deducting a third.[3]

No exception to the rule for the deduction of a third on a new ship prevails in the United States, the deduction being made on such ships no less than others.[4]

The practice of deducting a third is adopted in the interior navigation.[5]

There have been temporary local exceptions of new copper sheathing, but I cannot learn that there is any such permanent exception in any port.

Mr. Stevens mentions a rule of an association of experienced underwriters, to make no deduction on copper sheathing during

[1] Pirie *v.* Steele, 8 C. & P. 200; S. C., 2 Mood. & R. 49.

[2] One of the witnesses stated, that by usage a ship was considered to be new until it had been afloat eighteen months from the time of first sailing. In the case of Thompson *v.* Hunter, 2 Mood. & R. 251, n., stated 2 Arn. Mar. Ins. 982, the period was stated to be a year for vessels out of the Humber; but Mr. Justice Bayley ruled that the usage was not binding under an Irish policy upon a vessel out of that river.

[3] Poingdestre *v.* Royal Exch. Ass. Co., Ryan & M. 378.

[4] Nickels *v.* Maine Fire & Mar. Ins. Co., 11 Mass. R. 253; Dunham *v.* Commercial Ins. Co., 11 Johns. 315.

[5] Wallace *v.* Ohio Ins. Co., 4 Ohio R. 234; Firemens' Ins. Co., *v.* Fitzhugh, 4 B. Monroe, 160.

the first year of the sheathing being on, and to deduct one fifth every succeeding year.[1]

Some insurance companies in the United States, instead of the deduction of a third on copper sheathing, as already mentioned,[2] stipulate for a deduction of two and a half per cent. on the new copper for each month that the old had been on.[3]

The deduction of a third is made on chain-cables, no less than other iron-work, though such cables were at first exempted by very many insurance companies for the purpose of encouraging their introduction.

No deduction is made in replacing new anchors, in England [4] or the United States.[5]

An exception has been made where the ship does not come to the use of the assured after the repairs are made.[6] Upon this exception Mr. Benecke remarks, that the one third is brought to the charge of the ship-owner under the supposition that the ship will be of so much greater value to him, which he says is not the case unless the ship comes into his hands after the repairs. And he thinks "it can make no difference whether this was caused by default of the underwriter or by the subsequent loss of the vessel." [7]

In a case before the King's Bench in England,[8] the court considered that the underwriters prevented the ship from being restored to the assured by their own fault in refusing to discharge

[1] Stevens on Average, London ed. 1822; Benecke & Stevens by Phil. 374, n.

[2] Supra, Vol. I. p. 32, No. 50.

[3] I understand that this provision is gaining ground. At Bourdeaux, they have, or formerly had, a similar usage as to all repairs, varying the deduction for new according to the age of the vessel.

[4] Benecke, London ed. 1824, p. 458; Benecke & Stevens by Phil. 386.

[5] At Hamburg, averages for damage to the ship occasioned by running aground are not adjusted as in other cases. In the case of running aground, the underwriters pay two thirds and the ship-owner one third of the expense of repairs, whereas in other cases, by the practice at that place, each party pays one half of the expenses. Benecke, London ed. 1824, p. 453; Benecke & Stevens by Phil. 381.

[6] Da Costa *v.* Newnham, 2 T. R. 407.

[7] London ed. 1824, p. 459; Benecke & Stevens by Phil. 386.

[8] Da Costa *v.* Newnham, 2 T. R. 407.

the bottomry bond on which the money was raised to pay the expense of the repairs. But it has been held by Mr. Justice Story, that this case is not an exception. A vessel was bottomried for the expense of repairs in a foreign port, and on her return to her home port, where the owners resided, they permitted her to be sold under judicial process on the bottomry bond, by their neglect to discharge the bond. Mr. Justice Story said: "The loss has been voluntary on the part of the owner by his own default. He has never been dispossessed of his vessel but under a decree, which he suffered because he did not choose to pay the ship's debts contracted for his benefit and by the act of his own agent. The underwriters are, therefore, entitled to the deduction of one third new for old, because they have done no act to prevent the fullest possession by the owner." [1]

On the above principle, the deduction should not be made from temporary repairs, the benefit of which does not come to the assured. Such repairs are usually general average.

1432. *The deduction of a third is made only from the repairs; the question therefore is, What expenses belong to the repairs?* [2]

It is the custom in Boston, in adjusting a particular average, to deduct a third, not merely from the expense of materials and labor, but also from the incidental charges, such as dockage, and the charge for the use of a marine railway, and that of moving the vessel from the wharf where she is moored to the place of repair. And this practice seems to be well founded in respect of such charges as are directly incidental to repairs.[3]

1433. *Whether the deduction of a third is made on the necessarily extraordinary expense of raising funds to pay for the repairs* under the particular circumstances of the case?

Where repairs were paid for by a sale of a part of the cargo, Mr. Chief Justice Savage, giving the opinion of the court, said:

[1] Humphreys *v.* Union Ins. Co., 3 Mason, 429.

[2] In France, the deduction of a third is made only from the materials, not the labor. Benecke, London ed. 1824, p. 458; Benecke & Stevens by Phil. 386.

[3] See statement of Mr. Tyler, a witness, in Orrok *v.* Commonwealth Ins. Co., 21 Pick. R. 456, at p. 459.

"The assured is entitled to the amount expended for repairs, deducting one third new for old, and also the difference between the price for which the sugars sold at Halifax and what they would have sold for at Rotterdam."[1] The expression implies that the third was deducted only from the amount expended in the repairs, and that the underwriters were liable for the whole loss by the mode necessarily resorted to for raising the funds, without any deduction.

Where a part of the expense of repairs consisted of marine interest paid for the funds, and commissions and exchange, the Supreme Court of Massachusetts held that those charges were subject to the deduction of one third for new, no less than the other expenses.[2]

If the deduction is a general estimated benefit to the assured by having new work and materials instead of old, this extra expense ought to be wholly reimbursed to him, for, according to the theory of the rule, he is benefited by his vessel's arriving with the new repairs, instead of arriving with no other diminution of its value than that from deterioration by time and wear and tear, only by one third of what the repairs would have cost at home. The better rule seems, therefore, to be, that

The deduction is not to be made from the extraordinary expense unavoidably incurred for raising funds to make repairs.

The commissions of an agent for advances and transacting the business of the repairs and refitting of the ship, seem to be strictly incidental to the loss, and subject to the deduction.

If the assured is in fault in not having provided means for raising funds, the whole of the extra expense for this purpose should be his.[3]

[1] Depau *v.* Ocean Ins. Co., 5 Cowen, 63.

[2] Orrok *v.* Commonwealth Ins. Co., 21 Pick. 456.

[3] In the original edition of this treatise, (1823,) p. 371, the rule was stated as in the text above. Before the publication of the work, I learned from my since deceased friend, Mr. Joseph Balch, well known as one of the most experienced and scientific underwriters in the country, that the practice was different in his office and the others in Boston, and his authority was of sufficient weight with me to induce a doubt whether on principle

1434. *Whether the proceeds of the sale of the old materials are to be deducted before or after making the deduction of a third for new?*

It is evidently of some importance to the parties whether the old materials rejected in making repairs, and sold, are to be deducted from the gross expense of repairs before deducting the third for new, or after making that deduction. This question is most material in repairs of copper sheathing, since the old copper is a valuable material, and, in case of its being replaced before it has been much worn, may sell for more than two thirds of the expense of coppering anew, so as to permit the singular result of a ground of claim on the part of the underwriters against the assured in consequence of a loss on the ship; if we can suppose the rule to be applied to such a case, and fully carried out. The replacing of a chain-cable, of which a part only had been lost, by purchasing a new one and selling what remained of the old one, might, in some instances, present a case of the proceeds of the old being more than two thirds of the cost of the new.

As a mere question of principle, independently of all usage, I cannot but think that the deduction of the proceeds of the old materials from the gross expense of repairs before deducting the one third for new, is more conformable to the general principles of the contract of insurance, by accommodating the adjustment and indemnity to the particular circumstances of each case, giving the two parties jointly the benefit on the one hand and the disadvantage on the other, of the article being new or old. It would be desirable, if it were practicable, that in every case the assured should be exactly indemnified; that is, in case of the loss of a new article he should recover the value of a new one, and in that of the loss of an old one recover only its value, whatever it might be. But as the estimating of the value in each particular case is attended with much trouble, and is all but impracticable in many cases, a

the third should not be deducted from the extra expense by raising funds by hypothecation or sale of goods, as stated at that time in a note at the end of the work, p. 538. On reconsideration, I restore the rule originally stated, as being the better.

general rule is resorted to. In choosing this rule it is certainly desirable, if it can be conveniently done, to shape it so as to give the assured in as great a degree as practicable the advantages and disadvantages of the quality of the article injured or lost. Now the deduction of the proceeds of the old materials from the gross expense of repairs evidently comes nearer to this result.

Another reason in favor of this mode of adjustment is, that it makes the computation of the loss and the claim for indemnity begin at the same point, namely, the incurring of expense, for so far as the proceeds of the old repairs will go, the value of the article remains; or, in other words, so far as the article may be said to repair itself, so far the assured has no claim for indemnity. It is at this point, in fact, that the claim for indemnity really begins. What is strictly the loss — the ground of claim — is the excess of the expense of the repairs beyond this point; and, accordingly, the deduction of the third should apply to this amount.

Another reason given for this construction of the rule is, that it sometimes happens that in making the repairs the old materials may be used. Thus, in case of the breaking of a chain-cable and loss of a part of it, if the vessel happen to put into a port where this article is manufactured, the chain can be repaired, whereas in another port a new one must be purchased; and even if the vessel be in a port where the article is manufactured, it may be more convenient and expeditious to purchase a new chain, and sell what remains of the old, than to procure the old one to be repaired. Now, if the proceeds of the old are to be deducted from the gross expense of the repairs, it will make no material difference between the parties whether one or the other mode is adopted; that is, the claim for a loss will be substantially the same amount, whether the old chain is mended or a new one purchased and the old one sold. But if the third is to be deducted from the net expense, it will evidently make a material difference in the amount of the loss which of the two modes is adopted, a difference precisely equal to the proceeds of the old materials. This affords another instance of the very irregular operation of the rule for deducting the proceeds of the old from the new repairs after deducting the third.

On the other hand, two reasons are given for the deduction of the third from the gross repairs; namely, first, the custom, if there be such a one, and, second, that by this mode of adjustment, though more favorable to the underwriters, still the assured on ships on an average will be more than indemnified; or, in other words, the articles lost or damaged are usually more than one third part worn out. But this can certainly not be a sufficient reason for adopting a mode of deducting the third, which might in fact amount in some cases to the deduction of a half. The mode that will operate most equally ought to be adopted, and if such deduction of a third will still, on an average of the cases, leave the assured more than indemnified, this would be a reason, not for deducting the third in a way that would operate unequally and irregularly, but for deducting more than a third.

It is, however, not easy to estimate whether the deduction of a quarter or a third, or more, would, on an average, give more or less than indemnity, since it does not depend merely upon the fact of the old article being more or less than a quarter, third, &c., worn out. In mending a ship, or any thing else, the repairs are not valuable to the owner in the proportion of the quality of the materials and workmanship of the repairs, since they are often at least, and probably in a great majority of instances, of little or no value except as part of the thing repaired. Repairs, therefore, that are precisely of the quality of the thing repaired, and of equal durability, are in many, and probably in much the greater number of instances, of as much value to the owner of the article as better and more durable repairs would be. A new piece of timber put into an old hull, a new link put into an old chain, or a new patch upon an old sail, does not necessarily, and in all cases, make the thing worth more to the owner than if it had been mended with a piece corresponding to it in value and durability. Even if the new part might be worth something when the thing itself is worn out, the labor bestowed in attaching and fitting the repairs ceases, for the most part, to be of any value, and the expense of this labor constitutes no inconsiderable part of that of the repairs. In all cases where the new part is only of value as a part of the thing itself, the assured is only indemnified by the underwriters paying

the whole expense of the repairs without any deduction; and considering in how large a proportion of instances this is the case, it should seem from a general estimate, without going into an investigation of the subject particularly and in detail, extremely questionable whether the assured on ships are, on an average, indemnified by the rule for deducting a third. In case of a variation one way or the other, the safer side is undoubtedly to come short of indemnity, since a rule that gives more and makes the assured a gainer by the loss has a sinister influence. But the rule for deducting a third does not seem to be subject to this objection.[1]

Mr. Justice Sutherland, giving the opinion of the court upon this subject in New York, says: "The question seems to me to resolve itself into the inquiry, To whom do the old materials belong? If they belong to the assured, there is an end of the question, for having been applied by them for the payment of the repairs pro tanto, the assured cannot possibly claim any further benefit from them. If there is any thing in the nature of abandonment of them to the underwriters, then the principle contended for by the underwriters may be well founded. But there is nothing like abandonment. The assured do not, and could not, claim from the underwriters the gross amount of repairs. They can only claim the difference between that amount and the value of the old materials; for to that extent only are they injured, and an indemnity is all they can claim."

"*The true rule*, therefore," to adopt the words of the same judge, "*seems to be to apply the old materials towards payment for the new, and to allow the deduction of one third from the balance.*"[2] This rule seems to have been since followed in New York.[3]

The same question has come under consideration in Massachusetts. Mr. Justice Putnam, giving the opinion of the court, said:

[1] For a discussion of this question, see American Jurist and Law Magazine, Vol. V. pp. 252, 263; Vol. VI. p. 45.

[2] Byrnes *v.* National Ins. Co., 1 Cowen, 265.

[3] Dickey *v.* New York Ins. Co., 4 Cowen, 222; American Ins. Co. *v.* Center, 4 Wend. 45.

"We do not see how the property in the old materials has changed and become the property of the insurer. There has not been any abandonment of the old materials. If the owner should do the work and apply the old materials towards it, we think that the amount of the expenses after such application should be the cost of the repairs, and the sum from which one third new for old should be deducted." The court was accordingly of opinion, that the proceeds of the old materials should be deducted from the gross expense of repairs before the deduction of one third for new.[1] On the question being presented to the same court, in a subsequent case, for reconsideration, the court adhered to its former opinion.[2]

The practice of deducting from the gross repairs is gaining ground, as I am informed. The prevalent practice in Philadelphia is to make the deduction from the net repairs.

1435. *The insurer must pay the same proportion of the whole loss, that the sum insured is of the whole amount of the insurable interest.* If the underwriter has agreed to insure one half or one quarter of his interest, he must pay the same proportion of the expense of repairs. This is plain; but then a very important question occurs as to the mode of estimating the amount of the insurable interest; since, the greater the value is at which the amount of the interest is fixed, the smaller will be the sum which the insurer is liable to pay on a given amount insured, if it is less than the whole value. If $1,000 is insured in an open policy on a ship worth $2,000 at the commencement of the risk, which sustains a partial loss of $500 at a subsequent period, when her value is diminished by wear and tear, and decay, and the consumption of provisions, to $1,500, shall the underwriter pay 50 per cent. or 66⅔ per cent. of the loss? According to the practice, he pays 50 per cent.; that is, the value of the ship at the commencement of the risk is the basis on which the partial loss is estimated. The result is the same in a valued policy in which the ship or other subject is put at an undervaluation.

[1] Brooks *v.* Oriental Ins. Co., 7 Pick. 259.

[2] Eager *v.* Atlas Ins. Co., 14 Pick. 141. See also Benecke & Stevens by Phil. 376.

Accordingly, an undervaluation, or an insurance at an amount less than the value of the ship at the commencement of the risk, operates unfavorably to the underwriters in respect to particular average for repairs.[1]

1436. *Whether the amount assessed on the ship in a foreign jurisdiction, for the excess of the proportion of the aggregate damage to another ship by collision, is to be included in the particular average on an American ship, in addition to the damage to the ship itself?*

It has been so held by Mr. Justice Story,[2] and by the Supreme Court of the United States,[3] in opposition to the decision of the Court of King's Bench in England.[4]

That such assessment is not a direct effect of the collision, and accordingly is not particular average on the ship, under the common form of the policy, seems to be the better doctrine.[5]

1437. *Whether the assessment to which a ship is liable for injuring another by collision, through the fault of its master and mariners, is a particular average for which the underwriters are liable?*

It has been stated above as the better doctrine, that

They should not be liable,[6] though they have been held to be liable.[7]

SECTION III. ON FREIGHT.

1438. *A particular average or partial loss on freight is occasioned by the loss of the ship after a part of the voyage is performed,* which makes it necessary to hire another ship to

[1] Benecke, London ed. 1824, p. 460; Benecke & Stevens by Phil. 388.

[2] Peters *v.* Warren Ins. Co., 3 Sumner's R. 389.

[3] S. C., 14 Peters's Sup. Ct. R. 99. And see Hale *v.* Washington Ins. Co., and Sherwood *v.* General Mut. Ins. Co., 1 Blatchford's R. 251.

[4] Devaux *v.* Salvador, 4 Ad. & El. 420; S. C., 6 Nev. & Mann. 713.

[5] See supra, Vol I. No. 1137; and Vol. II. No. 1419.

[6] Supra, No. 1419.

[7] See cases cited supra, No. 1419.

carry on the cargo to the port of destination in order to earn the freight.[1]

1439. *A loss of a part of the cargo*, whereby the ship is prevented from earning a part of its freight,[2] *is a particular average on freight;*[3] and it does not appear to make any difference in this respect that the loss is on an article of a perishable nature and of more than ordinary liability to damage.

As in case of tobacco being damaged and destroyed by sea-water.[4]

1440. *Where*, on account of the perils insured against, *only freight pro rata is earned, this is a* case of *partial loss* upon this interest.

1441. *In case of goods being transported for a part of the voyage only* by the ship of which the freight is insured, and a freight pro rata itineris peracti is earned, *the loss is computed by deducting from the gross freight the* actual or estimated *expense of forwarding the goods* to the port of destination.[5]

A vessel being wrecked on Cape Cod, on a voyage from Demarara to Biddeford, in Maine, Mr. C. J. Parsons said, the loss on freight must be decided, not by the proportion in time of sailing, as was determined in Luke *v.* Lyde, (2 Burr. 882,) but the respective rates of freight. Let the average from Demarara to Biddeford, if she had not been wrecked, be ascertained, and deduct therefrom the expense of bringing the goods on."[6] The expressions of the Chief Justice first quoted intimate that the particular average on the freight is to be estimated by a comparison of the rates of freight from Demarara to Cape Cod and to Biddeford. But by the direction of the court, as to the mode of computation, that rule evidently was not adopted; it would indeed have given no loss at all on freight, since the rate from Demarara

[1] Saltus *v.* Ocean Ins. Co., 12 Johns. 107; Schieffelin *v.* New York Ins. Co., 9 id. 21.

[2] Supra, c. 13, s. 14.

[3] Coolidge *v.* Gloucester Mar. Ins. Co., 15 Mass. R. 341; and see cases generally.

[4] M'Gaw *v.* Ocean Ins. Co., 23 Pick. R. 405.

[5] Bork *v.* Norton, 2 M'Lean's C. C. (U. S.) R. 423.

[6] Coffin *v.* Storer, 5 Mass. R. 252.

to those two destinations is the same. The case was treated as a salvage loss, that is, the adjustment is precisely the same as in a technical total loss, the underwriter being liable for the whole amount insured on freight, (supposing it not to be an over-insurance,) deducting as salvage the excess of the freight for the whole voyage over the expense of forwarding the goods.

A similar question was involved in a case that occurred in the Court of Chancery in New York. Goods being shipped at London for New York, the ship put into Fayal in distress, where she was sold by the master as being unseaworthy. A part of the goods had been thrown overboard in stress of weather before the vessel arrived at Fayal. Another parcel was sold there on account of its being damaged, and for the purpose of raising funds to defray expenses. The remainder was forwarded by another vessel to New York, at a rate of freight exceeding that from London to New York as agreed on for the same goods in the original charter-party.

The salvage on the freight of the original ship was the excess of the amount of the freight, as agreed on by the original charter-party, over the amount paid for the freight of a part of the goods from Fayal to New York. And the loss, accordingly, was the expense of forwarding the goods.[1]

Mr. Chancellor Walworth, giving his opinion in the Court of Errors in New York, adopts the same rule.[2] And there seems to be no doubt that the loss must be so settled, as a salvage loss.[3]

1442. *The same rule is adopted where the goods are forwarded by land.*[4]

In a case submitted to the author and others, the ship was wrecked at a place where the goods could not be reshipped, and it was necessary to transport them by land to a port of reshipment. It was decided that the expense of saving and storing the cargo

[1] Searle *v.* Scovel, 4 Johns. Ch. R. 218.

[2] American Ins. Co. *v.* Center, 4 Wend. 45.

[3] See Benecke, London ed. 1824, p. 449; Benecke & Stevens by Phil. 364.

[4] Bork *v.* Norton, 2 M'Lean's C. C. (U. S.) R. 423.

was a charge on the goods, but that of transporting it to the port of reshipment was a charge on the freight, being a part of the expense of forwarding the goods to the port of destination.

1443. So also *if the whole original cargo is lost, and another is taken*, instead of it, to the port of destination, *the* average is adjusted as a salvage *loss*, and its amount *is the excess of freight, as contracted for, over that earned* by carrying the new cargo.[1]

This rule holds in case of the vessel proceeding to the same port of destination, but not if it goes upon a new voyage.[2]

1444. *If the ship is disabled and another might be procured within a reasonable distance, and on such terms as to leave an excess of the original freight* over that stipulated with the substituted vessel, or agreed price of other transportation, *the loss is the amount that must have been so paid*, and the underwriters are not affected by the neglect of the master to forward the cargo.

1445. Since the ship-owner does not, by merely agreeing to transport an article, take the risk of its deterioration in value by reason of perils of the seas, or the qualities of the article, *if the goods arrive*, being still of the same species as when shipped, *though*, in consequence of sea-damage or otherwise, they are *of no value*, still *the whole freight is due*,[3] *and accordingly the assured on freight has no claim for any loss.*

1446. *If the supercargo or captain sells goods at some intermediate port, on account of sea-damage, deterioration occasioned by the qualities of the articles, or other cause which might* probably diminish or *destroy their value* in the subsequent part of the voyage, *but still leave them specifically remaining, the entire freight* to the port of destination *will be due on* such articles, *if the master is ready to carry them on* immediately, or within a reasonable time.

This proposition is merely a corollary from the preceding one. It has been so held by Mr. Justice Story, in case of insurance on the freight of a cargo of cotton from New Orleans to Havre, where the ship put back to New Orleans on account of damage

[1] Jordan v. Warren Ins. Co., 1 Story's R. 342.

[2] S. C.

[3] Lutwidge v. Gray, Abbott on Merchant Ships, 292.

by collision with a steam-towboat, in consequence of which much of the cargo was damaged by sea-water: [1]

And by Kent, C. J., and his associates of the Supreme Court of New York, in respect of a cargo of flour, the freight of which was insured from New York to Barcelona, and which, in consequence of damage of twenty-seven per cent. by sea-water in going out of the harbor of New York, was relanded and sold there: [2]

And by Parker, C. J., and his associates, in Massachusetts, in case of freight of tobacco, damaged on a voyage from Richmond, Virginia, to Nice, in France: [3]

And by Shaw, C. J., and his associates, of the Supreme Court of the same State, in case of insurance on the freight of flour from New Orleans to Havre, which was damaged in going out of the Mississippi, and was sold at New Orleans.[4]

1447. A question as to the construction of the facts suggests itself in cases of this description, namely, whether, in the consent of the parties to the sale of the article, a reservation is impliedly made of the right to full freight on the part of the master, as is stated by Mr. Justice Story.[5] If a mechanic agrees to build a house, and the parties, after the frame is up, consent to convert it into a stable of one quarter of the value of the house, the contractor is surely not entitled to demand the price of the house. It does not appear why the shipper might not in such case as well say that the master, by consenting to the sale, relinquished all claim to freight. The more obvious and certainly more equitable construction is, that,

If both parties consent to the sale at an intermediate port, each for his own benefit, and, under the circumstances, from choice, without any agreement about freight, freight pro ratâ, and that only, is due.

[1] Jordan *v.* Warren Ins. Co., 1 Story's R. 342.

[2] Griswold *v.* New York Ins. Co., 1 Johns. 205; S. C., 3 Johns. R. 321; and see Herbert *v.* Hallett, 3 Johns. Cas. 93.

[3] Clark *v.* Mass. Fire & Mar. Ins. Co., 2 Pick. R. 104.

[4] M'Gaw *v.* Ocean Ins. Co., 23 Pick. 405.

[5] Jordan *v.* Warren Ins. Co., ut supra.

Thus, in a parallel case, where, under a charter-party for successive passages to successive ports of delivery, the complete performance of the voyage agreed for by charter was prevented by a blockade, after the delivery and shipment of a part of a cargo at the first port of delivery, and the cargo was, thereupon, voluntarily delivered to and accepted by the shipper, it was considered in Maryland to be a case of pro ratâ freight,[1] and accordingly was a partial loss on that subject, the amount earned being less than half of all that was agreed for by the charter.

1448. Suppose, however, that, as is usually the case, neither the shipper nor any supercargo other than the master is present. Is the sale of the cargo or any part of it at an intermediate port by the master, to be presumed to be made exclusively at the request of the shipper, or at that of the ship-owner? Or is it a matter of construction according to the circumstances, on account and for the benefit of whom, and at whose request, whether that of one or the other, or of both, the sale is made? Surely the latter.[2] In such case, therefore,

If the goods sold at an intermediate port might have been carried on without damage to the ship or crew, and delivered at the port of destination in specie, and not so changed by the ordinary action of the elements, or in consequence of the previous sea-damage, as to have lost their identity, though of no value, and accordingly *so that full freight should be due, the sale should be presumed to be made* by the request and *for the benefit of the shipper, and* full freight be allowed, and, therefore, *the underwriters on freight should not be liable for any loss.*

Where there would be danger of disease or spontaneous ignition if the goods sold by the master *at an intermediate port, on account of damage or the quality of the articles, had been carried on, this is ground of presumption of consent and election by the ship-owner that the sale should be made so far as he is concerned,*[3] *without discharging the underwriters on freight* from a claim for

[1] Charleston Ins. & Trust Co. *v.* Corner, 2 Gill, 410.

[2] Whitney *v.* N. Y. Firemens' Ins. Co., 18 Johns. 208.

[3] Ibid.

partial loss, where the damage is occasioned by a peril insured against, and without discharging his claim on the shipper for full freight, where the damage is not by a peril of the seas.

1449. *The same circumstances ought to be a ground of conclusive presumption of the consent of the shipper and the underwriters on either interest, so far as their consent is material;*[1] that is, the master should be considered as acting under their authority; though some of the decisions leave this point in doubt, or have a contrary aspect.[2]

In such case, if the damage to the goods and their decayed condition are owing to the perils insured against, the underwriters ought to be liable for the loss, whether on the goods or on freight, for it cannot be supposed that the master can be subjected to the alternative of putting his own life and those of the seamen into imminent jeopardy, besides the danger of a total loss of the ship and cargo, by prosecuting the voyage with the hazardous goods on board, or of losing freight and insurance by selling them at an intermediate port. If the circumstances justify the sale or jettison of the goods, certainly the rights of no party are thereby forfeited, and the liability of no one is discharged.

1450. *If the goods are delivered to the shipper without demand* and payment *of the* full, or pro ratâ, *freight*, for which the shipper is liable, and for payment of which the goods are subject to a lien, *this does not affect the underwriters* on freight, who do not guaranty the payment, but only that the earning of it shall not be prevented by the perils insured against.

1451. *In case of unavoidable delay* for repairing damage or otherwise, *the master may retain the cargo a reasonable time for the purpose of resuming the voyage, and if he does not so detain it when there is a probability of a delay only for a reasonable time, but delivers it to the shipper, this is not* a loss by the peril which occasions the delay, and accordingly is not *a ground for claiming an average loss on freight.*

[1] Whitney *v.* New York Firemens' Ins. Co., 18 Johns. 208.

[2] See particularly Jordan *v.* Warren Ins. Co., 1 Story's R. 342; Vrierboom *v.* Chapman, 13 Mees. & W. 230.

The period which may be considered as a reasonable delay and detention of the cargo must depend upon the voyage, its length, objects, and dangers; and is plainly a question for the jury in the particular case. It has been stated by judges in different cases, that a detention for ten days,[1] two months,[2] four months,[3] and six months,[4] is not unreasonable. The opinion of a judicial magistrate upon such a question is, however, not of decisive authority in the particular case in which it is given, and still less is it in other cases.

1452. *Whether it is the duty of the master, in case of damage to the cargo, to incur expense in drying it, or otherwise restoring it to a transportable condition?*

It is stated or implied in divers cases, that it is the duty of the master to delay a reasonable time for restoring the cargo, or any part of it, to a transportable condition, if it can be done at a reasonable expense within a reasonable time.

The reasonable time for such detention is variously estimated, according to the particular article, the voyage, and other circumstances.[5] In this case, however, as in that of detention for the purpose of repairing the ship, the question is for the jury in the particular case, and any estimate of the court is not of predominant weight in the case itself, and is of very little in others.

Another inquiry relates to the circumstances under which it is the master's duty to restore the cargo to a condition to be reshipped for the voyage. Suppose the shipper, or his agent, to be present, as in one of the cases above stated,[6] and to refuse to take charge of the damaged goods in any way. This certainly is a ground for putting a construction upon the master's acts very

[1] Griswold *v.* New York Ins. Co., 1 Johns. 205.

[2] Saltus *v.* Ocean Ins Co., 14 Johns. 138; Clark *v.* Mass. Fire & Mar. Ins. Co., 2 Pick. 104.

[3] M'Gaw *v.* Ocean Ins. Co., 23 Pick. 405.

[4] Jordan *v.* Warren Ins. Co., 1 Story's R. 342.

[5] In Moody *v.* Jones, 4 B. & Cr. 394, the English Court of King's Bench estimated six weeks not to be an unreasonable delay at Jamaica, whither the ship put back on a voyage thence to England.

[6] Jordan *v.* Warren Ins. Co., 1 Story's R. 342.

favorable to him and his owners, so far as the shipper and consignee are concerned, in respect to delay and incurring expense for the purpose of restoring the goods.

The cases on which questions arise most frequently, however, are where the master is under the necessity of acting according to his own judgment, in the absence of the shipper and consignee. The first question, then, is, Whether it is the duty of the master, under any circumstances, to incur expense for the purpose of restoring damaged goods? The books, so far as I have been able to make examination, do not state any distinct doctrine on this subject. It is undoubtedly incumbent on the master to take good care of the cargo in the course of the voyage, as, for instance, to give a cargo of fruit proper ventilation,[1] and to sort and repack articles at an intermediate port to prevent the sound from being injured by the damaged,[2] and to take other measures requiring little or no skill or service other than those of the crew. Where other great or very considerable expense, or long or very considerable delay, is requisite in order to restore the cargo, or a part of it, this is a case for which, as Lord Tenterden remarks in respect to the repairing of a vessel, "no general rule can be given. Every case must depend upon its own peculiar circumstances. The conduct proper to be adopted with respect to perishable goods will be improper with respect to a cargo not perishable; one measure may be proper in distant regions, another in the vicinity of the merchant; one in a frequented navigation, another on unfrequented shores."[3] The case must also depend on its involving the whole cargo, or a considerable, or only a small, part. It will also depend upon the market for the particular article at the intermediate port compared with that at the port of destination, and consequently upon the amount of the sacrifice, if any, to be made by a sale at the former instead of the latter.

The predicament in question involves an election between the

[1] Davidson *v.* Gwynne, 12 East, 381.

[2] As was done in case of a cargo of fruit, Humphrey *v.* Union Ins. Co., 3 Mason's R. 429; and a similar process is not unfrequently mentioned in respect of other articles.

[3] Abbott on Shipping, 3d ed. 242.

sale or throwing away of the damaged article, or a restoration of it. The question as to the authority of the master to sell the ship or cargo will come under consideration subsequently, in reference to total loss and abandonment, and what is said there is, mutatis mutandis, applicable here.

Though no definite rule can be given for such indefinitely various cases, we may say with some confidence, that,

So far as the question relative to restoring, or selling, or throwing away goods, arises on account of damage by the perils insured against, the underwriters are bound by whatever proceedings of the master are justifiable in reference to the shipper under a bill of lading in the common form, not containing any peculiar stipulation affecting the case, *except in respect of negligence of the master and mariners.*

The loss, if there is one, may be partial or total, according to the amount and the circumstances of discrimination between the two descriptions of loss; the circumstances, however, which determine the liability or exoneration of the insurers, will be the same in either case. In comparing the liability of the ship-owner to the shipper under the bill of lading, and that of the insurer to the shipper under the policy, I am not aware of its having been intimated, that, under the bill of lading, the negligences of the master and mariners are at the risk of the shipper, as they are held to be at the risk of the underwriters under a policy of insurance. The discrepancy, if there be one, as there certainly seems to be, has the appearance of an anomaly in jurisprudence, since the phrase "perils," or "dangers of the seas," under which the case comes, is the same, or equivalent in both instruments. An apology for a different construction, if a difference is made, may be in the doctrine, that in insurance presumptions are to be made, and doubts are to be construed, in favor of indemnity to the assured, but, on the contrary, stringently upon carriers under bills of lading.

So far as the obligation of the master to incur expense in cases of this description is concerned, it will, no doubt be generally limited to the amount that he can raise by hypothecation of the part of the cargo belonging to the party whose goods are damaged.

1453. *Mere delay of the voyage is not a particular average on freight for wages and provisions:*[1]

As in case of delay for two months by capture.[2]

1454. The amount for which the underwriters are liable, in a partial loss of freight, is computed similarly to a partial loss on the ship. If a part of the original cargo is discharged in the course of the voyage, or lost by inevitable accident, the amount of this interest at risk is thereafter less. *Where the sum insured*, whether in a valued or open policy, *is less than the value* of the interest *at risk* when a partial loss happens, *the underwriter pays the same proportional part of the loss that the sum insured is of the value of the interest then at risk;* but if the sum insured is equal to the value at risk, he pays the whole of the loss.

1455. *Whether, if the freight of goods jettisoned is valued* by the policy at a rate *higher than* that at which *it is contributed for* at the port of destination, *the underwriters are liable for particular average on the freight according to the valuation?*

Insurance being on freight valued at $30,000, teas were jettisoned, of which the freight was by the bills of lading $4,950, but according to the valuation the freight of that proportion of the cargo was $11,606; the contribution by freight was $1,658. According to the doctrine already stated,[3] that the assured may recover for the loss of the jettisoned article against the underwriters without first claiming contribution from the other interests, in the same manner as if the article had been lost by the operation of the perils of the seas, without any voluntary agency of the master and crew, the amount recoverable is the $11,606. Accordingly, under the insurance in question, made in Philadelphia, the underwriters con-

[1] Ins. Co. of North America *v.* Jones, 2 Binn. 547.

[2] Mayo *v.* Maine Fire & Mar. Ins. Co., 4 Mass. R. 374. It was suggested by Mr. Justice (afterwards Chancellor) Kent, in an early case, Herbert *v.* Hallett, 3 Johns. Cas. 93 (1802,) that a delay might be particular average on freight. And a like suggestion was made by Mr. Justice Livingston, in Henshaw *v.* Mar. Ins. Co., 2 Caines, 274; and see M'Bride *v.* Mar. Ins. Co., 7 Johns. 431. But this doctrine does not appear to have ever been acted upon.

[3] Supra, c. 15, s. 7.

tended that the loss on freight was only the amount of contribution in general average by that interest, namely, $1,658. In a particular average, according to the valuation, the loss was $11,606, from which deduct (4,950 less 1,658) $3,292, and the net loss is $8,314; a result which gives a very wide difference between the two modes of adjustment.

The construction maintained by the underwriters in Philadelphia was put in part upon the ground of the doctrine prevalent in Pennsylvania, that the insured proprietor of the jettisoned subject is bound to claim contribution from the other contributory interests before coming upon his underwriters. Admitting this doctrine, however, it does not seem to decide the question, for supposing the assured to be satisfied to the amount of the value of the article as estimated in the adjustment in general average, it does not appear to be, by any means, a necessary consequence, that he is satisfied for its value in respect to the underwriters who insure it at a higher valuation. That any estimate of, or compensation for, the value of an insured subject between the assured and a third party, is not conclusive, or even relevant, as between him and his underwriters, appears in cases of insurance by divers policies upon the same subject at divers valuations,[1] and in other analogous cases. Admitting, then, not only that demand must be made in the first instance upon others to contribute, but that the assured must rely absolutely upon them, without any resort to the underwriters, so far as their liability to contribute goes, we seem not to have made a step towards answering the present inquiry.

Another reason against adjustment or particular average according to the valuation was, that the freight of the jettisoned goods was not lost, but was in fact earned and paid at the rate agreed by the bill of lading, on the arrival of the vessel at the port of destination. This position covers also the case of the jettisoned goods, and assumes that they have arrived at the port of destination, and there been sold and paid for at the market price, and that the contribution made by the jettisoned goods and the freight of them is only so much expense incurred to put the goods into

[1] Supra, No. 1191.

the destined market and save the freight, to the same effect as an expense of the same amount, in successfully prosecuting a claim for the release of a captured ship, cargo, and freight, and to be contributed for proportionally by each of those interests.

In this position the real question is plainly presented, namely, whether the jettisoned goods and the freight of them have been lost by the perils insured against; or have not been lost, but expenses have been incurred for the purpose of saving them from being lost by those perils.

If ship, freight, and cargo belong to the same owner uninsured, no such question can be made. In respect to him, the jettisoned goods and freight of them have been literally, and unquestionably, not merely in danger of being lost, but actually lost, by the perils of the seas; and to describe the case in reference to him by any phraseology implying the contrary would be simply a fallacy, if not an absurdity. And if the goods and the freight of them have been really lost to the UNINSURED proprietor, it savors strongly of fallacy or solecism to say that, in respect of the same proprietor INSURED, they are not lost.

The third reason was, that the sacrifice, having been a general average in respect to the other contributing parties, cannot be treated as a particular average as between the assured and his insurers. But why it cannot be so does not appear. The valuation is an agreement by the assured and his underwriters, that as between them the goods or freight shall be considered as of the agreed value, which is a stipulation that the valuation shall override all other estimates or assumed values in respect to any other party; and it does not appear that any different estimate or assumption of value, in general or particular average, in relation to others, is of the slightest weight, except so far as it results in more or less satisfaction for the loss, as estimated on the basis of the valuation.

It was decided by three eminent jurists in a case submitted to them as arbitrators, that jettisoned goods, being contributed for in general average at a value less than the valuation or invoice value in the policy, are to be paid for by the underwriters at the value

in the policy, and the contribution received in general average is to be credited to the underwriters.[1]

Suppose the case to be reversed, and the jettisoned freight by the bills of lading to have been $11,606, and by the valuation $4,950. In that case, assuming the amount of loss and that of the aggregate contributory interests to have been the same, and the freight to have contributed on its gross amount, the contribution by the whole freight would have been about $3,900, instead of $1,658, and the underwriters, by the rule which I understand to be most generally adopted, would have been liable only for the latter amount, though by the New York rule to the former.[2] The rule which limits the liability of the insurers to reimburse contributions to the amount of the value according to the policy, seems, as already remarked in the place just referred to, to be the better, since it makes the liability more nearly correspond to the amount of the premium, which is an important reason in favor of any doctrine.

Whether, in the case under consideration, the adjustment of the loss with the underwriters is made according to the valuation in the policy, or according to that upon which contribution in general average is made, it will be subject to irregularities in its operation upon the rights and liabilities of the parties to the policy considered as a contract of indemnity, which inconvenience can only be remedied, if at all, by express provisions introduced into the policy. As the instrument stands, the reasons above stated seem to me to lead to the conclusion that

The loss of freight by jettison is to be adjusted between the assured on freight and his underwriters, upon the basis of the value at which the freight is insured.

[1] So awarded by Professor Simon Greenleaf, Hon Franklin Dexter, and Professor Theophilus Parsons, referees, 1849. They adopted the rule that jettisoned goods were to be paid for by the underwriters in particular average. See also Thornton *v.* United States Ins. Co., 3 Fairfield's (Maine) R. 150.

[2] See supra, p. 160, No. 1410.

SECTION IV. ON GOODS, PROFITS, AND COMMISSIONS.

1456. The value in the policy is the basis of an adjustment of a partial loss.[1] In case of the destruction of a part of the goods, the underwriter pays their value according to the invoice or valuation; and the rule is the same in case of the loss not exceeding half of the value of the goods, by sea-damage or otherwise, though they remain in bulk.

1457. *Excepting in case of a salvage loss*, to be mentioned subsequently, *the underwriter has nothing to do with the state of the market* in adjusting a particular average on goods, the amount of which will be the same, whether the goods come to a losing or gaining market.[2] The insurer does not engage to make good all which the assured has failed of gaining in consequence of the perils insured against, but only what he has lost of the value insured, that is, the invoice price or valuation.[3]

1458. *Losses may be adjusted on the same ship or goods on the basis of different values.*

The sum of $4,000 was insured on a ship and cargo from Hamburg to New York, valued at that sum. In a subsequent policy the sum of $4,000 more was insured on the same ship and cargo, valued at $6,000. A partial loss having taken place, a question occurred as to the amount for which the underwriters on the second policy were liable. Mr. Justice Washington held that they were liable for a partial loss on $2,000, the excess of the value of the property as valued in this policy over its value as valued in the first policy.[4]

1459. A particular average is usually adjusted at the port of delivery. *If the loss is* occasioned by *the entire destruction of a part of the goods* insured, *the insurer is liable to pay for them*, as far as they are covered by the policy, *at the price at which they*

[1] Waldron *v.* Coome, 3 Taunt. 162; Goldsmith *v.* Gillies, 4 Taunt. 803.

[2] Hardy *v.* Innes, 6 Moore, 574.

[3] See supra, c. 14.

[4] Murray *v.* Ins. Co. of Pennsylvania, 2 Wash. 186.

are insured; and such a loss is easily adjusted, there being no difference of opinion or practice respecting it.[1]

1460. *If the* particular *average is occasioned by damage to the goods,* whereby their value is diminished, though they remain in quantity, there seems to be but one, and that a very plain way of estimating the degree of damage. *If* in consequence of the damage *the goods sell for only half of what the same goods would have sold for if sound,* the direct loss by the damage is fifty per cent., and *the insurer must pay,* not half of the price of sound goods at that market, but *half of the value at which he insured the goods; and so proportionably in other cases of particular average.* This is too obvious to admit of any doubt.[2]

1461. But a question still occurs, which has been the subject of much discussion, namely,

Whether the underwriter must indemnify the assured for his loss by paying full freight on damaged goods?

Magens thinks that the loss by payment of full freight is to be included in the adjustment. He supposes the goods to be damaged fifty per cent. in value, without any diminution of their bulk, and accordingly that the full freight is due at the port of destination.[3] Suppose that the goods, if they had arrived sound, would have sold for $1,000, but arriving in a damaged state, though undiminished in quantity, they are sold for $500, the freight being $100. By the damage to the goods, the assured has lost $50 in the freight, since he pays $100 to place the value of $500 in the market; whereas, had the goods arrived without damage, he would at the same expense, have placed the value of $1,000 in the same market. Magens thinks that this loss ought to fall upon the insurers.

A similar question arises, where, the ship being disabled by the perils insured against in the policy on the goods, the master con-

[1] Supra, No. 1458.

[2] Lewis *v.* Rucker, 2 Burr. 1167; Johnson *v.* Sheddon, 2 East, 581; Hurry *v.* Royal Exch. Ass. Co., 3 B. & P. 308; Usher *v.* Noble, 12 East, 639; Dick *v.* Allen, Park, 167; Lawrence *v.* New York Ins. Co., 3 Johns. Cas. 217.

[3] Vol. I. s. 38, p. 39, and page 214, case xvi.

tracts for their transshipment and transportation to the port of original destination by another vessel, at a freight from the place of transshipment exceeding that agreed upon in the original bill of lading or charter-party. The question then occurs, whether the underwriters on the goods are answerable for this excess of freight as a particular average. On this question, Mr. Chancellor Walworth, giving his opinion in the Court of Errors in New York, says: "The underwriter on the cargo is chargeable with the extra expense."[1] Mr. Benecke[2] cites the French Commercial Code, the Ordinances of Amsterdam and Sweden, and the practice at Hamburg, for the same doctrine, and the Chancellor, in the above case, refers to Mr. Benecke's work.

The question in either of these cases, as between the underwriters on goods and the assured, does not appear to have been distinctly presented to any court in England or the United States.

In the adjustment of a salvage loss and of a technical total loss, *the underwriters on the goods are made, in effect, liable for loss on freight;* that is, the underwriter is chargeable with the whole amount insured by him, and credited with the salvage subject to the payment of freight. Mr. Stevens remarks,[3] that *this is the only case where the insurer of goods "ought to pay the freight,* because it is for his interest to do so." But this doctrine can only hold to the extent of the salvage; if the freight exceeds this, the underwriter is not liable for the excess; he is liable for the freight only incidentally and indirectly, as a deduction from the salvage.

1462. *Whether, if the ship becomes innavigable in consequence of the perils insured against, and the cargo* is transshipped *at a higher freight than that originally agreed upon, the underwriters upon the cargo are liable for this loss on freight?*

In such a case it is not the duty of the master, and he is under no obligation, as representing his owners, to transship at the charge of his owners, but it is his duty, as representing the shipper in the

[1] American Ins. Co. *v.* Center, 4 Wend. 45.

[2] London ed. 1824, p. 448; Benecke & Stevens by Phil. 363.

[3] Page 84, n.; Benecke & Stevens by Phil. 286.

emergency, to transship, if it is plainly for the interest of the shipper, in which case the latter is liable for the extra freight.[1] Still the question arises whether this expense is a direct loss upon the cargo, for which the underwriters upon it against perils of the sea are liable, or one of the indirect, remote, incidental or consequential losses by those perils not covered by such an insurance in the usual form of policy. The real loss, if any, is the enhancement of the expense of transportation. There may be no loss, since the cargo may be at as good a market at the intermediate port as at that of destination. But the case supposes a loss to the amount of the excess of freight over that originally contracted for. This was deliberately held in 1810, by Kent, C. J., and his associates Thompson, Spencer, Van Ness, and Yates of the Supreme Court of New York, to be a particular average on the cargo,[2] which doctrine was admitted in 1838 by Denman, C. J., and Patterson, J., Williams, J., and Coleridge J., of the Queen's Bench in England,[3] partly on the authority of the New York decision. The same doctrine has been subsequently recognized in 1851, by Jervis, C. J., Cresswell, J., Williams, J., and Talfourd, J., of the English Common Pleas.[4] Kent, C. J., giving the opinion of the court in New York, cites foreign jurists and marine ordinances.[5]

The law of Oleron puts this extra freight upon the footing of salvage of the cargo, and Cleirac, in his comment, considers it to be general average; Emerigon regarding it as salvage of the cargo, is of opinion that the underwriters are liable for it. In a

[1] Shipton *v.* Thornton, 9 Ad. & El. 314; Mumford *v.* Commercial Ins. Co., 5 Johns. R. 262; Searle *v.* Scovill, 4 Johns. Ch. R. 218; 3 Kent's Com., 3d ed. p. 212; Rosetto *v.* Gurney, 7 Eng. Law & Eq. R. (Press of Little, Brown & Co.) 461; S. C., 20 Eng. Law J. R. (N. S.) Com. Pl. 257; S. C., 15 Eng. Jur. 1157.

[2] Mumford *v.* Commercial Ins. Co., 5 Johns. 262; and see also Scovill *v.* Searle, 4 Johns. Ch. R. 213; 3 Kent's Com., 3d ed. 212.

[3] Shipton *v.* Thornton, 9 Ad. & El. 314.

[4] Rosetto *v.* Gurney, 7 Eng. Law & Eq. R. (Press of Little, Brown & Co.) 461; S. C., 20 Eng. Law J. R. (N. S.) Com. Pl. 257; 15 Eng. Jur. 1157.

[5] Pothier, Assurance, n. 52; Cleirac's Comment, n. 4, on art. 4 of Judgmens d'Oleron; Emerigon, c. 12, s. 16, tom. 1, p. 432; in Meredith's translation, ed. 1850, p. 344, et seq.

case of capture and condemnation in France, and reversal of the sentence on appeal, and restoration of the proceeds of the ship and cargo, which had been sold pending the proceedings, the court of appeals in decreeing restoration, allowed the vessel freight pro rata, according to the law in France in a similar case. The assured on the goods claimed of his underwriters this loss of freight, to which he would not have been subject by the maritime law of England. But Lord Mansfield and his associates held that they were not liable, and he remarked in giving the judgment that "the underwriters have nothing to do with freight." [1] In this case the extra freight was not the expense of salvage, and so it does not come within the principle on which Cleirac and Emerigon put the liability of underwriters.

Lord Mansfield's remark, that underwriters on the cargo have nothing to do with freight, is doubtless true in general. The cases of salvage loss and total loss with salvage are an exception, on the ground that the underwriters by the rules of adjustment and of abandonment, become owners, and, as such, take the salvage subject to the lien for freight. In the case of extra freight by transshipment now in question, as a total loss of the goods or adjustment as for a salvage loss is not supposed, the only ground on which the liability of underwriters for the excess of freight over the ordinary rate or that stipulated by the bills of lading for the voyage insured, seems to be the one already mentioned,[2] namely, that the expense is incurred in order to prevent a total loss of the goods for which the underwriters would be liable if the voyage should be broken up by the peril in consequence of which the transshipment is made. The loss is thus in the nature of a sacrifice to save the property or prevent a greater loss upon it.

The question is not, however, free from difficulty under this principle. Take the judgment of Kent, C. J., and his associates above cited, which is substantially the whole of the modern authority on the subject, since the subsequent cases supply merely incidental references to it or recognitions of it, without any studious revision or reinvestigation, or any new actual application of it. In

[1] Baillie *v.* Modigliani, Marsh. Ins. 728. [2] Supra, No. 1138.

that case the loss arose from the circumstance of the vessel being carried into the British port of Halifax, where, on the liberation of the ship and the offer of the master to carry on the cargo to New York, the port of destination, which could not be then carried on because it had not been restored, full freight was allowed to the original ship, whereas by the French law in like cases only freight pro rata would have been allowed. The excess of freight seems, therefore, to be attributable quite as much to the English and American rule as distinguished from that on the continent of Europe in like case, as to the perils of the sea. Still, however, as the voyage by the original ship had been broken up, if we suppose the master not to be obliged to wait for an adjudication upon the claim for the cargo, or, as representing his owners, to transship it after it was restored, the case is one of expense of transshipment to prevent a total loss and the abandonment of the cargo at the intermediate port. Accordingly there seems to be some reason in favor of the conclusion that

Where, in consequence of a peril insured against the voyage is broken up so that a total loss will ensue on the cargo unless extra freight is incurred by transshipment, the underwriters on the cargo are liable for the excess over and above the freight for the voyage insured.[1]

1463. The rule in respect to port charges, wharfage duties, &c., will be the same as in respect of freight. *In case of* a salvage *loss*, that is, in one *where the insured damaged goods are sold at an intermediate port for the benefit of the assured and his underwriter*, the adjustment is precisely the same in respect of those goods as it is in a total loss. The voyage is broken up in respect of those goods, and *the underwriter is liable to pay* to the assured *the amount at which they are insured*, whether under an open or valued policy, *and the* salvage; that is, the *net proceeds of the goods, subject to all necessary charges, are to be credited to the underwriter.*

1464. *A particular average on goods delivered at the port of*

[1] See infra, No. 1777, as to a similar question under the exception of particular average.

destination is adjusted on the gross proceeds or market value there, and is the same proportion of the value of the goods in the policy, whether open or valued, as the deficiency of the gross market value of the damaged goods compared to those of the sound, is of the gross market value of the latter. That is to say, if the invoice price of the damaged goods in an open policy, or their value in a valued policy, is $1,000, and they are sold for $600 at the port of destination, and the same goods sound would have been worth there $1,200 dollars, the loss is one half, or $500.

It will readily appear that the calculation upon the net proceeds is not correct. Suppose the invoice value of goods insured, in an open policy, to be $500, of which the freight and other charges are $200. If the goods had arrived sound, the gross sales would have been $1,000, but being damaged they sell for only half of that sum, and yet the freight and other charges in question are supposed to be the same. According to Magens's rule for an adjustment on the net proceeds,[1] as it is understood by Mr. Justice Lawrence, from a statement of a loss made to the court,[2] the insurer would be liable to pay five eighths of $500; since, by this mode of computation, the amount of sales of the sound goods would be $800, of the damaged goods $300, and the difference of these compared with the gross sales of the sound goods gives the rate of damage.

Mr. Justice Lawrence shows the incorrectness of this rule very clearly, since, the deductions remaining equal, the proportional difference of the proceeds of sound and damaged goods will be greater, if the goods come to a losing market; or, in other words, the particular average for the same damage will be thereby increased.[3] This shows, conclusively, that the mode of computation is erroneous.

The real question here is, whether the underwriter shall bear the loss by the enhancement of freight and duties and other charges, if there be such enhancement on damaged goods compared with their value at the port of destination. We have seen that there is

[1] Vol. I. s. 38, p. 39, and case xvi. p. 218.

[2] 2 East, 584.

[3] Ibid.

such an enhancement of freight, since the damaged goods arriving in specie pay the same freight as sound, and consequently, if the amount of their gross proceeds is but half of that of sound, there is an enhancement of fifty per cent. on the freight compared to their value; in other words, it costs twice the amount of freight to put the same value into the market. A similar enhancement may be caused in duties, wharfage, drayage, and storage. It is well settled by usage as recognized in jurisprudence, that the underwriter is not to be affected by such enhancements. The enhancement by reason of the same duties being payable on damaged goods as sound, if that were the regulation, would be excluded on principle, as being an indirect and remote consequence of the peril whereby the damage was caused. The other enhancements of freight, drayage, storage, are more direct consequences of the perils of the seas whereby the damage was occasioned, more especially that by payment of full freight. They are all, however equally excluded in practice and in jurisprudence, by making the adjustment in the mode above stated.[1]

1465. The expense of an auction sale made merely for the purpose of adjusting the average constitutes a part of the loss, and is to be deducted from the proceeds in making the adjustment; otherwise, if the sale is made for the purpose of disposing of the goods, and not merely for that of making the adjustment.

The court in New York said, that the expenses of a "sale at auction, to ascertain the injury the cargo had received, and limited to such parts as were damaged, would be a reasonable charge." It should be allowed, however, only in case of its being necessary in order to adjust the loss.[2] Mr. Stevens puts this charge upon the same grounds as that of freight, duties, and other charges.[3] If a pro forma sale at auction is made for the purpose merely of adjusting the loss, the expense is very similar to that of a survey

[1] See Johnson *v.* Sheddon, 2 East, 581; Hurry *v.* Royal Exch. Ass. Co., 3 B. & P. 308; Lawrence *v.* New York Ins. Co., 3 Johns. Cas. 217, in which last case the question is more particularly considered.

[2] Muir *v.* United Ins. Co., 1 Caines, 54.

[3] Part. Average, s. 3, a. 1, p. 101, n.; Benecke & Stevens by Phil. 333.

and appraisement for the same purpose, and seems to be a part of the loss. But if the goods are actually sold, or intended to be so, and are wholly or in part bought in by the assured, merely because he does not think the price offered sufficient, there does not appear to be any reason for considering the expense of the sale as a part of the loss. The assured would have been at this expense had the goods all arrived sound.

1466. *Where different articles are damaged, the loss ought to be adjusted on each separately;* since, otherwise, the adjustment will be erroneous, unless the rate of increase or diminution of the market value at the place of adjustment is the same on all, or, which would almost never happen, unless the different rates of increase and diminution of the value of different articles exactly countervail each other in the computation.[1]

In a case decided in Connecticut, relating to a policy upon a shipment of horses and oxen, the judges expressed an opinion, that, if they were valued together at one sum, a particular average must be adjusted on the whole, but otherwise if valued separately.[2] But Mr. Benecke says it is immaterial in this respect whether the underwriter agrees to pay average on the different species of articles separately or together; and a valuation of the articles in a mass only affects this question as an agreement to pay average on the articles together. It has no reference to the mode of computing the loss. If, for instance, the underwriters are not liable for an average unless it amounts to five per cent. on the whole ship-

[1] Stevens, tit. Part. Average, s. 3, a. 7, p. 143; Benecke, London ed. 1824, p. 441; Benecke & Stevens by Phil. 1834, p. 355. The following examples will show the incorrectness of computing losses on different articles together:—

	Invoice value.	*Sales of sound.*	*Sales, being damaged.*	*Rate per cent. of loss.*	*Amount of loss.*	
Coffee,	$250	$500	$200	$60	$150	375
Cotton,	300	100	25	75	225	
Coffee, Cotton,	550	600	225	62.50		$343.75

Thus the loss on both articles, being computed separately, is $375; but computed on both together, is $343.75.

[2] Ocean Ins. Co. *v.* Carrington, 3 Conn. R. 357.

ment, including both oxen and horses, the damage on each is estimated, and, if their sum amounts to five per cent. on the shipment, the insurers are liable. It does not appear that the valuation has any bearing on this question, or that there is any difference in this respect between a valued and an open policy.

1467. *A particular average is usually adjusted at the port of destination*, and when it is adjusted there, the mode of adjustment is always as above stated. But *if it is adjusted at some other port, the mode of adjustment depends on the reasons for making it at any other than the port of destination.* The assured may put an end to the risk whenever he pleases, by paying full freight. If he receives the goods at an intermediate port, on account of a favorable market there, an average loss is adjusted upon the same principles as at the port of destination. And it does not appear that he has not a right to such an adjustment, if he chooses it, for whatever reason the goods are received by him and withdrawn from the risks insured against, short of the port of destination.[1]

1468. Insurance against perils of the seas does not cover losses by the quality of the subject, nor ordinary loss and deterioration, as we have already seen in respect of articles subject to leakage and breakage.[2] Accordingly,

In estimating a particular average on any article subject to loss by ordinary leakage, breakage, or other deterioration, the customary rate per centum of deduction is first made from the invoice value, for such cause, and the particular average is estimated on the remainder.[3]

1469. *Expense incurred on the cargo, or any part of it, in direct consequence of a peril insured against, is particular average on the same.*

A vessel being wrecked, the crew escaped, having saved some coin and gold dust, and landed on the Mosquito shore, in Hondu-

[1] Mr. Stevens says, a particular average cannot be adjusted in the usual mode, short of the port of destination, (tit. Part. Average, s. 1, p. 80; Benecke & Stevens by Phil. 285); but it does not appear why it may not.

[2] Supra, Vol. I. pp. 619, 620, No. 1090, 1091.

[3] The value of such articles, whether contributed for or contributing in general average, is estimated in like manner.

ras. Not being able to navigate along the coast in the boat, they landed and abandoned their boat, and, being on a desert part of the coast, they buried the coin, and, taking the gold dust about their persons, proceeded along the coast, the master intending to come back, as soon as he could obtain assistance, and take away the coin which had been buried on the beach. They were subject to frequent extortion from the Indians for assistance in proceeding. They had not long proceeded, before two of the men gave out, and said they would go no further, and they were left behind by the others. At Corn Island, the first convenient place for the purpose, the master procured a boat and went back to recover the coin which had been concealed; but he found that it had been taken away, and supposed it to have been stolen by the two men who were left behind. The master incurred further expense also, in attempting to recover the coin from the two seamen; in which he did not succeed. He returned to the United States with a part of the property saved from the wreck. The assured claimed the following charges in the master's account against the underwriters on the cargo.

For cash paid sundry natives for transporting, &c., until arrival at Corn Island, $710; amount of charter of schooner Sea-Gull, to proceed in quest of specie, &c., buried in sand, $300; J. R. for proceeding to Pearl Key Lagoon in quest of same, $150; board in Corn Island, $49.50; passage of master and crew from Corn Island to St. Juan de Nicaragua, $60; services of the crew in transporting the gold from the Mosquito shore to St. Juan de Nicaragua, $355.24; the captain's expenses in St. Juan, $16; captain's passage from St. Juan to New York, $120.

The case was referred to a despacheur, with a direction of the court, "That all losses, charges, and expenses, necessarily, prudently, or reasonably incurred in respect to the property saved, from the time of the shipwreck to the time when the property could be directly transported to its ultimate destination, are proper charges upon the property so transported, and ought to be borne by the insurers. That the sums paid for transporting the master and crew, for their support, board, lodging, and passage, during the same period, are also proper charges upon the property, and

ought to be borne by the underwriters. That the master and seamen, also, after becoming disconnected from the vessel by shipwreck, are entitled to compensation as laborers, or salvors, for their services in transporting and saving the cargo; to be allowed according to the nature of the services. That the sums for going after the dollars were properly apportioned on the dollars alone." [1]

1470. *Where expense is incurred on divers articles in common, the adjustment is made by an average on the respective articles according to their value.*

1471. *Under a continuing policy attaching to different parcels of goods successively* and indiscriminately, *an adjustment* of a loss *is made upon all the goods at risk* under the policy *at the time of the loss.*

The sum of £12,000 being insured for twelve months on goods on board of thirty boats, backwards and forwards, between London, Birmingham, &c., and damage having happened to the goods on board of one of the boats in consequence of its sinking, the question was made whether this loss was to be adjusted by estimating what percentage the damage was upon all the goods carried in all the boats during the year, or upon the goods at risk in all the boats at the time of the loss. It was held that the loss must be adjusted in the latter mode. That is, if there were £24,000 worth of goods then at risk, the underwriters were liable for fifty per cent. of the loss.[2]

1472. *Where no particular mode of proving damage to goods is stipulated for, the assured is not subject by usage to any condition as to a survey of the damaged goods.*

In a suit in New York, on a claim for particular average by sea-damage, the underwriters proposed to prove that, according to the usage of New York, the production of the report of a survey of the cargo by the port-wardens, before it is discharged from the vessel, is an essential part of the preliminary proof. Mr. Justice Oakley, in giving the opinion of the court, said: "An attempt is made to introduce into the contract a condition that the insurers

[1] Bridge *v.* Niagara Ins. Co., 1 Hall's City of New York Sup. Ct. R. 423.

[2] Crowley *v.* Cohen, 3 B. & Ad. 478.

shall not be answerable, unless such damage is ascertained in a particular mode, and that too by third persons over whom the assured has no control. Such a condition would, in my judgment, vary the legal obligations of the insurers as ascertained by the plain language of the policy." It was accordingly held, that such a document could not, by the usage, be made an essential part of the preliminary proof, and the production of it was not a condition on which the claim to such a loss depended.[1]

1473. *According to the English doctrine*, that, in order to constitute an insurable interest in profits, it must appear that, in the state of the market at the time, there would have been a profit,[2] *it seems to follow that, under an open policy upon profits, the assured must*, in order to recover for a particular average, *prove what amount of profit would have accrued* on the goods had they arrived sound.

By the same doctrine, if the profits are valued, and a part of the goods are lost or damaged, *the assured must prove what proportion of the profits*, that would have accrued on the goods having arrived sound, *he has lost* by reason of their being damaged, or a part of them lost, by the perils insured against, *according to the state of the market, and he will* be entitled to *recover a corresponding proportion of the amount at which the profits are valued.*

Such, as I infer, would be the mode of adjustment, though no adjustments of particular average under that doctrine have come to my knowledge.

1474. *In the United States* it is frequently agreed by the parties, that the adjustment of the loss on profits or commissions shall correspond to that on the goods on which the profits or commissions are to accrue. But without any such express agreement, *the adjustment of a particular average on profits or commissions on goods damaged, or a part of which are lost*, by the perils against which the profits or commissions are insured, *is at the same rate per centum as that on the goods.*[3]

[1] Rankin *v.* American Ins. Co., 1 Hall's City of New York Sup. Ct. R. 619.

[2] See supra, Vol. I. No. 317.

[3] See Loomis *v.* Shaw, 2 Johns. Cas. 36; Fosdick *v.* Norwich Ins. Co., 3 Day, 108; Mumford *v.* Hallett, 1 Johns. 433; Patapsco Ins. Co. *v.* Coulter, 3

Insurance being made upon "supposed profits on a cargo, in the ship Bengal, on a voyage from Canton to Philadelphia, free from average and without benefit of salvage," valued at $20,000, a part of the goods were damaged on the voyage, and, on this account, some of them thrown away at the Isle of France, and others sold there and the proceeds invested in other goods, and on arrival at Philadelphia it was found that other parts of the cargo shipped at Canton had also been damaged before touching at the Isle of France, in consequence of all which damage, though the sound goods sold at a profit in Philadelphia, there was on the whole cargo, taken together, a loss. Mr. Chief Justice Tilghman, giving the opinion of the court, said: "An insurance on profits partakes of the nature of an insurance on the goods on which the profits are to arise. The profits are valued at $20,000. Yet it cannot be considered as an undertaking that the assured shall, at all events, make profits to that amount. If the cargo had arrived in good condition at Philadelphia, the underwriters would have been discharged, though it had sold at a loss."[1] This was accordingly considered a partial loss on the profits, and so not recoverable under the policy.

1475. *Where the loss on goods is by expenditure, and not by damage to them, it is not a loss on profits*, unless it is specifically so agreed in the policy, since to hold it to be such a loss would be to hold that a policy on profits is so far a guaranty of profits on expenditures, for the reimbursement of which insurers of the goods are liable.

SECTION V. THE AMOUNT PAYABLE. SALVAGE LOSS.

1475 a. *The greatest amount payable for a loss under a policy may be limited by its provisions, or by the charter or constitution of the company by which it is made;*

Peters's Sup. Ct. R. 222; Alsop *v.* Commercial Ins. Co., 1 Sumner's R. 451; Natchez Ins. Co. *v.* Buckner, 4 Howard's (Miss.) R. 63.

[1] Waln *v.* Thompson, 9 Serg. & Rawle, 115.

As in case of a provision in the policy of a marine company that its "capital stock and funds shall alone be liable, and that no proprietor shall be liable beyond the amount of his share of the capital stock:"[1]

Or where a policy contains the clause relative to prior insurance or other insurance:[2]

Or where, as is usually the case, the charter of the company in accordance with which the policy is made, provides that the capital stock only shall be liable for losses:

Or where the amount, or the proportion of the value of any subject which a company is authorized to underwrite, is limited by the charter, and the assured has notice of the limitation, and directors or other individual members have not, by any act or neglect, rendered themselves personally liable.[3]

So underwriters sometimes provide the kind of indemnity to be made by stipulating for the right to repair the damage to the insured building or vessel, instead of paying to the assured the amount of the loss.[4]

1476. *The underwriter is liable for loss only on the amount* or proportion *insured by him* on a ship or other subject, whether the remainder, if any, is insured by other underwriters, or is at the risk of the owner.

1477. *The contract of the underwriter, in case of the destruction of the whole or a certain proportion of the subject by the perils insured against, is not to make good the actual loss on the whole subject, if the whole is insured, or on the part of it insured, but to indemnify the assured according to the value at which it is wholly or partly insured by the policy, whether this is above or under the actual value.*

The value of the divers subjects of insurance, and divers interests in them, as between the parties to open and valued poli-

[1] Hallett *v.* Dowdall, 9 Eng. Law & Eq. R. (Press of Little, Brown & Co.) 348; S. C., 21 Eng. Law J. R. (N. S.) Q. B. 98.

[2] See supra, No. 1254, et seq.

[3] Williams *v.* New England Mut. Fire Ins. Co., 31 Maine (1 Redd.) R 219.

[4] Infra, No. 1481

cies, has been already treated of.[1] If the subject is wholly destroyed, the insurer is liable for its whole value in the policy, and also, not unfrequently, for expenses incidental to the loss,[2] in addition it may be, to previous partial losses.[3]

If a certain part, being a definite proportion of the value of the subject, has been destroyed by the perils insured against, as one article out of ten similar ones, the underwriter is liable for a tenth part of the value at which all the articles were insured in the policy, besides incidental charges.

In like manner, a definite proportion of the freight may be lost, by the destruction of a part of the cargo, in which case a corresponding part of the value of the whole freight in the policy is the amount of loss, so far as the freight is insured, at whatever value it is insured.

The same rule will hold in respect to profits and commissions, where the adjustment follows that of loss on the goods, as it usually does on commissions, and very frequently, at least, if not generally, by agreement, in the United States, on profits.

There is no such computation on a loss of a fractional part of a ship in respect to a destruction of a part of which the particular average can be estimated only by the expense of the repairs, and will accordingly follow the rule about to be stated relative to such a loss.

1478. *Where divers articles are indiscriminately at risk under a policy at the time of the loss, the underwriter pays the same proportion of the loss that the amount insured by him bears to that of all the articles at risk.*[4]

1479. *In case of particular average for expenses* incurred on the ship or other subject, *the underwriter is liable for the whole* amount incurred by reason of the perils insured against, *so far as he insures* the subject, *whether at a high or low value*, not exceeding the amount insured for any one loss, besides expenses, though in general average, as we have seen, he does not, by the practice in some ports, pay contributions assessed on the insured

[1] Supra, c. 14.

[2] See supra, No. 1268.

[3] Supra, No. 1267.

[4] Crowley *v.* Cohen, 3 B. & Ad. 478.

subject at a higher value than that at which it is insured in the policy; whereas in others he reimburses the full amount of the assessment on the subject, so far as he insures it, though the subject is assessed at a higher value than that at which it is insured in the policy.[1]

Thus, if the ship is valued at the amount insured, the insurer pays in particular average the whole expense of repairs, though it is a low valuation, and he pays no more where the valuation is high.

The same rule holds in respect of other expenses coming within particular average on any subject.

1480. Under an adjustment of the loss on damaged goods sold at an intermediate port, being a part only of the goods insured by the policy, the underwriters are liable, as we have seen,[2] for the whole loss, enhanced by freight, duties, wharfage, and storage.

This is a SALVAGE LOSS, *so denominated because the insurer*, as in a total loss, *pays for the whole value of the subject, and is entitled to the salvage*, or net proceeds of the sale of it, after the deduction of all expenses.[3]

In a salvage loss there is no transfer of the salvage to the underwriters, as by abandonment in total loss. The salvage belongs to the assured, and he credits the underwriter with the amount of it in the adjustment.

The underwriter is liable for such an adjustment of a particular average only in cases where the sale at an intermediate port is obviously expedient, and made on account of damage by the perils insured against, where, if the subject were forwarded to the port of destination, it would be greatly diminished in value, or be of no value, on arriving there.

Insurance being on a cargo of the invoice value of $12,041, including premium, from New York to Cuba and back, the vessel, in the course of the voyage, was driven by stress of weather into Port Republican, in the island of St. Domingo, where the cargo was forcibly seized, and goods given in exchange worth, at that

[1] See supra, No. 1410.

[2] Supra, No. 1461.

[3] See Stevens, p. 79, and Benecke & Stevens by Phil. 284.

place, $10,162, which were sold in New York on the return of the vessel, after deducting freight ($748) and duties, for $8,667. The question was, whether the particular average was to be adjusted by deducting $10,162, the value of the return cargo at Port Republican, from the invoice value, or the net sales of it at New York after deducting freight, namely, $8,667; or the sales at the latter place without deducting freight, namely, $9,415. The court decided in favor of the first mode, making the loss $1,879.[1]

This was neither according to the ordinary mode of adjustment, nor one as of a salvage loss. By the ordinary mode the adjustment should have been by taking the outward cargo at its value at Port Republican, and ascertaining the deficiency of the goods forced upon the master in exchange, and the loss would have been the same proportional part of $12,041 that such deficiency was of the market value at Port Republican. By an adjustment as of a salvage loss, the loss would have been the excess of the invoice value over the net proceeds of the return cargo, after deducting all charges, including duties. This would, however, have made the adjustment precisely the same as of a total loss, against which the court had previously decided, and therefore no other method than one of the three above mentioned could be proposed by either party.

A reason against adjustments as salvage loss is, that this, like all cases of technical total loss, necessarily involves the underwriters in the state of the markets. The reason in favor of such adjustments is, that the voyage is broken up in respect to the particular goods; by the perils insured against, they are prevented from arriving at the port of destination. If this had happened in regard to the whole cargo, the assured might have abandoned and recovered for a total loss, though all the goods had been landed at another port and sold there, in a sound state. If we say that there is nothing inconsistent with the general principles of insurance in throwing upon the underwriters the risk of any other market than that at the port of destination, the objection to the

[1] Suydam *v.* Marine Ins. Co., 1 Johns. 181; S. C., 2 id. 138.

adjustment on the principle of salvage loss ceases. The doctrine of abandonment for a technical total loss goes upon the principle, that, though the assured must take the risk of the state of the market at the port of destination, yet he may insist on having the benefit, whatever it may be, of this market. The adjustment as for a salvage loss does not go at all beyond this.

SECTION VI. UNDER FIRE POLICIES, LIFE POLICIES, AND ON THE INTERESTS IN AN HYPOTHECATED SUBJECT.

1480 a. Some fire policies stipulate for a settlement of a loss by the underwriters' repairing or restoring the damaged subject,[1] and *it has been held in some cases* under an express stipulation in a marine policy,[2] and, in others, independently of any express stipulation bearing upon the matter,[3] *that the underwriters have a right to repair a damaged vessel instead of paying* to the assured *the amount of damage*.[4] The assertion of such a right has been made by underwriters who disputed a claim for a total loss with salvage, and insisted on making repairs in order to determine the amount of the loss. Where the right is claimed in virtue of some stipulation in the policy, its validity and the cases to which it is applicable, will, of course, depend upon the phraseology of the policy; and it may be limited to cases of claim for a total loss or extended to damage which is only a partial loss, whether upon a vessel or any article insured against maritime risk. So far as such a right can be held to be implied by the fact of making an insurance, it is as applicable to a partial loss, as one which the assured alleges to be total. But the concession of any such implied right is subject to grave objections, more especially where the underwriters insure but a part of the value of the subject.[5]

1481. *Under a fire policy, as usually made, the assured recovers the whole amount of a partial loss, if it does not exceed the*

[1] Supra, Vol. I. No. 63; infra, No. 1482.

[2] Cincinnati & Firemens' Ins. Co. *v.* May, 20 Ohio R. 211.

[3] See infra, No. 1557.

[4] See infra, No. 1556, 1557.

[5] See infra, ibid.

amount insured, though the amount insured may be less than the value of the property insured;[1] and he recovers to the same extent, whether he is absolute owner or mortgager, and though his equity of redemption may have been sold on execution if he still had the right to redeem it at the time of the loss. "The value of the assured's interest in the property insured," said Mr. Justice Wilde, in giving the opinion of the court, "is not material. If he had an insurable interest at the time the policy was effected, and an interest also at the time of the loss, he is entitled to recover the whole amount of damage to the property, not exceeding the sum insured."[2]

Under such a policy the loss is adjusted according to the actual or estimated expense of the repairs, or rebuilding, restoring, or reconstruction of the damaged subject, or by a sale of it in its damaged condition, or a sale of the remnants of it as salvage.[3]

Insurance for $4,000 being made "upon frame buildings, machinery and tools, according to a survey on file, to secure a mortgage held on the above named property by the assured,"[4] the value of the destructible property in an estimate presented by the assured at the time of the application, was $6,230. In the proceedings on the policy the land is said to have been worth $5,000. The assured held other prior mortgages on the property real and personal amounting to $5,684, of which $3,684 was on the machinery and tools and the remainder on the real estate. There remained, therefore, $2,000 in machinery and tools to be covered by the policy, according to the assured's estimate at the time of his application. The amount of destructible property at the time of the loss is stated to have been between seven and eight thou-

[1] Paddie *v.* Quebec Fire Ins. Co., Stuart, 174; Nicolet *v.* Louisiana Ins. Co., 3 La. R. 371; Liscom *v.* Boston Mut. Fire Ins. Co., 9 Metc. (Mass.) R. 205; Underhill *v.* Agawam Mut. Fire Ins. Co., 6 Cushing's (Mass.) R. 440.

[2] Strong *v.* Manufacturers' Ins. Co., 10 Pick. 40.

[3] See supra, No. 1244, respecting an adjustment under a fire policy in favor of a mortgagee of property subject to prior encumbrances.

[4] The assured had mentioned in his application that the mortgage included the land belonging to the factory, but the policy did not purport to insure the land.

sand dollars, of which about five sevenths was burnt, and two sevenths saved. The specific apportionment to be made of the destructible property and of the salvage, between the policy and prior mortgages is not material to our present purpose. On the loss being demanded, the insurers made the singular proposition "to pay what they were liable for, if the assured would transfer his interest in the property saved and also the prior mortgages, to the company," alleging that the assured was bound to have disclosed the prior mortgages.[1] The amount which the underwriters proposed to pay is not stated, but it no doubt was not over the whole $4,000 insured, which appears by the above items to be much less than the amount which they demanded to have transferred to themselves. The judge who presided at the trial did not understand the assured to be in the dilemma implied by this offer, but instructed the jury that the fact of there being prior mortgages was immaterial in respect of the risk under this insurance, and had no bearing except in ascertaining the amount of the assured's insurable interest, and accordingly the adjustment of the loss under the policy; and that the assured was not bound to state the prior mortgages except in reply to inquiries by the underwriters. He also ruled that the amount of insurable interest covered by the policy was not "confined to the distribution of the risk," in the assured's application; "that any difficulty on this head was removed by proof that all the property was of a value greater than the amount insured." The verdict being in favor of the assured was set aside and a new trial granted on the ground that the assured was bound to have disclosed the prior mortgages because the salvage was thereby diminished.[2] How this was so, does not appear, otherwise than by the construction put upon the contract by the insurance company, that they were entitled to have the lien on the lot of land transferred to them as salvage. This claim is quite inadmissible, since the policy does not purport by its phraseology to be an insurance of the land against fire, and if it did so, such purport would be rejected as absurd; and if it

[1] See S. C., supra, Vol. I. No. 641. [2] Smith *v.* Columbia Ins. Co., 17 Penn. (5 Harris,) R. 253.

was not one of the subjects insured, there could be no pretence to demand that the title to it or any lien upon it, should be transferred to the underwriters. Salvage, by its very definition, is what remains of the subject insured, which, as heretofore stated, was the excess of the value of the buildings, machinery and tools, over the prior encumbrances upon them.[1] The underwriters could not, therefore, have any pretence for claiming credit for any thing more than the remnants of that surplus, namely, two sevenths of it, credited to them in diminution of a loss equal to the whole amount insured, supposing that amount to have been exactly equal to such excess, that is to say, precisely equal to the value of the assured's insurable interest under the policy. If the amount insured by the policy was equal to the amount of the loss and only equal to five sevenths of the value of the insurable interest, then, according to the usual mode of adjusting losses on a fire policy, as distinguished from a pro ratâ adjustment,[2] all the salvage which the underwriters seem to have had any pretence for claiming was a part of the assured's demand against the mortgager secured by the mortgage, proportional to the amount of loss paid by them.[3]

1482. *In some fire policies it is agreed that a partial loss shall be adjusted pro ratâ*, according to the amount insured compared with the value of the subject, as in a marine policy.

If, instead of any adjustment of a partial or total loss, the underwriter shall have a right *to restore* a damaged subject by repairing it, *or to replace a* destroyed *subject* by one as good, the only question will be, whether it is done properly in due time.

1482 a. *The adjustment of a partial loss, under double insurance* and over insurance *against fire* on land, *is the same as in marine insurance, so far as the stipulations are similar.*[4]

If divers policies are all in the ordinary form, or all provide for a pro ratâ adjustment of losses, then the adjustment among the different sets of insurers will be the same as under marine policies. But where the policies are different as to the mode of adjustment,

[1] Supra, No. 1244.
[2] No. 1481, 1482.
[3] No. 1712.
[4] See supra, No. 360, 361, 362, et seq.

one being in the usual form and another providing for an adjustment pro ratâ, and the policies do not contain the stipulation usual in marine policies as to prior and subsequent insurances, or are simultaneous,[1] and there is an over-insurance, a different case for the apportionment of the loss between the different sets of underwriters is presented. Let the value of the subject be $1,200 and each policy for $1,000, and the loss $600. If the policy of the ordinary form were the only one, the underwriters in it would be liable for the whole $600; but if the policy stipulating for a pro ratâ adjustment were the only one, the underwriters on that would be liable for five sixths of the loss, viz. $500. It accordingly seems that, in such case, the loss should be apportioned between the two sets of insurers in the proportion of six elevenths and five elevenths.

Another diversity is presented in the case of insurance on the same subject by divers policies at different values. Jurisprudence supplies a case of this description where the loss was total. Fifteen thousand dollars being insured on buildings with the proviso that in case of other subsequent insurance the underwriters "should be liable to the payment only of a ratable proportion of any loss;" were subsequently insured at another office for a like amount, valued at $30,000, and burnt down. The first underwriters insisted that the buildings were not worth $30,000, and, accordingly, that, in respect to their policy, it was a case of over-insurance, and that they were liable for only one half of the actual value of the building, viz., supposing the actual value to be $24,000 instead of $30,000, as valued in the subsequent policy, they contended that their ratable proportion of the loss was only $12,000. It was held in Louisiana that they were liable for $15,000.[2] This was holding them to be liable to a ratable proportion of the loss as the subject was valued in the other policy. But the obvious construction of the stipulation seems to be, that they should be liable for the same proportion of the loss that

[1] See supra, No. 32; infra, No. 1251.

[2] Millaudon v. Western Mar. & Fire Ins. Co., 9 La. R. 32, cited supra, No. 1246.

their policy was of the whole amount insured. The underwriters in either policy ought not to be prejudiced by the valuation in the other.

1483. *The adjustment of a loss on goods damaged by fire is made on the gross sales, as under a marine policy.*

Mr. Beaumont considers this mode objectionable, because it will cost more in proportion to the value to transport the damaged goods to market,[1] which is true, supposing the goods not to be in a market where they can be sold for consumption. But this does not seem to be a ground of objection to the rule, for the supposition is of a sale of sound and damaged at the place where the loss happens, under a fire policy. If they can be consumed or used only in a distant market, then the purchaser at the place where the loss occurs takes into the account the proportionally greater expense to transport the damaged goods. If they will sell for half as much as sound in the distant market, but it will cost half of the proceeds to transport them, he will give for them, at the place where the loss occurs, only a quarter of the price of sound; and the loss by the rule is seventy-five per centum, which is the true loss.

1484. *Under fire policies there is no deduction of a third new for old, nor* are there usually *exceptions of partial losses,* or losses under particular rates, as in marine policies under what is termed the "memorandum," *nor is* the *salvage assigned to the underwriters by abandonment* as in a total loss under a marine policy. The adjustment is as of a particular average, or of a salvage loss.

It is held in Louisiana, that, to render a sale at auction admissible in evidence of the amount of loss, the underwriters must have notice of the sale.[2]

Where the assured puts up a new improved building in place of the old, the amount of loss will not be determined by the cost of the new one, but the loss will be the estimated ex-

[1] Law of Life and Fire Ins., ed. 1833, p. 61, n.

[2] Hoffman *v.* Western Fire & Mar. Ins. Co., 1 La. (Annual) R. 216.

pense of restoring the old one, without improvement or enlargement.[1]

The assured cannot recover rent,[2] or damage, on account of the suspension of his business,[3] while the building is under repairs or rebuilding.

Where, under a statute of New York, an assured receives a compensation from the municipality for damage by his building being demolished to stop a fire, the estimate of the damage under such statute is not binding as between him and his underwriters.[4]

1484 a. It seems that in the earlier stages of English commercial jurisprudence, lenders on bottomry or at respondentia assumed only the risk of total loss,[5] but they now usually assume the losses for which underwriters are liable in the common form of policies of insurance, and are entitled to salvage. And where the value of the hypothecated subject, or the salvage, proves, at the end of the lender's risk under the bond, to be greater than the amount of the loan, the particular average, and contribution to general average, and the salvage, should, it seems, be apportioned pro ratâ between the borrower and lender.[6] The result of this sale is that,

Where a total loss with salvage is caused by the risks covered, the lender, being entitled to the whole of the salvage, *ought to bear the whole loss ;* in other words, he should take the salvage in satisfaction of the bond, and in discharge of the bor-

[1] Brinley *v.* National Ins. Co., 11 Metc. 195.

[2] Pontalba *v.* Phœnix Ins. Co. of London, 2 Rob. (La.) R. 131.

[3] Niblo *v.* North American Fire Ins. Co., 1 Sandford's City of New York Sup. Ct. R. 551.

[4] Pentz *v.* Receivers of the Ætna Fire Ins. Co., 9 Paige, 569. The estimate of the damage by the demolition may refer to a building already on fire, which might possibly have been saved, (Mayor of New York *v.* Lord, 17 Wend. 285,) and so is not necessarily an estimate of the value insured and destroyed. Besides, it is inter alios.

There is no partial loss on a life policy, per Willes, J., in Lockyer *v.* Offley, 1 T. R. 252; Ellis, Ins. 129. In a policy on the life of a debtor in favor of a creditor, the amount recoverable is, by some policies, limited to that of the debt, and accordingly, though the loss is of the whole insurable interest, and thus total, it may be less than the amount insured by the policy.

[5] Supra, No. 1169, et seq.

[6] See supra, No. 1173.

rower. *If it is* a case *merely* of *particular average or contribution* in general average or of both of these, *the lender should be chargeable with a part of it proportional to the amount of his insurable interest* in the subject at the beginning of the risk, and the remainder of the loss should be borne by the borrower.

This rule is not specifically established by any authority in English jurisprudence, nor is it in that of the United States, unless a Pennsylvania case [1] and one in Massachusetts [2] can be considered as supporting it. Valin's comment on the French Marine Ordinance [3] seems to favor such a rule, but the doctrine of Boulay Paty,[4] that the lender is liable for the expense of transshipment if it exceeds the original freight, if taken without qualification, is against it, since by the rule suggested this loss would be apportioned between the two parties to the bond, where the amount which arrives, exceeds that of the insurable interest of the lender.

1484 b. *Under a life policy* in favor of *a creditor* or other party having only an interest of an ascertainable definite amount, in a jurisdiction where gaming insurance is void, the assured cannot recover beyond that amount; [5] and Mr. Marshall [6] is of opinion that, *if the* insured creditor has collateral security this must be deducted *in* estimating the loss. But *the proper adjustment* in such case *seems to be to allow a recovery of the whole amount of the debt, not exceeding the amount insured*, on an assignment *being made to the underwriters, of the debt and the collateral security, or a proportional part of each*, where the debt exceeds the amount insured.

[1] Gibson *v.* Philadelphia Ins. Co., 1 Binn. 405.

[2] Thorndike *v.* Stone, 11 Pick. 183.

[3] Contr. a La Grosse.

[4] Droit Com., tom. 3, ed. 1822, p. 160.

[5] Stat. 4 Geo. III. c. 48, s. 3.

[6] Marsh. Ins. book 3, c. 3, 2d ed. p. 777.

CHAPTER XVII.

TOTAL LOSS AND ABANDONMENT.

SECT. 1. In what cases abandonment is necessary to recovery for a total loss.
2. Notice and claim of loss under fire policies.
3. Notice and claim of loss under life policies.
4. What interest, and what control of the property, and what authority, are requisite.
5. Of the ship.
6. Of the cargo.
7. Of the freight.
8. Of profits and commissions.
9. Of different subjects insured in the same policy.
10. The existing facts constitute the loss.
11. Upon what intelligence abandonment may be made.
SECT. 12. Within what time abandonment must be made.
13. Form of abandonment.
14. Acceptance of abandonment.
15. Revocation of abandonment. Waiver of right to abandon.
16. Whether an abandonment may be defeated by subsequent events.
17. Effect as to rights of property, salvage, and claims and liabilities.
18. Effect as to conduct of agents.
19. Effect of the abandonment of the ship as to freight.
20. Adjustment. Amount recoverable.
21. Total loss in fire and life insurance, and bottomry.

SECTION I. IN WHAT CASES ABANDONMENT IS NECESSARY TO RECOVERY FOR A TOTAL LOSS.

1485. *A* TOTAL *loss of a subject of an insurance is where, by the perils insured against, it is destroyed, or so injured as to be of trifling or no value to the assured for the purposes and uses for which it was intended, or is taken out of the possession and control of the assured, whereby he is deprived of it; or where the voyage or adventure for which the insurance is made is otherwise broken up by the perils insured against.*

1486. *In a total loss the assured is entitled to recover from the underwriter the whole amount insured by the policy on the subject so lost.*

1487. *A constructive or technical total loss is one in which some part or remnant of the subject insured is surviving, or some claim accruing from it against third persons.*

To constitute a loss of this description, there must be some property or right still subsisting that may be the subject of a transfer or assignment. Where the subject or remnants of it have been necessarily sold, and the proceeds have come to the hands, or are subject to the control, of the assured, constituting a certain amount to be accounted for by him, and chargeable to him in the settlement of his claim against the underwriter, it is, notwithstanding this, an absolute, and not a constructive and technical total loss.[1]

1488. The part or remnant of the subject insured, which survives the peril in a total loss, is denominated *salvage.*

1489. *The allowance to salvors* for saving property *is also called salvage.*

1490. *An abandonment is an act on the part of the assured, by which he relinquishes and transfers to the underwriters his insurable interest,* or the proceeds of it, or the claims arising from it, *so far as it is insured by the policy.*

1491. *An abandonment is requisite in order to recover the whole amount insured by a policy, only in case of a technical or constructive total loss.*

An abandonment being a transfer, it can be requisite only where there is some assignable, transferable subject, on which it can operate. Where this is subject to contingencies, and may be of greater or less value, especially where, as is sometimes the case, it may, in a certain event, exceed the amount at which it is rated in the policy, the assured is usually required to make an abandonment before he can recover for a total loss.[2] When nothing remains to be assigned or transferred, an abandonment is useless and unnecessary.[3]

[1] This is the distinction in the more frequent use of the terms, more particularly the phrase "technical total loss," and will be most convenient in the present chapter, though "a constructive total loss" is sometimes used to comprehend the case of proceeds already received by the assured, and to be accounted for by him.

[2] 1 T. R. 608; Martin *v.* Crockatt, 14 East, 465.

[3] Park, 288, n.; 8 Johns. 286; 2 id. 185. Lord Ellenborough remarks, that "the general convenience of making an abandonment has led to an opinion that it is more necessary than it really is." Mellish *v.* Andrews, 15 East, 13.

1492. *The object of abandonment is a fair indemnity to the assured, which he could not otherwise obtain in many cases of constructive total loss*, since it would otherwise be necessary to put it to the jury to make a conjectural estimate of the value of the salvage.

Mr. Justice Buller intimates a doubt whether abandonment should have been permitted at all, and says, that "about the year 1745 that question was determined, after much deliberation."[1] But in cases of capture and detention, insurance would afford a very inadequate indemnity to the assured, without the right to abandon; and in many cases of sea-damage the indemnity would be long delayed and very difficult to adjust.

Lord Mansfield says: "In late times the privilege of abandonment has been restrained for fear of letting in frauds."[2]

Mr. Justice Story says, on the contrary: "It has been said, that abandonments are not to be favored; that they have been liable to great abuses; and that courts of law are not disposed to enlarge the practice. I am very much inclined to believe, that of late years this consideration has had quite as much weight as it deserved."[3]

The Supreme Court of Massachusetts says, Putnam, J., giving the opinion: "We prefer the construction which restrains, rather than that which enlarges, the right to make a total loss."[4]

The reason given for this leaning is, that restraining this right adapts the indemnity more nearly to the actual loss. But this result is by no means obvious. One object of insurance is, to enable the merchant to throw the adventure off his hands as soon as his enterprise is frustrated, and embark his capital in a new one. It is doubtless a grave question how far this principle can advantageously be carried; but there can be no doubt that the doctrine of technical total loss must be carried to a very considerable extent, in order that insurance may, in its general operation, make

[1] Mitchell *v.* Edie, 1 T. R. 608.

[2] Goss *v.* Withers, 2 Burr. 683.

[3] Peele *v.* Merchants' Ins. Co., 3 Mason, 27.

[4] Deblois *v.* Ocean Ins. Co., 16 Pick. 303.

a reasonable approximation to indemnity, and at the same time promote enterprise and activity in business; and it will become obvious, on slight practical experience, that, whatever rule is adopted in this respect, it will sometimes work disadvantageously to one party, and sometimes to the other.

1493. *The assured has his election, in all cases whether or not to make an abandonment;* "all the books agree that he is never obliged to abandon."[1]

"The object of abandonment is to turn that into a total loss which would otherwise not be so;"[2] and the assured may choose whether he will change the character of his claim against the insurers by making an abandonment. In some cases he can recover for a total loss without abandonment, in others he will have no claim against the insurers unless he makes an abandonment; in others he may recover for a partial loss without abandonment, or abandon and recover for a total loss.

1494. It will subsequently appear,[3] that abandonment may be delayed. *Where an abandonment may be delayed by the assured without losing his right to abandon, the exercise of the right should be so regulated that the underwriter shall not be prejudiced by the delay.*

That is to say, the assured is entitled only to an adjustment as of a particular average, until by abandonment, agreed adjustment, payment, or judgment, the character of the loss is definitely fixed as total, and the right to salvage vests irrevocably in the underwriter.

In a suit for loss of freight without abandonment, in a case of the seizure of a ship, Mr. Chancellor Lansing was of opinion, that as the seizure and with it the character of total loss, continued until the action was brought, the assured had a right to recover for such a loss.[4] But the better rule in such case is, that, if the assured neglects to abandon, he shall recover only according to

[1] Allwood *v.* Henckell, Park, 280; and see 1 Johns. Cas. 313; 2 id. 250; 2 Burr. 1211; 8 Johns. 244.

[2] Gracie *v.* New York Ins. Co., 8 Johns. 237.

[3] Infra, s. 12.

[4] Smith *v.* Steinback, 2 Caines's Cas. 172, in Error, 158, at p. 172.

the state of things at the time of the trial; since, as we shall see, under a declaration for a total loss he may recover for a partial loss, and the underwriter ought to have the advantage of whatever may occur to make the loss partial, so long as the assured delays to elect a total loss. If he has judgment for a total loss, this is equivalent to an abandonment, and gives to the underwriter a right to salvage.[1]

1495. The records of jurisprudence present many *cases showing under what circumstances the assured may recover for a total loss* of the different subjects of insurance, *without previous abandonment.*

A ship having run upon the rocks, surveyors gave their opinion that the expense of getting her off and repairing her would far exceed her value when repaired. The master accordingly sold her as she lay, and she was got off and repaired by the purchaser. A suit was brought without abandonment. The jury found this to be a total loss. Abbott, C. J.: "Whether the ship were repairable or not was left to the jury, and I think they disposed of it correctly. If the subject-matter of insurance remained a ship, it was not a total loss, but if it were reduced to a mere congeries of planks, the vessel was a mere wreck; the name which you may think fit to apply to it cannot alter the nature of the thing." Bayley, J.: "I take the legal principle to be this. If, by means of any of the perils insured against, the ship ceases to retain that character, and becomes a wreck, that is a total loss, and the mas-

[1] Ibid.; also Gracie *v.* New York Ins. Co., 8 Johns. 237; Watson *v.* Ins. Co. of North America, 1 Binn. 47. In Brown *v.* Phœnix Ins. Co., 4 Binn. 445, an abandonment is considered to be necessary in the case stated. But if the condition of things, so far as can be known at the time of trial, still shows a total loss, there seems to be no objection to a recovery for such. There is not apparently any objection to a rule on the assured, on motion of the underwriter in a suit on a policy, either to abandon pending the suit, and continue until the state of things at the time of the abandonment can be known, if this would put the claim in a position more satisfactory for a verdict between the parties; or, at the discretion of the court, to permit the assured, on his own motion, to abandon, that is, to assign the salvage to the underwriters, on terms, or without terms, as the court might order.

ter may sell her, and the assured recover for a total loss without giving any notice of abandonment." [1]

Where a wrecked vessel is in such a condition that it cannot be brought into port, and is of no value where it lies, it is held in Maine that no abandonment is necessary in order to recover for a total loss.[2]

1496. *If the ship has not been heard from for so long a time, as to be a ground of presumption that it has perished by perils of the seas, a total loss may be recovered on ship, cargo, or freight, without abandonment.*[3]

1497. *Whether, if the subject remain in specie, though it has been justifiably sold in direct consequence of the perils insured against, the assured can recover for a total loss without an abandonment?*

It has been held in some cases, that the assured cannot, in such case, recover for a total loss without an abandonment.[4]

The recovery of a total loss without abandonment, where the subject has been sold, has been decided against in some instances, on the ground that the underwriters have not had notice by an abandonment before the sale was made, so as to give them an opportunity to examine the circumstances.[5] Such a decision has reference to the question, whether there is evidence of the sale being necessary, and the objection is confined to cases where some delay may be made without risk of the destruction of the subject, and the distance is not too great for communication. Our present inquiry relates to a case of justifiable sale.

It has been held in divers cases, that, *the ship having been sold justifiably as between the parties to the policy, on account of the*

[1] Cambridge *v.* Anderton, 2 B. & C. 691; 1 R. & M. 60; 4 D. & R. 203; 1 C. & P. 213.

[2] Walker *v.* Protection Ins. Co., 29 Maine R. 317.

[3] Green *v.* Brown, 2 Str. 1199; Newby *v.* Read, Park, 106; Twemlow *v.* Oswin, 2 Camp. 85; Brown *v.* Neilson, 1 Caines, 525; Cambreleng *v.* M'Call, 2 Dall. 128; S. C., 2 Yeates, 281; Gordon *v.* Bowne, 2 Johns. 150. See remark of Kent, C. J., 2 Caines's Cas. 208; and query, per Livingston, J., 1 Johns. 191.

[4] Hodgson *v.* Blackiston, Park. Ins. 281, n.; S. C. Marsh. Ins., 2d ed. 600.

[5] Bell *v.* Nixon, 1 Holt's N. P. 423 and 426, n.

perils insured against, the assured may recover for a total loss without an abandonment.[1] We shall subsequently see,[2] that if the subject, whether ship or goods, has changed its form and become a certain amount of money received by the assured or his agent in direct consequence of the peril insured against, and such change has been made under circumstances rendering it binding upon the underwriters, the only difference between an adjustment of the loss as partial or total is, that in the former the salvage is at the risk of the assured, in the latter at that of the underwriters. Accordingly, if the proceeds of the sale of the subject have actually come to the hands of the assured, the adjustment and payment, whether as of a partial or total loss, will be precisely the same. But if the proceeds are still outstanding, then the assured is at the risk of the insolvency and fraud of agents into whose hands the same may come, until he has made a valid abandonment; and, as we shall subsequently see,[3] the delay of abandonment will impose that risk upon him.

Still, the loss in such case has been held to be a total one by Lord Abinger, C. B., and his associates of the English Exchequer, after deliberate and thorough discussion, in an action for the loss on hides insured free of particular average, on a voyage from Valparaiso to Bourdeaux, in which case the hides, having become putrid in consequence of sea-damage, were sold at Rio Janeiro.[4] Lord Abinger remarks, that if, by the fault of the assured, the proceeds of the sale of the article are not received by him, he cannot recover for a total loss;[5] meaning probably, what seems to be the true doctrine, as above stated, that he thereby becomes chargeable with the proceeds, which are to be deducted in the adjustment of the loss.

The doctrine on the subject is the same in respect of ship or

[1] See Gordon *v.* Mass. Fire & Mar. Ins. Co., 2 Pick. R. 249; Patapsco Ins. Co. *v.* Southgate, 5 Peters's Sup. Ct. R. 604.

[2] See infra, s. 17.

[3] Infra, s. 12.

[4] Roux *v.* Salvador, 3 Bing. N. C. 266, reversing the judgment of the Common Pleas given after two arguments; S. C., 1 Bing. N. C. 526.

[5] He cites Mitchell *v.* Edie, 1 T. R. 608, where the proceeds of the sale were permitted to remain in the agent's hands three years.

goods; if either subject is so damaged by the perils insured against as not to remain in specie, or so as to be in a condition rendering a sale necessary, and the sale is made in such manner as to render it binding upon the owner and underwriters, it is a total loss, and may be recovered without abandonment. The distinction mentioned above, as to recovering a total loss without abandonment, is to be observed; viz. that the assured is charged with the proceeds in the adjustment of the loss as in a salvage loss, though the same may not have actually come to his hands. This circumstance being borne in mind will reconcile the most of the decisions on this subject, which otherwise would appear to be directly contradictory, according to the language commonly used by the courts, which must, however, be construed in reference to one or the other description of case under consideration.

That a total loss is unquestionably recoverable without abandonment in case of sale authorized by necessity, where there is no question which of the parties is responsible for the acts or neglects of agents, has been held in divers cases:

By Lord Ellenborough and his associates, in case of a shipment of saltpetre sold by order of court at the Cape of Good Hope:[1]

By Dallas, C. J., and his associates of the English Common Pleas, in case of a policy on freight from Quebec to Great Britain, where the ship, being stranded in the St. Lawrence, was sold by the master:[2]

By the Supreme Court of Maine, in case of a vessel sold to pay salvage:[3]

By Parker, C. J., and his associates of the Supreme Court of Massachusetts, in respect to a damaged ship:[4]

By the Court of Appeals in Maryland, on a policy upon freight, in respect of a loss of the voyage:[5]

[1] Mullett *v.* Shedden, 13 East, 304.

[2] Idle *v.* Royal Exch. Ass. Co., 8 Taunt. 755; S. C., 3 B. Moore, 115.

[3] Robinson *v.* George's Ins. Co., 17 Maine R. 131.

[4] Gordon *v.* Mass. Fire & Mar. Ins. Co., 2 Pick. R. 249.

[5] Charleston Ins. & Trust Co. *v.* Corner, 2 Gill's R. 410.

And by the same court, on a policy upon a vessel sold on account of sea-damage.[1]

Where a contrary doctrine is alleged, it is usually merely in reference to the responsibility for agents; as

By Shaw, C. J., and his associates, in Massachusetts.[2]

1498. *Where a damaged vessel has been repaired, and is bottomried for the expense of the repairs, the owner cannot recover for a total loss without abandonment.*[3]

1499. So far as the freight insured has been earned and become absolutely due, the contract of insurance is satisfied. *If freights between different ports successively,* and becoming absolutely due at the several ports of delivery, *are insured in one policy, and,* after one or more of the freights is earned, *a total loss upon this interest takes place, an abandonment can have relation only to the freight pending at the time of the loss.* In respect to the freights previously earned, they have either been paid to the assured, or his claim for them is become absolute, and they have ceased to be exposed to the perils insured against. In respect to such freights, therefore, the insurers are discharged, since all that they agreed in the policy to be answerable for has been accomplished. An abandonment, accordingly, has no operation upon freight earned.

1500. *Under a policy upon freight, an abandonment can only transfer certain rights* and advantages *in relation to freight which is pending;* in which an interest has accrued, *on account of a contract respecting it, and something done towards earning it.*

Accordingly, *if the ship and cargo are both entirely lost,* though the loss happen after a greater part of the voyage is performed, *no abandonment is requisite in order to recover for a total loss of freight,* there being nothing to abandon, since the assured has not, in consequence of what has been done under the contract for freight, acquired any rights which can be of any value to the

[1] Mutual Safety Ins. Co. *v.* Cohen, 3 Gill's R. 45.

[2] Smith *v.* Manufacturers' Ins. Co., 7 Metc. R. 448, at p. 453.

[3] Fleming *v.* Smith, 1 House of Lords Cases, 513.

underwriters, it having become utterly impossible to earn any part of the freight insured.

Freight being insured, the ship put back and was sold on account of damage; and the cargo was also sold. It was objected to a claim for a total loss of the freight, that no abandonment had been made. Gibbs, C. J., was of opinion, that there was no foundation for this objection. He said: "He could not understand what there was to be abandoned." And the court were of opinion that there was no necessity for an abandonment.[1]

1501. *Where nothing has been done towards earning the freight*, of which the assured or the underwriters to whom he abandons it can avail themselves, by the goods being carried on, either in the same or in another ship, or by the shipper's electing to receive them at an intermediate port in preference to having them delivered at the port of destination, the rule and practice will be the same in the United States and England, for, *as there is nothing to abandon, no abandonment will be necessary.*

In case of insurance on the freight of the ship Olive-Branch, after she had taken on board about half of her cargo at the Cape of Good Hope, the rest being engaged, she was driven on shore and embedded in sand eight feet above high-water mark; and in that situation sold by the master, in pursuance of the advice of experienced persons, who were of opinion that she could not be got off except at a ruinous expense; the purchaser got her off in about three months, after several unsuccessful attempts, and she subsequently performed several voyages. The cargo was put on board of another ship. A suit was commenced on the policy on freight, without abandonment. It was decided by the English C. P. that abandonment was not necessary.[2]

1502. There is a diversity on this subject in England and the United States. *It has been* finally *decided in England, that an abandonment of the ship carries freight*, and of course, if both ship and freight are insured, and there is a total loss of both, and

[1] Green r. Royal Exch. Ass. Co., 1 Marsh. R. 447; 6 Taunt. 68; and see Idle *v.* Royal Exch. Ass. Co., 8 id. 755. But see also Parmeter *v.* Todhunter, 1 Camp. 541.

[2] Mount *v.* Harrison, 4 Bing. 388.

an abandonment of the ship, there is nothing to abandon on the freight policy. Hence the remarks of the English judges, that there is nothing to abandon under a policy on freight. This notion, so much at variance with the fundamental principles of insurance, results from the unwillingness of the English courts to admit of an apportionment of freight. But *in the United States, the ship and freight are treated as distinct interests in regard to abandonment.* If, upon the American doctrine, therefore, any part of the freight is earned before the event happens, that gives the right to abandon freight; or *if, by sending on the goods* to the port of destination in the same or another ship, *a pro ratâ freight, by the original ship may*, in effect, *be realized, the assured* certainly *is bound to give the underwriter the advantage of this pro ratâ freight*, in case of adjustment as a total loss, either by accounting for and allowing the amount so saved, or by transferring the right of receiving it to the underwriter. There are some difficulties attending this subject, undoubtedly, whether the doctrine of the English or the American decisions is adopted; but that of the American decisions, if carried fully out, seems to be the most practicable, as well as the most equitable. The doctrine carried out to its ultimate results will be, that, in all cases of abandonment of the ship, the underwriters are entitled only to the freight earned subsequently to the event for which the abandonment is made; and if this event happens in the midst of a pending voyage, and the same ship subsequently proceeds to complete the voyage and earn freight, then the underwriters on the ship should be entitled to a proportion of it, and the owner or the underwriters on freight to the rest; that is, the freight should be apportioned. This rule being adopted, it follows that the general principles as to abandonment, applicable to an insurance on the ship, will apply to an insurance of freight; and they have been so applied by our courts.[1]

1503. *A policy upon expected profits does not seem to offer any thing upon which an abandonment can operate*, and it does not appear from any speculation, or any judicial opinion, relating to

[1] See sections 7 and 19 of this chapter.

this subject, which has come to my knowledge, that an abandonment of this interest can be of any importance to the underwriters, otherwise than as a notice that a total loss is claimed; and if this is its only effect, an abandonment is not necessary.

In a policy upon the profit of goods, the insurer undertakes that they shall not be prevented, by the perils insured against, from arriving at a certain market. *If a part of the goods only are prevented from arriving, it constitutes a partial loss upon this interest*, according to the construction put upon it in the United States. But the arrival of a part only, however small it may be, does not make a constructive total loss of the interest, whereby the assured is entitled to transfer the profit on such part, and recover the whole amount at which the interest is valued in the policy.

Under an abandonment of freight, the underwriters may, in some instances, avail themselves indirectly of what has been done towards earning freight. They may receive the freight pro ratâ for the part of the voyage performed previously to the event on account of which the abandonment is made. But not so of profits; there is no profit, or any thing like a profit, pro ratâ itineris peracti, which can be assigned, or prove to be of any value to the insurers. It does not appear, therefore, that an abandonment of profits can be any thing more than a nugatory ceremony.

In one case the court in New York were of opinion, that an abandonment of profits was necessary, in order to enable the assured to recover for a total loss; but the court did not state upon what ground it was necessary, or what interest would be transferred by it. The court suggest a query, whether an abandonment of profits would not give the underwriters on profits a right to the goods, by paying to the underwriters, to whom they were abandoned, the prime cost. But they expressly reserve their opinion on this point.[1]

Allowing it to be practicable to apply this doctrine, it would evidently be inconsistent with a first principle of abandonment, which is always defined to be a transfer of the assured's property in the subject, as far as it is covered by the policy; whereas this

[1] Tom *v.* Smith, 3 Caines, 245. See also Mumford *v.* Hallett, 1 Johns. 433.

doctrine would make an abandonment of goods a transfer of only a part of his property. It has never been hinted that the assured can make any claim upon the insurers for the profits on goods abandoned to them, and if he has no such right, he cannot transfer it to the underwriters on profits, or to any other persons.

1504. *In regard to a policy upon commissions, the right of abandonment depends upon the same principles as in the case of freight*; the assured cannot abandon the right of earning commissions. So far as the commissions are earned, and have become absolutely due, the underwriters are discharged from their liability, this being equivalent to the arrival of goods at the port of destination in the case of a policy upon the cargo. The only right, then, which can pass to the underwriters by an abandonment under a policy upon commissions, is that of receiving the commissions, towards the earning of which the assured has done all that he is bound to do, but the absolute claim for which depends upon some future contingency.

If a supercargo is to receive, for selling the outward-bound cargo and investing the proceeds, a certain per cent. on the sales of the return cargo,[1] and the ship is arrested on the homeward voyage, the assured may, by an abandonment, transfer to the insurers the right of receiving his commissions in the event of the release and subsequent arrival of the goods. A case of this sort, *where the assured has done what he agreed to do to earn the commissions* insured, *but their ultimately becoming due* depends upon an event which *may be prevented by the perils insured against* in the policy, *seems to be the only one where any right* or advantage *whatever can be transferred by an abandonment of commissions.* If this is the only case in which any thing can be assigned by an abandonment, it is the only one in which an abandonment is necessary, as a condition on which the assured is entitled to recover for a total loss.

1505. There are *cases in which the assured cannot assign the salvage* to the underwriter, and therefore cannot make an abandonment in the usual acceptation of that term; as where a ship is valued at $4,000 in one policy, and $6,000 in a subsequent one,

[1] Robertson *v.* Columbian Ins. Co., 8 Johns. 383.

in which an additional $2,000 is insured.[1] In such a case, an abandonment under the first policy carries the whole salvage. So in case of insurance to the full value by both mortgager and mortgagee.[2]

The only practicable course to give effect to two policies, in case of a constructive total loss, *is to estimate the* value of the *salvage*, of whatever description the constructive total loss may be, *and allow its deduction in settling* for such a loss. And the right to do this arises directly out of the nature and objects of a contract of insurance, namely, indemnity, which can in no other way be made; and that indemnity is practicable the courts admit, by holding such insurances to be valid, and, therefore, seem to be bound by this doctrine, as well as by the rule to give effect to contracts rather than defeat them, to adopt such construction as may give policies a practical operation.

1506. It has been held, that *there is no necessity of abandonment in a reinsurance.*

The reassured could not abandon without accepting the abandonment of the assured, since he otherwise has nothing to abandon; and Mr. Justice Livingston says, giving the opinion of the court: "It would be to the disadvantage of the reassurer to compel his assured in all cases to accept of an abandonment, which would be necessary if he himself be entitled to one."[3]

1507. In the preceding cases the courts will modify the doctrine of abandonment under a policy of insurance, with a view to give effect to contracts relative to the same subject, for which the interests of commerce and a liberal jurisprudence require the way to be left open. A similar principle of construction is suggested by the analogous practice under fire and life policies. I cannot, therefore, but doubt a decision of the Court of Appeals in Maryland on a policy upon a ship with *a stipulation not to abandon.* The ship was captured by the French, and, after detention for a

[1] Murray *v.* Ins. Co. of Pennsylvania, 2 Wash. C. C. R. 186; Higginson *v.* Dall, 13 Mass. R. 96.

[2] Gordon *v.* Mass. Fire & Mar. Ins. Co., 2 Pick. 249.

[3] Hastie *v.* De Peyster, 3 Caines, 190.

year, was taken into the French service by order of the Minister of Marine. In an action on the policy, it was decided in Maryland that the assured could not recover for a total loss, because the stipulation precluded an abandonment of the right of salvage, or claim of indemnity against the French government; and could not recover what amount the jury should estimate the loss at, taking into consideration the value of the chance of the restoration of the ship or of indemnity from the French government, on the ground that the estimation of such chance could "not be resorted to as a criterion by which to ascertain the amount of the loss," because it would put the insurers too much in the power of the assured, and hold out to the latter a temptation to fraud, and would disturb the law of abandonment.[1] This was to put the assured into a dilemma, which could not have been contemplated by the parties to the contract, and which it would be very desirable to avoid. The maxim of construction, Ut res magis valeat quam pereat, might very excusably be invoked to such a case. Had the jury given a verdict for a total loss, the underwriters would ipso facto have been entitled to the salvage, if any had ever turned up. In very similar cases the Supreme Court of New York decided for a total loss, without putting it to the jury to estimate the value of the chance of restoration or indemnity,[2] which was not necessary, since, whatever that chance was, it remained for the benefit of the underwriter on payment of a total loss.

These decisions authorize the doctrine, that, *under a stipulation not to abandon, the right of the assured to recover for a constructive total loss does not accrue until the hope of recovering the subject insured is desperate, or the chance of such recovery is indefinitely postponed.*

SECTION II. NOTICE AND CLAIM OF LOSS UNDER FIRE POLICIES.

1508. The term "abandonment" is not used in reference to fire policies; but the principle of abandonment is applicable to them.

[1] Barney *v.* Maryland Ins. Co. 5 Harris *v.* Johnson, 139.

[2] Gracie *v.* New York Ins. Co., 8 Johns. 237; Smith *v.* Steinback, 2 Caines's Cases in Error, 158.

These policies usually *require immediate notice of a loss.*[1]

1509. If the subject is so destroyed by fire that only remnants and fragments are left, the value of these is accounted for by the assured, and the amount is deducted from the amount insured, and the balance paid to the assured. *Some underwriters reserve the right of taking the remnants themselves, and paying a total loss.*[2]

1510. If the subject damaged by fire remains, and is worth repairing, then, according to the provisions of the policy, *the damage is estimated by appraisers* as agreed by the policy.[3]

1511. An important application of the principle of abandonment and salvage to fire policies is in case of insurance by a mortgagee independently of the mortgager. The fundamental general principle of insurance, as distinguished from gambling and wagering, as we have seen,[4] is, that it is a contract of indemnity, and not of gain by one party at the expense of the other. This principle requires that the assured shall not be paid the full value of his insurable interest, as agreed upon by the parties to the policy, and at the same time retain the interest, or any part of it. *The payment of a total loss vests in the underwriter an equitable right to the interest itself and its remnants and proceeds, and any claims arising on account of the value of the interest, or any part of it, or as indemnity for its injury or destruction by the perils insured against;* and *this principle is as applicable to a fire policy as to any other.*

What, then, is the insurable interest of a mortgagee, or pledgee, or party having a lien? Undoubtedly the debt or claim as security for which the mortgage, pledge, or lien is given. A mortgagee holding a mortgage for one thousand dollars cannot insure the mortgaged subject on his own account for two thousand. His insurable interest is only commensurate with his debt. Therefore, to permit him to receive the whole amount or value of this interest, and at the same time retain his demand and realize the same amount again from the debtor, is directly inconsistent with the fundamental principle upon which the whole system of insurance doctrines and jurisprudence is founded.

[1] See c. 1. s. 6. [2] Ibid. [3] Ibid. [4] Chap. 1, s. 1.

Accordingly, in such a case, the Supreme Court of the United States lay down the doctrine, that, upon the payment of a loss of the mortgaged subject, to an amount equal to the debt, "the underwriters are entitled to an assignment of the debt from the mortgagee."[1] It has been objected to the assignment of the debt and security, that there is no privity between the underwriters on a policy in favor of a mortgagee who pays the premium and the mortgager; which is true, but it seems to be quite immaterial that there should be. It has also been objected to such an assignment, that the insured mortgagee may have previously paid premiums, or otherwise incurred expense, so that on the payment by the underwriters of the amount insured, and of the debt by the debtor, the mortgagee will not be more than indemnified. Such a conjectural contingency seems, however, to be too remote to have any weight in the case.[2]

1512. *Where a part of a debt only is secured by a mortgage*, or other lien on property, which the creditor insures on his own account at his own expense, which is consumed by fire, the question may arise, *Whether the insured creditor shall be required to assign to the insurers*, or account to them for, *a part of his debt equal to the amount paid on the loss, or only that part of his debt* remaining *outstanding, after he has received from both his underwriters and his debtor an amount equal to his whole original debt? This latter is the proper rule*, for such a doubt should be settled on the principle of indemnity and in favor of the assured. By this rule, also, the liability of the underwriter corresponds more nearly to the premium.

SECTION III. NOTICE AND CLAIM OF LOSS UNDER LIFE POLICIES.

1513. An *insurance on the life of the assured himself*, or of any other life than that of a debtor, is a policy against total loss

[1] Carpenter *v.* Washington Ins. Co. of Providence, 16 Peters's Sup. Ct. R. 495.

[2] See infra, No. 1712, remarks upon King *v.* The State Mut. Fire Ins. Co., 7 Cushing's (Mass.) R. 1.

only; or, in other words, it *is an insurance free from average and without benefit of salvage.*

1514. *The principle of salvage is applicable to the payment of a loss on a policy in favor of a creditor upon the life of his debtor.* And if so, *an assignment, which is equivalent to an abandonment, is requisite,* though the term "abandonment" is not applied in the case.

1515. Where William Pitt's creditors, who had effected a policy upon his life, were paid the full amount of their debt out of funds supplied to his executors by the government, it was held that they could recover nothing on the policy, as they had already received, on account of their insurable interest, its full amount.[1] It should follow from this decision, that, if the executors of an insolvent creditor should pay a part of the debt to secure which the insurance was made, the assured would be required to account for it as so much salvage. But as the assured is not obliged to wait for the settlement of the estate of his debtor before he makes a claim against the underwriters, it seems to be a direct inference from the above case, that, if the underwriters pay him the amount insured, he must assign to them his claim upon the executors for a dividend on account of his debt, or account to them for what he may receive.

It has been suggested that there is a distinction between a payment made in behalf of a debtor before, and one made after, the payment of a loss to the creditor by underwriters in a fire policy on property mortgaged as security for the debt;[2] and the same distinction would be applicable in the case of a life policy. And according to that distinction, if adopted, the creditor of Mr. Pitt, though he was obliged to credit what the government had paid him in diminution, or, as in this case, in extinguishment, of his insurance on his life, yet if he had been paid the whole amount insured in the policy by his underwriters, and had held collateral security of the government for the same debt, he might have realized his

[1] Godsall *v.* Boldero, 9 East, 72.

[2] See objections alleged against salvage on a fire policy in favor of a mortgagee, supra, s. 2, No. 1511, p. 249.

whole claim again on such collateral security, without accounting to his underwriters for it, on the ground that there would have been no privity between these several parties. This would certainly be making a very great distinction as to the rights and liabilities of the parties to a policy, merely on account of the order in which two payments are made, as already said in case of a fire policy.

The better doctrine seems to be, that whatever rights and claims the creditor holds as part of his insurable interest, or as accruing from it, are to be accounted for to the underwriters, who pay for the destruction of that interest, or a part of it, *whether such rights and claims are realized before or after the payment of the loss.*

SECTION IV. WHAT INTEREST, AND WHAT CONTROL OF THE PROPERTY, AND WHAT AUTHORITY, ARE REQUISITE.

1516. *The assured, in order to avail himself of the right of abandonment, must have the power of transferring the property insured.*[1]

If he has assigned all his interest by abandonment to one set of underwriters, he cannot abandon to other underwriters on the same subject.[2]

So if, by mortgaging his ship, he voluntarily deprives himself of the power of transferring the title, it has been held that he cannot, by abandoning her, recover against his underwriters for a constructive total loss. In such case, he can only recover the actual damage as a partial loss.[3]

1517. *Where the thing insured is taken out of the* hands and *control of the assured, by some peril* or act *not insured against* in the policy, *he cannot abandon.*

A ship being insured against sea-damage only, after sustaining sea-damage which constituted a constructive total loss, was captured. It was held that the assured could not abandon, since

[1] 13 Mass. R. 207.

[2] Higginson *v.* Dall, 13 Mass. R. 96.

[3] Gordon *v.* Mass. Fire & Mar. Ins. Co., 2 Pick. 249.

the ship had been taken out of his control by an act not insured against, and he could not transfer it by abandonment.[1]

In such case it is reasonable that the actual loss should be recovered, and it has been determined in New York that it may be so.[2] The circumstance that the assured has chosen to put the property into a predicament not admitting of abandonment, seems to be equivalent to his choosing not to abandon where he has the right and is not prevented by the situation of the property.

1518. *A consignee who has made advances on a shipment, of which the bill of lading has been transmitted to him, has sufficient control of the shipment, as against the consignor, to make an abandonment.*

The consignees at Liverpool, having made advances on goods shipped in the United States, which were arrested in an American port by an embargo, abandoned to their underwriters and claimed a total loss. Lord Ellenborough said: "It might perhaps be difficult to make out that they had such an interest as was capable of abandonment."[3] This seems to depend upon the question whether the possession of the bill of lading gives the consignee a right to have the possession and disposition of the property, as against the consignor; since, so far as the bill of lading gives him this right, his ability to make an abandonment differs, in no respect, from that of an absolute owner; and there seems to be no ground of question, that in such case the consignee has absolute control of the goods so soon as they are put on board of the ship and the bill of lading is despatched to him.

SECTION V. OF THE SHIP.

1519. The parties to policies sometimes provide under what circumstances the assured shall have the right to make an abandonment, more particularly in respect to capture and detention.[4]

[1] Rice *v.* Homer, 12 Mass. R. 230.
[2] Williams *v.* Smith, 2 Caines's R. 13.
[3] Conway *v.* Gray, 10 East, 536; Same *v.* Forbes, id. 539; Maury *v.* Sheddon, id. 540.
[4] Puller *v.* Staniforth, 11 East, 232; Same *v.* Glover, 12 id. 124.

We are at present considering the general doctrines on this subject independent of any such specific stipulations.

Mr. Justice Story gives the following scientific and accurate definition of a total loss : —

"The right of abandonment has been admitted to exist where there is a forcible dispossession or ouster of the owner of the ship, as in cases of capture, — where there is a moral restraint or detention which deprives the owner of the free use of the ship, as in case of embargoes, blockades, and arrests, — where there is a present total loss of the physical possession and use of the ship, as in case of submersion, — where there is a total loss of the ship for the voyage, as in case of shipwreck, so that the ship cannot be repaired in the port where the disaster happens, — and lastly, where the injury is so extensive that by reason of it the ship is useless, and the making repairs would exceed her value. *The right to abandon exists whenever*, from the circumstances of the case, *the ship, for all the useful purposes of a ship for the voyage, is for the present gone from the control of the owner, and the time when she will be restored to him in a state to resume the voyage is uncertain or unreasonably distant, or the risk and expense are disproportionate to the expected benefit* and objects of the voyage."

The rule adopted in the English jurisprudence in respect to a loss of a vessel by damage, is, that the loss is total in case of its being impracticable to repair it, and repairs are considered to be impracticable, where the expense would be more than its value when repaired,[1] since in such circumstances the restoration of the vessel is in effect the building of a new one.

"There are situations," says Mr. Chief Justice Marshall, "in which the delay of the voyage, the deprivation of the right to conduct it, produce inconveniences to the assured, for the calculation of which the law affords, and can afford, no standard. In such cases there is, for the time, a total loss."[2]

[1] Per Jervis, C. J., Rosetto *v.* Gurney, 7 Eng. Law & Eq. R. (Press of Little, Brown & Co.) 461; S. C., Eng. Law J. R. (N. S.) Com. Pl. 257; 15 Eng. Jurist, 457.

[2] 4 Cranch, 45.

1520. *It is requisite to* the validity of *an abandonment* of the ship, or any other subject, *that the state of things existing at the time should justify it*, as distinguished from that of which the assured has had intelligence.

It is not sufficient that some previous condition of things would have authorized an abandonment. Where the assured, having received intelligence of a capture, or other state of things, which would, while it continued, have been good ground of abandonment, immediately makes an abandonment on receiving the intelligence, but in the mean time, by recapture or otherwise, the circumstances have changed so that the loss is not then a total one in its character, the abandonment will be to no purpose.[1]

1521. It is a general rule, as we have already seen,[2] that *the assured on any subject may abandon, when the voyage is broken up, in respect to that subject*, by the perils insured against.

In respect to a policy upon a ship, this rule does not necessarily suppose the insurance to be upon a voyage. In the case of an insurance made in 1744, on a privateer, for the term of four months, to cruise from place to place, the crew mutinied, and afterwards deserted within the four months, and carried away the boat, fire-arms, and cutlasses belonging to the privateer; the vessel, however, arrived safe at Jamaica. A total loss was claimed on the ground that the voyage was lost, though no specific voyage had been contemplated; and the court made no distinction between this policy and one made on a vessel from one port to another. They were of opinion, however, that the voyage was not lost, within the meaning of the policy.[3]

It seems to have been formerly considered, that in case the voyage, or even a cruise of a few months for which the ship was insured, was broken up and defeated by a peril insured against, the assured might abandon the ship, although it was in his possession, or subject to his control, at the time of abandonment, without being materially injured:

[1] See infra, s. 10, where this subject is particularly examined.

[2] Supra, s. 1.

[3] Pole *v.* Fitzgerald, Willis, 644; 5 Brown's Parl. Cas. 131; Amb. 214.

As in case of a privateer insured (1744) for three months, without benefit of salvage, being captured, and her guns and one hundred and seventeen men taken out when she was recaptured.[1]

This doctrine continued to prevail until 1750, when it was overruled in the case of Pole *v.* Fitzgerald ; [2] but afterwards, and when it could not be said still to subsist legally, very evident traces of it are discoverable in the language used by Lord Mansfield, in giving the opinion of the court on questions of total loss. The doctrine seems to have grown out of wagering policies ; the policy was of this description in Pond *v.* King.[3] These were not strictly contracts of indemnity, though made respecting a real interest, and contemplating an actual loss. But the parties were considered to have in view only the success or failure of the adventure ; if the ship did not arrive at the port of destination, or was prevented from cruising for the time specified, the insurer lost the wager. These were, therefore, insurances upon the voyage or cruise ; but, as Beawes justly remarks,[4] it is very unreasonable to apply this doctrine in putting a construction upon a contract strictly of insurance or indemnity.

1522. Mr. Chief Justice Willes shows, in an elaborate argument,[5] that insurance is not "on the voyage," that is, the insurer of the ship does not guarantee that she shall cruise for the time mentioned in the policy, or perform the voyage described, since the question as to loss under the policy is never, what damage has the assured sustained by the interruption of the voyage, or cruise, whereby he may have lost great profits in a favorable market, or the opportunity of taking a rich prize ; but how much damage is done to the ship. *The policy is* not "on the voyage," but "*on the ship for the voyage" or time specified.*

Mr. Chief Justice Marshall explains the principle that insurance is "on the ship, for the voyage," to mean, "that the voyage shall

[1] Pond *v.* King, 1 Wilson, 191 ; S. C., Com. R. 360. See also Whitehead *v.* Bance, Park, 122 ; Jenkins *v.* M'Kenzie, Millar, 321 ; Jalabert *v.* Collier, id. 323 ; S. C., Beawes, tit. Insurance, p. 311.

[2] Ut supra.

[3] Supra.

[4] Page 311.

[5] Pole *v.* Fitzgerald, Willes, 644.

not be destroyed by the fault of the ship, or in other words, that the ship shall be capable of making the voyage."[1] But he does not mean that the insurer must pay the assured all the damage he may sustain by reason of the ship's being disabled. The insurer contracts to pay the damage done to the ship by the specified perils, and if this damage exceeds half of the value of the ship, or is so great as to render the ship incapable of prosecuting the voyage, or if the ship is taken out of the control of the assured, by any of those perils, he will take it off the hands of the assured, and pay the whole sum at which it is valued in the policy.

1523. By a policy on the ship, the effects of the perils on the ship are the subjects of indemnity, not those on the freight or cargo; therefore *the voyage may be broken up by the effect of the perils on cargo and freight*, so as to make a total loss of either or both of those interests, *without giving a right to abandon the ship*,[2] where it is still in a condition to be repaired, and proceed on the voyage within reasonable time. In other words, the insurance is not that the voyage shall not be prevented by the perils, but that the ship shall not by reason of the perils be disabled, so far as its own capacity and condition are concerned, from performing the voyage. This doctrine frequently recurs in the jurisprudence on insurance.

A ship insured, free from average and without benefit of salvage, with a stipulation that a total loss should be paid if she did not arrive at Marseilles, was captured by the Spaniards and carried into Ceuta, where it became necessary to dispose of the cargo, it being of a perishable nature. Both ship and cargo were finally released, but the cargo having been sold, there no longer remained any object for pursuing the voyage; and the ship accordingly did not arrive at Marseilles. It was held, however, that these circumstances did not give the assured any right to abandon the ship.[3]

So under insurance for a voyage from New York to Gibraltar,

[1] 4 Cranch, 377.

[2] Church *v.* Marine Ins. Co., 1 Mason, 341.

[3] Kulen Kemp *v.* Vigne, 1 T. R. 304.

on a ship and cargo, which were taken into Algesiras by the Spaniards, where the cargo was sold by the supercargo, but the ship was not detained at all with a view to condemn it, Mr. Justice Washington ruled that the ship could not be abandoned.[1]

A similar decision was given by the Supreme Court of the United States on a policy upon the ship where the cargo was in like manner detained by captors, but not the ship.[2] The same court made a like decision in case of a ship insured on time, that suffered considerable damage, though less than half of its value, and was delayed about two and a half months at New Orleans for repairs, and lost the freight of the cargo which was on board at the time, though it took in another at the same port after being repaired.[3]

So Mr. C. J. Tilghman, of Pennsylvania, says: "The insurer on the ship has nothing to do with the cargo. He undertakes that the ship shall be sufficient to perform the voyage, and that he will make good any damage she may suffer in the course of the voyage; but he does not undertake that she shall perform the voyage, because the cargo may be lost, or other events may occur which may render it unnecessary that she should perform the voyage."[4]

1524. As the master or other agent having charge of the subject insured may, without prejudice to the rights of the assured, take the measures that are apparently expedient or justifiable, however the event may prove, so *the assured may abandon for a loss at the time apparently and according to the strongest probability total, though, by the success of subsequent endeavors to extricate the subject, the loss is, in the event, reduced to one that is partial in its character.*

This proposition is incidentally recognized in the whole course of jurisprudence, both American and English. There are circumstances, says Lord Ellenborough, in which the assured may aban-

[1] Hurtin *v.* Phœnix Ins. Co., 1 Wash. R. 400.

[2] Alexander *v.* Baltimore Ins. Co., 4 Cranch, 370.

[3] Bradlie *v.* Maryland Ins. Co., 12 Peters's Sup. Ct. R. 378.

[4] Ritchie *v.* United Ins. Co., 5 Serg. & Rawle, 501.

don where an actually total loss is in the highest degree probable.[1]

So Mr. Justice Story, in the case of a vessel that had been stranded, of which an abandonment was made after she was got off, remarked, that, "if she had been abandoned while she remained in that state, [namely, stranded,] the assured might have claimed for a total loss."[2]

Mr. Justice Story, speaking of a stranded ship that had been abandoned and afterwards got off by the insurers, said: "We are not to judge by subsequent events, except so far as they operate by way of evidence upon the preëxisting state of the ship. The right of abandonment depended altogether upon the facts as they were, and the conclusions which reasonable men ought then to have drawn from them in the exercise of sound discretion."[3]

In respect to an abandonment of a ship, which had been stranded at Martinique, and was sold by the master, without any attempt being made by him to get it off, Mr. C. J. Kent told the jury, that "the case at the time appeared desperate, and the good fortune of the purchasers," in getting the vessel afloat, "could not destroy the right of the assured; and that, if the transaction was honest, and a sound discretion was exercised in selling the vessel, the insurers were liable for a total loss."[4]

So in case of a ship which, to prevent it from sinking, was purposely run upon the rocks in the St. Lawrence, where it was exposed to the full force of the current and the bodies of ice drifting down the river, and was sold by the captain as it lay, after

[1] Anderson *v.* Wallis, 2 M. & S. 240.

[2] Church *v.* Marine Ins. Co., 1 Mason, 341. See also Bradlie *v.* Maryland Ins. Co., 12 Peters's Sup. Ct. R. 378.

[3] Peele *v.* Merchants' Ins. Co., 3 Mason, 27. See also The Ship Fortitude, Haven, et al. Claimants, 3 Sumner's R. 228. See also Patapsco Ins. Co. *v.* Southgate, 5 Peters's Sup. Ct. R. 604; The Brig Sarah Ann, 2 Sumner, 206; The Schooner Tilton, 5 Mason's R. 475; Idle *v.* Royal Exch. Ass. Co., 8 Taunt. 755; The Warrior, 2 Dods. Ad. R. 288; The Ship Packet, 3 Mason's R. 258; Winn *v.* Columbian Ins. Co., 12 Pick. 279; Fontaine *v.* Phœnix Ins. Co., 11 Johns. 293.

[4] Fontaine *v.* Phœnix Ins. Co., 11 Johns. 293. See also Wood *v.* Lincoln and Kennebec Ins. Co., 6 Mass. R. 479.

surveys, and with the consent of one of the owners who was the agent of the others, though it was afterwards got off, and performed the homeward voyage with another cargo, yet it was held to be a total loss of the freight; for the captain acted bonâ fide, and for the benefit of all concerned, according to the circumstances as they appeared at the time upon the best examination that could be made.[1]

1525. In a policy on the ship on time, or for a voyage, *a merely temporary "retardation by any of the perils insured against*, not amounting to or producing a total incapacity of the ship eventually to perform the voyage, *does not constitute a technical total loss."*

A retardation for the purpose of repairing damages from the perils insured against not exceeding one moiety of the value of the ship, falls directly within this doctrine. Under such circumstances, if the ship can be repaired and is repaired, and is thus capable of performing the voyage, there is no ground of abandonment founded upon the consideration that the voyage may not be worth pursuing for the interest of the ship-owner.[2]

1526. *In case of shipwreck or stranding without such injury* to the ship *as to prevent it from being got afloat and repaired within a reasonable time at a reasonable expense, the assured has no right to make an abandonment of the ship.*[3]

In giving the opinion of the court, Mr. Chief Justice Parsons said: "When the ship is stranded, the assured cannot, for this cause merely, immediately abandon. By some fortunate accident, by the exertions of the crew, or by extraneous assistance, the ship may be again floated, and rendered capable of pursuing the voyage. In such case the insurers are only answerable for the expense occasioned by the stranding and repairing the damage. But undoubtedly, when by the stranding the voyage is defeated the

[1] Idle *v.* Royal Exch. Ass. Co., 3 Moore, 115; S. C., 8 Taunt. 755. See also Fuller *v.* Kennebec Mut. Ins. Co., 31 Maine (1 Redd.) R. 325.

[2] Bradlie *v.* Maryland Ins. Co., 12 Peters's Sup. Ct. R. 378, at pp. 400, 401.

[3] Peele *v.* Merchants' Ins. Co., 3 Mason, 27.

owner may abandon. And the stranding of the ship may prove the destruction of the voyage, either by her afterwards becoming a wreck, before she shall be put afloat, or by circumstances accompanying the accident."[1]

The question of partial or total loss of a stranded or innavigable ship does not depend wholly upon the degree of damage; it depends in part upon the locality.

If it is on a coast where no assistance can be procured to get her afloat, or where there are not to be had within a reasonable distance materials and workmen for making repairs, at least such as to render her safely navigable to some place convenient for making complete repairs, an abandonment may be made.[2]

Thus in case of a ship in a damaged state, which was under the necessity of putting into the island of Tortola, where there were not materials and workmen for repairing her, the loss was held to be total, and an abandonment to have been properly made, without considering whether it would have been justifiable had she been at a port more favorable for repairs.[3]

"It is well known," says Mr. C. J. Kent, "that stranding is not ipso facto a total loss. It is a question of evidence, whether stranding be a total loss, either because it is followed by shipwreck, or other destruction of the property, or because the vessel cannot be set afloat, or because she cannot be repaired at the place of the peril, for want of workmen or materials.[4]

In consequence of the captain's mistaking the lights, some of which had been erected after he sailed from the United States, a ship went ashore, with her head upon the rocks, on Gerrish's Island, near Portsmouth in New Hampshire, on the 2d of March, in a place surrounded by breakers, in a heavy swell, which caused her to strain very much, and strike, so that it was difficult to stand upon deck. She remained there until the time of the abandon-

[1] Wood *v.* Lincoln and Kennebec Ins. Co., 6 Mass. R. 479.

[2] See remarks per Parsons, C. J., in Wood *v.* Lincoln and Kennebec Ins. Co., 6 Mass. R. 479.

[3] Manning *v.* Newnham, 3 Doug. 130; S. C., Park, 260; Marshall, 586; 2 Camp. 624, n.

[4] Patrick *v.* Commercial Ins. Co., 11 Johns. 9. See also Sewall *v.* United States Ins. Co., 11 Pick. 90.

ment, when her bottom was broken in several places, so that the tide ebbed and flowed through her. The cargo was discharged, and the sails and rigging had been cut away from her masts, and all her furniture removed for safety, and she was deserted by the master and crew. The chance of getting her off was small, and the expense of undertaking to do it great, and if got off it would require three months to make the necessary repairs. Mr. Justice Story held this to be a total loss, though the expense of repairs should in the event prove to be less than half of the value.[1]

A ship attempting to go through Helgate was thrown upon the rocks, her rudder and part of her keel knocked off, and one of her sides beaten in, so that the whole of her cargo, consisting of salt, was washed out and lost. It was held, that, if the vessel in this situation was in imminent danger of being utterly destroyed, the assured might abandon.[2]

The ship General Smith, insured on a voyage from Rotterdam to Baltimore, sailed from Rotterdam in ballast, December 3, 1822, and anchored about four miles below Rotterdam. On the 5th, being at anchor in Helvoet Roads with a pilot on board, she was struck by a squall which drove her aground. On the 6th, she was driven one hundred fathoms on a mud-bank. On the 7th, the weather moderated, but the exertions of the master and crew were unavailing to get her off. At low water she was dry, and at a distance of two hundred or three hundred fathoms from the water's edge. She remained aground until the middle of February, when she was got off and repaired, and proceeded on the voyage. The place where she lay was a soft mud-bank, but how great the danger of wreck was, or whether proper exertions were made to get her off at an earlier period, does not distinctly appear from the case. The Court of Errors in Maryland, without giving a decided opinion, intimated that this was not a total loss, giving the right of abandonment.[3]

[1] Peele *v.* Merchants' Ins. Co., 3 Mason's R. 27.

[2] King *v.* Middletown Ins. Co., 1 Conn. R. 184.

[3] Bosley *v.* Chesapeake Ins. Co., 3 Gill & Johns. 450. See also Allen *v.* Sugrue, 8 B. & C. 561.

1527. *Submersion does not of itself in all cases authorize the abandonment of the ship. Whether it does so, depends upon the same rules as in stranding.*[1]

A vessel insured on time, valued at $10,000, being on a voyage from Boston to Baltimore, struck the ground off Chatham on Cape Cod, and, after beating some time, was driven upon the bar, and she finally sunk in about seven fathoms of water. While she remained under water the assured abandoned. The expense incurred in getting her up, bringing her to Boston, and repairing her, did not amount to fifty per cent. of her value. Mr. C. J. Shaw, giving the opinion of the court in Massachusetts, said: "Some authorities say that a submersion de facto amounts to a total loss, but we think it would be difficult to maintain that opinion. For instance, a vessel might sink while repairing, when her masts were out, so as to be wholly out of sight, and yet be under the control of the owner, so that when raised and pumped out she would be as valuable as before. It will be admitted that, when a vessel is sunk in the sea, it affords a strong primâ facie evidence of total loss, because it would, in general, preclude all hope of recovering her. We think, therefore, that it comes to this, that submersion, like stranding, or other serious disaster, is to be taken in connection with other circumstances in determining whether the loss is or is not total. The ultimate question is, Can she be raised and repaired at a reasonable expense of time and money? as, in the case of stranding, Can she be got off at a reasonable expense? And the question in either case must depend on all the circumstances affecting it."[2]

1528. The insurance being on the ship "for the voyage," or for some specified service, it has been held, that, *if the ship is so damaged that she cannot be repaired and refitted for the voyage or service, the assured may abandon*, though she might still, after being repaired, answer for a different service. It was so held in a case of insurance from Batavia to New York. The ship put into

[1] The rule is similar respecting a submersion of the cargo. See infra, s. 6.

[2] Sewall *v.* United States Ins. Co., 11 Pick. 90.

St. Kitts in a damaged state, and was there sold, as not being "in a capacity to be repaired, so as to prosecute her voyage with her cargo," though, after being repaired, she carried a part of a cargo of molasses and rum to New York, and might have carried a full cargo of rum, that being more buoyant than the cargo from Batavia.[1]

In order to form a right opinion of a case of this description, we must separate the ship from both cargo and freight, either of which may have been totally lost without a total loss of the ship. The question then, is, whether the ship can, at a reasonable expense, and within a reasonable time, be repaired where she is, or taken to a suitable port within a convenient distance and repaired, so as to be fully restored; and whether funds can be raised for the purpose. These are questions of fact, and not of doctrine. Suppose she cannot be so restored, but may be repaired so as to be again navigable, though a different description of ship, and fit only for an entirely different kind of service. In this case, the character of the subject being totally changed, for all practical purposes, by the perils insured against, the loss can hardly be estimated as a partial one; at least, the estimate would be unsatisfactory. It therefore seems to be a proper case for abandonment, similar to that of the change in specie of an article of cargo, even though the loss should not exceed half of the value.

1529. *A ship deserted at sea by her crew on account of sea-damage, and brought by others into a port where the assured may have her restored to him, cannot, after being so brought in, be abandoned,*[2] *unless she comes in so damaged and encumbered with liens for repairs and salvage that the loss is still thereby a total loss.*[3]

1530. *The capture of the ship is a constructive total loss of it, so long as it remains in possession of the captors.*

1531. *Where the detention of the ship or other subject by capture or seizure has ceased,* and it is subject to be taken possession

[1] Abbott *v.* Broome, 1 Caines, 292.
[2] Thornely *v.* Hebson, 2 B. & A. 794.
[3] Holdworth *v.* Wise, 7 B. & C. 513.

of and disposed of by the assured or his agents, his *right to abandon is gone, so far as the mere detention is concerned.* Whether a constructive total loss of the ship still continues, will depend on the liens with which it is still encumbered, and the damage it has sustained, in consequence of the perils insured against.

It is true that in the earlier cases, before the distinction already pointed out between the total loss of the ship and a loss of the voyage as distinguished from that of the ship,[1] was clearly established, and before the notion of the insurance being a sort of wager upon the voyage being performed had wholly disappeared, the courts used a phraseology and introduced considerations, in deciding questions of total or partial loss of the ship, which were properly applicable only to the cargo.

Where a ship insured from Newfoundland to Portugal, Spain, or England, after suffering damage in a storm and throwing overboard a part of her cargo, had been captured and recaptured, and brought into Milford Haven, and thereupon abandoned, Lord Mansfield, in giving the opinion of the court that this was a proper case for abandonment, said: "Half the value must be paid for salvage. The disability to pursue the voyage still continued. The master and mariners still were prisoners. The charter-party was dissolved. The freight, except in proportion to the goods saved, was lost."[2]

Some of the circumstances here enumerated by Lord Mansfield, though material in respect to a claim for total loss of cargo or freight, are not so in respect to such a claim under a policy on the ship. This case gave Lord Ellenborough occasion to remark: "I must say that there is a looseness and generality in the expressions which make one pause upon it. What has a loss of the voyage to do with a loss of the ship?"[3] Now it is evident that the loss of the cargo, or the master and mariners, may have something to do with the loss of the ship, when the assured is thereby, and on account of the direct effects of the perils insured against, prevented from availing himself of the ship to any useful purpose.

[1] See supra, No. 1521, 1522.

[2] Goss *v.* Withers, 2 Burr. 683.

[3] Falkner *v.* Ritchie, 2 M. & S. 290.

But in the case before Lord Mansfield they certainly had no bearing for the ship was in England, where she could be repaired and another crew had, and another voyage undertaken, so that partial or total loss depended solely upon the degree of damage to the ship, and the amount of liens with which it was encumbered in consequence of the perils insured against, which do not distinctly appear in the case; so that it is really not a practical authority to any purpose.

Where a British privateer, being recaptured, had been actually sold in a provincial port, and half of the proceeds awarded to the recaptors, the surplus remaining in court, Lord Chancellor Hardwicke decreed the abandonment to be valid.[1] Here, notwithstanding the recapture, the consequences of the capture still constituted a total loss.

Lord Mansfield very justly remarked, that each case of this description must stand upon its particular circumstances; and where on recapture a ship and cargo insured from Virginia to London were brought into Plymouth and restored to the possession of the assured, after a delay of one month, without damage, and subject to the payment of one eighth of their value for salvage, he and his associates held the loss not to be total.[2] Lord Mansfield afterwards says: "I took great pains in delivering the opinion of the court in Goss *v.* Withers, and Hamilton *v.* Mendes. I think from those cases the whole law between insurers and assured, as to the consequences of capture and recapture, may be collected."[3] This is in one sense true, since the whole law is, that, after recapture, the question of partial and total loss is to be decided according to the situation of the property, the degree of damage by the disaster, and the amount of liens by reason of the perils insured against. When the property is once in circumstances to be taken possession of by the assured or his agents, it makes no difference, as to the character of the loss, whether it had been

[1] Pringle *v.* Hartle, 3 Atk. 195. And see Queen *v.* Union Ins. Co., 2 Wash. C. C. R. 331.

[2] Hamilton *v.* Mendes, 2 Burr. 1198.

[3] Douglas, 232.

taken out of his possession and control by capture or sea-damage. If under the English jurisprudence it be within reach of the assured, but not worth taking possession of,[1] or, under the American jurisprudence, if the damage is over fifty per cent., the loss continues to be constructively total. But in determining this question in respect to a total loss of the ship, Lord Mansfield and the other judges of his time put stress upon the circumstance of the particular voyage having been lost, and made this the criterion of the case being a total loss of the ship. In another case of capture and recapture, Lord Mansfield said: "The point is, What did the owner suffer by the capture? And it appears that he suffered so much that it was not worth while to pursue the voyage." And this was held to be a total loss of the ship.[2] And the same decision would have been given in case of the voyage having been lost by any other peril insured against.

Phraseology, implying that a loss of the voyage by capture is of itself a sufficient ground for an abandonment of the ship, appears, in the opinions of some of the judges, in an early case before the Supreme Court of the United States. A British registered vessel, owned by British subjects resident at Alexandria in Virginia, was captured on a voyage from Kingston in Jamaica to Alexandria, and recaptured and carried into Kingston, subject to a claim of one eighth for salvage, her register having been lost by the capture, and another such not being attainable while the owners continued to reside at Alexandria. The vessel was sold to pay the salvage. Johnson, J.: "It is true that a case of capture and recapture will not of itself sanction an abandonment. Yet it is equally true that, in case of capture, a recapture will not deprive the party of his right to abandon. The consequences of the capture and recapture, the effect produced upon the fate of the voyage, must govern the right of the parties. The effect is always a matter of evidence, and must rest much in the discretion of a jury." Washington, J.: "Whether the assured had a right to abandon, was a question dependent upon the

[1] Holdworth *v.* Wise, 7 B. & C. 794. And see Spencer *v.* Franco, cited 2
[2] Milles *v.* Fletcher, Douglas, 219. Burr. 1211.

fact, whether the voyage was broken up and not worth pursuing." Cushing, J.: "Strong circumstances are stated, that show the voyage could not be safely pursued, or could not be pursued at all, in consequence of the loss of the register, and loss of hands by the capture." [1]

The proper question in this case seems to have been, whether the ship could have been refitted and restored to the owner, in good condition for navigation, for less than one half of its value under the American rule, or for less than its full value under the English rule; and the suggestions concerning the loss of the voyage tends rather to involve the case in obscurity than to give light.

The doctrine that a total loss of the voyage in respect to the cargo is to be taken into consideration as one of the criteria of a total loss of the ship, is repudiated in the modern jurisprudence,[2] for the reason that the loss of the voyage in consequence of the loss of the cargo though the occasion of it is the operation of perils of the seas or any description of perils against which the ship is insured, is a merely remote and incidental operation of the perils in respect to the ship. There is a diversity in the application of the doctrine of partial or total loss of either the ship, freight, or cargo, by a total loss of one or both of the others. An actually total loss of the ship or cargo, is a total loss of the freight, though there may be salvage by the cargo being transshipped where the ship is rendered innavigable, or by shipping another cargo, where the original one is actually lost. So a constructive total loss of the cargo results from the innavigability of the ship, if the cargo cannot be carried on by another ship. But a total loss of the cargo, whether actual or constructive, does not constitute a total loss of the ship, which may be still subsisting in a fit condition for the prosecution of the voyage, the only hindrance,

[1] Marine Ins. Co. of Alexandria *v.* Tucker, 3 Cranch, 357. See Parage *v.* Dale, 3 Johns. Cas. 156.

[2] Falkner *v.* Ritchie, 2 M. & S. 290; Brown *v.* Smith, 1 Dow, 349; Pole *v.* Fitzgerald and Fitzgerald *v.* Pole, Willes, 641; S. C. 5 Brown's P. C. 131; Idle *v.* Royal Exch. Ass. Co., 3 Moore, 115; S. C., 8 Taunt. 755, and see Marsh. Ins., 2d ed. 585.

if any, being the want of a cargo to carry, and the underwriters on the ship do not guaranty that there shall be a cargo.[1]

1532. *The assured may abandon the ship* though it may have arrived *at the port to which it was insured, if it arrives so damaged by the perils insured against that it* cannot be restored to a navigable condition for the service to which it was before adapted, or *is not worth repairing.*[2]

It is said by Mr. Justice Radcliff, of New York, speaking of a policy upon the ship: "I know of no case in which the assured can abandon after the voyage is completed, and he is informed that it is so."[3]

There appears, however, to be no reason why the ship may not be abandoned at the port of destination, if she arrives there in a disabled state, not capable of being repaired, or not worth repairing. The above remark of the judge must be considered in reference to the particular case under consideration, which is one of capture and compromise with the captors, where the insurers offered to pay the expense of the compromise.

In a case that occurred in Pennsylvania, a total loss was claimed under a policy on a ship that had arrived at the port to which she was insured, and no objection was made on this account merely.[4]

Mr. Marshall says: "if the ship arrive at the port of destination, and there remain in safety twenty-four hours, any injury she may have sustained during the voyage, however great, can only amount to a partial loss."[5] A ship, however, that comes in a mere unrepairable wreck, cannot be said to have arrived and been in port in safety.

1533. One general test relative to floating, repairing, or selling the ship, or taking any measures affecting the claim for a total loss and right to abandon, is, that, *so far as the underwriters are*

[1] See supra, No. 1522, and infra, No. 1569, et seq.

[2] Goss *v.* Withers, 2 Burr. 683; Cazalet *v.* St. Barb, 1 T. R. 187.

[3] Parage *v.* Dale, 3 Johns. Cas. 156.

[4] Ralston *v.* Union Ins. Co., 4 Binn. 386. As to damage over fifty per cent. merely being a ground of abandonment at the home port, see infra, Pezant *v.* National Ins. Co., 15 Wend. 453, and Peters *v.* Phœnix Ins. Co., 3 Serg. & Rawle, 25.

[5] Marsh. Ins., 2d ed. p. 470.

concerned, the assured is bound to act as a prudent man not insured would do under like circumstances.[1]

A ship so damaged by the perils insured against as not to be worth repairing, is totally lost, and may be abandoned. That is to say, if the expense of repairs, and the sacrifices that must be made as connected with the prosecution of the voyage or adventure for which the insurance is made, would exceed the value of the ship when repaired, then the ship is as absolutely and totally lost to the owner as if it were a mere wreck, or at the bottom of the sea. This doctrine is very clearly stated by Mr. Justice Patterson, in giving the opinion of the judges before the House of Lords. Speaking of a case where the repairs of a ship would cost more than it would be worth when repaired, he says: "A vessel is totally lost when it becomes of no use or value as a ship to the owner; and the course has been in all cases in modern times, to consider the loss as total where a prudent owner, uninsured, would not have repaired." [2] Under this rule, accordingly, if the expense of repairs will exceed the value of the ship when repaired, it is a total loss; for a ship, in such a state, is not worth repairing. Whether this rule refers to the value of the ship in the market, or that in the policy, is subsequently considered.

1534. *In English jurisprudence the right to make an abandonment of the ship* is governed by the rule just stated; *namely, that the right to abandon on account of the damage and expense merely, accrues where, and only where, the ship when recovered or repaired will not be worth the expense necessarily to be incurred for the purpose of recovering or repairing it.*[3]

[1] Per Baron Gurney, Domett *v.* Young, Car. & Marsh. 465; and Pollock, C. B., Irving *v.* Manning, 2 Mann., Gr. & S. 784; and see S. C., 1 House of Lords Cas. 817; and 6 Mann. Gr. & S. 419; and Lord Abinger, C. B., Young *v.* Turing, in Exch. Chamber, 2 Mann. & Gr. 593.

[2] Irving *v.* Manning, 6 Mann., Gr. & S. 419.

[3] Robertson *v.* Carruthers, 2 Stark. R. 271; Cambridge *v.* Anderson, 4 D. & R. 203; S. C., 1 C. & P. 213; S. C., 1 R. & M. 60; S. C., 2 B. & C. 691; Somes *v.* Sugrue, 4 C. & P. 276; Robertson *v.* Clarke, 8 Moore, 622; S. C., 1 Bing. 445; Read *v.* Bonham, 3 Br. & Bing. 147; S. C., 6 Moore, 397. In Colvin *v.* Thompson, 1 L. & W. 140, it is ruled that the ship must

This rule has reference to a case in which the amount, merely, determines the character of the loss. Other circumstances may come into consideration in determining the loss to be partial or total.[1]

It is sometimes said that it requires an unquestionable excess of expense over the value of the ship when repaired, to authorize an abandonment under this rule,[2] which is assuming the presumption to be against a total loss; or, in other words, that the burden is on the demandant to fully make out his case. But there does not appear to be any peculiar stringency of the rule of evidence upon the assured in this case. The general presumption is that there is no loss, partial or total, and the burden is on the claimant, in this as in other claims, to make out his claim, but it is no stronger against a total than against a partial loss.

1535. *It is a general rule in the United States, that, if the ship or goods insured are damaged to more than half of the value, by any peril insured against, or more than half of the freight is lost, the assured may abandon and recover for a total loss. The same rate of damage has also been mentioned by early writers and in foreign jurisprudence as one criterion of total loss.*[3]

Mr. Chief Justice Parsons considered damage to the ship exceeding half its value to be a constructive shipwreck. He says: "When the ship becomes a wreck by any of the perils insured against, it is generally a total loss. The ship becomes a wreck

be repaired if it be practicable, at whatever expense; but the established doctrine recognized in English jurisprudence generally is as stated in the text, where the question of total or partial loss depends on the amount of expense merely.

[1] Holdworth *v.* Wise, 7 B. & C. 794.

[2] Somes *v.* Sugrue, 4 C. & P. 276.

[3] Clarkson *v.* Phœnix Ins. Co., 9 Johns. 1; Waddel *v.* Columbian Ins. Co., 10 id. 61; Queen *v.* Union Ins. Co., 2 Wash. 331; Fontaine *v.* Phœnix Ins. Co., 11 Johns. 293; Dupuy *v.* United Ins. Co., 3 Johns. Cas. 182; Depeyster *v.* Columbian Ins. Co., 2 Caines, 85; Byrne *v.* La. State Ins. Co., 12 Martin, N. S. 126; Hyde *v.* La. Ins. Co., 2 id. 410; Brooks *v.* La. Ins. Co., 4 id. 640; Dickey *v.* New York Ins. Co., 4 Cowen, 222; Dickey *v.* American Ins. Co., 3 Wend. 658; Riley *v.* Ocean Ins. Co. 4 Rob. (La.) R. 225; Saurez *v.* Sun Mut. Ins. Co., 2 Sandford's City of New York Sup. Ct. R. 482.

when, in consequence of the injury she has received, she is rendered absolutely unable to pursue the voyage without repairs exceeding the half of her value."[1]

1536. *This rule of abandonment on account of loss over fifty per cent.* of the value of the subject, *makes the most material difference between the American and English jurisprudence relative to total loss* and abandonment,[2] and is to be kept in mind in examining the decisions of the tribunals of the two countries. It extends equally to ship, cargo, and freight. This rule, and that rule in the United States whereby the validity of the abandonment is tested by the circumstances existing at the time of making it, instead of the time of bringing the suit, as in England, give a wider range to constructive total loss and abandonment in the United States, and consequently an increased liability of underwriters for loss by the agents who have charge of the insured subject.

1537. Though damage or loss exceeding fifty per cent. of the value constitutes a total loss, yet the loss may be total where the expense would be less than that proportion. *Where the ship* rendered unseaworthy by the operation of the perils insured against *is in a foreign port, in which the master cannot raise funds* requisite for repairs, by bottomry or any other means, *he may make sale of the ship, and the loss is total though the expense of repairs would be less than half of its value* when repaired, if he could have procured the means for repairs, and the underwriters will be liable for a total loss, unless it is the fault of the assured not to have provided the master with funds or credit.

It was so held by the Supreme Court of New York, in case of a vessel insured on time, that sailed thence to Charleston and Norfolk, and thence to the island of St. Thomas in the West Indies, where the master sold her.[3]

1538. Besides the difference between the English and Ameri-

[1] Wood *v.* Lincoln and Kennebec Ins. Co., 6 Mass. R. 479, at p. 482.

[2] Per Walworth, J., American Ins. Co. *v.* Center, 4 Wend. 45.

[3] American Ins. Co. *v.* Ogden and M'Combe, 15 Wend. 532. Mr. Justice Bronson dissented, on the ground that the owner was bound to have had sufficient credit at St. Thomas to procure the requisite funds.

can decisions respecting the amount of damage which of itself constitutes a constructive total loss, there is also a divergency of the American decisions from each other in reference to the mode of estimating the value of the ship in applying the rule of constructive total loss by damage over fifty per cent., namely, whether it is the value as the ship is rated in the policy, or the value for sale before the happening of the loss, or that after the repairs are made. The American decisions also differ in respect to deducting a third new for old, in estimating the expense of repairs to make up the fifty per cent., so as to constitute a case of constructive total loss.

The rule *in English jurisprudence* is as already stated.[1] *The question, whether the right of abandonment is to be regulated in reference to the value* at which the vessel is rated *by the policy, or that for sale* after the repairs are made, *has, after much discussion, been* authoritatively *decided in favor of the latter value.*

The question was early suggested,[2] and continued to be in doubt for more than half of a century, until it was at length solemnly settled by the House of Lords, in the case of insurance upon the ship General Kyd, for the purpose of covering her hull, &c., and her "stores, seamens' wages, and other matters not constituting her permanent value," from China to Madras and back to China, valued at £17,500. The ship sustained sea-damage on the voyage, the repairs of which would have cost £10,500, and when repaired she would not have been worth over £9,000, which was her marketable value at the time of making the policy, and a prudent owner, being uninsured, would not have repaired her. On abandonment being made, a verdict in favor of the assured was sustained by the Courts of Common Pleas,[3] the Exchequer Chamber,[4] and the House of Lords.[5]

[1] Supra, No. 1534.

[2] Cazalet *v.* St. Barbe, 1 T. R. 187, before Justices Buller, Willes, and Ashhurst.

[3] Irving *v.* Manning, 1 Mann., Gr. & S. 168.

[4] S. C., 2 Mann., Gr. & S. 784.

[5] 6 Mann., Gr. & S. 391. Lord Campbell said, in the House of Lords: "I am extremely glad that a question which has agitated Westminster Hall for the last thirty years comes at last solemnly to be decided by a judgment of your lordships." 6 Mann., Gr. & S. 422. In that case were cited by Sir F. Thesiger to the same doctrine, Al-

Where the loss being thus adjusted is total, the underwriter pays the value at which the ship is insured, though it may exceed its actual value at the time of the loss.

This doctrine does not appear to have been applied or come under discussion in reference to capture or detention, or any other loss than damage to the ship.

1539. *In the* jurisprudence of the *United States it is assumed in many cases, that the rule of constructive total loss by damage over fifty per cent.*, where there is no provision to the contrary in the policy, *refers to the value of the ship for sale* at the time of the loss;[1] *in others, the rule is applied to the value in the policy.*[2]

In giving an opinion upon this question, Mr. Justice Story asks: "In what respect does the case of the ship differ from the case of the goods, as to the ascertainment of the damage? Can the valuation in the policy be a more correct guide in the one case than in the other?" And he adopts the value for sale at the time of the loss.[3]

This doctrine of Mr. Justice Story has been distinctly adopted by the Supreme Court of the United States.[4] Giving the opinion of that court, he says: "In respect to the mode of ascertaining the value of the ship, and, of course, whether she is injured to the

len *v.* Sugrue, 8 B. & C. 561; S. C., 3 Mann. & R. 9; Young *v.* Turing, 2 M. & G. 593; S. C., 2 Scott, N. R. 751; also cited by same, 6 Mann., Gr. & S. at p. 414, Eggington *v.* Lawson, before Alderson, B., and Herne *v.* Hay, before Maule, J.

[1] Fontaine *v.* Phœnix Ins. Co., 11 Johns. 293; and see Dupuy *v.* United Ins. Co., 3 Johns. Cas. 182; Depeyster *v.* Columbian Ins. Co., 2 Caines, 85; Smith *v.* Bell, 2 Caines's Cas. 153; Coolidge *v.* Gloucester Mar. Ins. 15 Mass. R. 341. The rule is distinctly so laid down by Mr. Chancellor Walworth, in American Ins. Co. *v.* Center, 4 Wend. 45; and by the Supreme Court in New York, Center *v.* American Ins. Co., 7 Cowen, 564.

[2] Dickey *v.* New York Ins. Co., 4 Cowen, 222; Dickey *v.* American Ins. Co., 3 Wend. 658; Opinion of Mr. Senator Allen, American Ins. Co. *v.* Center, 4 Wend. 45; American Ins. Co. *v.* Ogden, 20 id. 287; Howell *v.* Union Mut. Ins. Co. of Philadelphia, in the Circuit Court of the United States, Maryland Dist., 1851; Hunt's Magazine, July, 1851.

[3] Peele *v.* Merchants' Ins. Co., 3 Mason, 27.

[4] Patapsco Ins. Co. *v.* Southgate, 5 Peters's Sup. Ct. R. 604.

amount of half her value, it has, upon the fullest consideration, been held by this court, that the true basis of the valuation is the value of the ship at the time of the disaster, and that if, after the damage is or might be repaired, the ship is not or would not be worth, at the place of repairs, double the cost of the repairs, it is to be treated as a technical total loss." [1]

A different doctrine has been propounded in Massachusetts.[2] The brig Pedler, which was valued in the policy at $6,000, on a voyage from Porto Rico to the United States, put into Bermuda on account of sea-damage, where it was estimated that the repairs would have cost $3,798, which would have been subject to the deduction of a third for new. The master sold her at auction for $1,708, and the assured made an abandonment. It was provided by the policy, "that the assured should not have a right to abandon the vessel for the amount of damage merely, unless the amount which the insurers would be liable to pay under an adjustment as of a partial loss should exceed half of the amount insured." [3] The material question, therefore, was, whether there were other grounds for abandonment than the mere expense of repairs. But in giving the opinion of the court, Mr. Justice Putnam took the position that, independently of that clause, the court would have looked to the policy itself for the value which should govern the application of the rule of total loss by damage over fifty per cent.; that is to say, the value at the commencement of the risk in an open policy, and the valuation in a valued one.[4]

The weight of authority is, however, in favor of the doctrine, that, so far as the amount of expense comes into consideration in a question, whether the loss is partial or total, reference is had to the actual value of the ship when repaired and restored to the

[1] Bradlie *v.* Maryland Ins. Co., 12 Peters's Sup. Ct. R. 378.

[2] Winn *v.* Columbian Ins. Co., 12 Pick. 279.

[3] This provision was adopted in Boston after the decision of Judge Story in the Circuit Court of the United States, in the case of Peele *v.* Merchants' Ins. Co., supra, No. 1526, et infra.

[4] Deblois *v.* Ocean Ins. Co., 16 Pick. 303. See also Hall *v.* Ocean Ins. Co., 21 Pick. 472; and Orrok *v.* Commonwealth Ins. Co., ibid. 456.

owner, and not to the value at which it is insured, unless a different rule is stipulated for in the policy.

If the rule of fifty per cent. is to be considered to be an enlargement or modification of that in England, it should refer to the value of the vessel for sale when repaired. This appears from the test adopted by the English courts in applying their rule, namely, the course which would have been taken by an uninsured prudent man in the same circumstances, for such a one would certainly not retrieve or repair a ship at an expense exceeding its value when repaired.

Another reason in favor of this construction is the plain subject of the inquiry, namely, the expediency of making the repairs, which must naturally be determined by the result, which is, in this case, the vessel in a state of repair.

This doctrine has been established by custom, which would not probably establish so variable a rule as to make a constructive total loss depend upon the rate of valuation in the policy, and to make the same case one of partial loss under a high valuation and a total loss under a low one.

If the value of the vessel in the policy is the criterion, the same loss may be total and partial under different policies on the same vessel at different valuations.

The same rule has been established respecting a constructive total loss on goods, and a high or low valuation of the goods will not affect the character of the loss by damage as partial or total. If the goods are damaged over half of their value, if sound, the assured may abandon and recover for a total loss, although they are insured at twice their market value.

Whether the rule adopted is of damage equal to the whole value, or half or any other proportion of it, to constitute a constructive total loss, it will be irregular, and, in some cases, unequal and inequitable in its operation. The reasons above given seem to lead to the conclusion, that

A damage over fifty per cent. of the value of the vessel when repaired is a constructive total loss of the vessel in case of the policy containing no express provision to the contrary, and not of one half of its value in the policy.

1540. *If the assured, or the master, or other agent of the assured, has proceeded to make complete repairs before the abandonment for the damage so begun to be repaired is made, the abandonment will be invalid, whether the loss be over or under fifty per cent.*[1] Whether the repairs are paid for by borrowing money on bottomry, or by other lien on the ship, or without any such lien, can make no difference, provided the assured has notice, and an opportunity to discharge the bottomry bond or other lien before the ship is sold under it.

1541. *Partial repairs at a port of necessity to enable the vessel to go to another port in ballast do not defeat the right to abandon*, if complete repairs would exceed half of the value.[2]

1542. This rule of the character of total loss being cancelled by repairing is subject to an exception, that *the circumstance of a derelict ship being rescued* from a peril *and repaired by volunteers*, for the benefit of the owners, but without their recognition or knowledge, *will not change a total into a partial loss, until the ship is restored to the possession or control of the owners, in a condition then constituting only a partial loss.*

A ship belonging to Liverpool had been deserted by the master and crew as being innavigable, and was taken possession of by the crew of another, and on the 14th of October arrived at New York, and the owners abandoned her on the 6th of November, on news of the disaster and desertion, before they had news of her being taken into New York. The British Consul at New York, as such merely, and without authority from the owners, appointed another master, and the ship was repaired and bottomried for the expenses for £1,200, and proceeded to Liverpool, and there sustained further damage in the Mersey, to the amount of £858, both of which amounts exceeded her value. The abandonment was held to be valid, on the ground that the ship, under

[1] Humphrey *v.* Union Ins. Co., 3 Mason's R. 429; Depeyster *v.* Columbian Ins. Co., 2 Caines, 85; Dickey *v.* New York Ins. Co., 4 Cowen, 222; Depau *v.* Ocean Ins. Co., 5 id. 63. See Coolidge *v.* Gloucester Ins. Co., 15 Mass. R. 341, contra.

[2] Saurez *v.* Sun Mut. Ins. Co., 2 Sandford's New York Sup. Ct. R. 482.

the bottomry and so damaged, did not subsist under such circumstances that the assured might reasonably be expected to take possession of it.[1] In England the rule is, that, in order to constitute a constructive total loss, and establish the right to recover therefor, the loss must continue to be a total loss till action brought. The decision accordingly amounts to the doctrine, that, where a loss total in its character has occurred, and, in consequence of the disaster and of other perils insured against, liens have accumulated upon the ship, before she is restored and comes within the control of the owner, to such an amount that her entire value is absorbed, the loss continues to be constructively total in its character, and an abandonment in due time is valid. And the case, in effect, adopts the principle, that the right to abandon is not taken away by reason of a third person's undertaking to make repairs who is in no respect the agent of the owner.[2]

1543. *Whether, in computing a total loss by damage over fifty per cent., a third for new should be first deducted?*

There are not wanting authorities of great weight in favor of the opposite answers to this question.

It was the opinion of the Supreme Court in New York, that "the rule has no reference to the distinction of new for old. It is the actual expenditure or damage that is taken into view, and, on the abandonment, the insurer has the benefit of the repairs."[3]

A majority of the Court of Errors were of a different opinion. Chancellor Lansing, giving the opinion of that court, said: "As the deduction is professedly made on the principle, that the value of the subject has been enhanced to that amount, that deduction

[1] Holdworth *v.* Wise, 7 B. & C. 794. In this case it was remarked by Bayley, J., that, in order to reduce the loss from total to partial, "the ship must be in esse in the country of the owner, in such circumstances that he may take possession of her." But this was not a well-considered expression, for the ship may be pursuing her voyage. The judge had in view the particular circumstances in the case before the court.

[2] The case of Dixon *v.* Reid, 5 B. & Ald. 597, and S. C., 1 D. & Ryl. 207, is somewhat analogous to that of Holdworth *v.* Wise, cited above.

[3] Dupuy *v.* United Ins. Co., 3 Johns. Cas. 182.

ought to be made before the test of total loss or not, is applied."[1] And this doctrine seems to have been subsequently adhered to in that State.[2]

The same doctrine prevails in Massachusetts,[3] in cases, however, where it was expressly provided for by the policy.

Mr. Justice Story, in giving his opinion upon this question, in in an early case, said: "If the deduction of one third could be made, I should have no doubt that the like deduction must be taken from the whole value of the ship after the repairs."[4] The rule has since been adopted by the Supreme Court of the United States, that a deduction of a third for new is not to be made in estimating the amount of the loss.[5]

"Such a deduction," says Mr. Chancellor Kent,[6] "is not to be allowed, and does not apply to cases of total loss."[7]

This is the doctrine held in Pennsylvania also.[8]

The positions, that deterioration to more than half of the value is a total loss, and that the value is to be considered, as between the parties, to be enhanced to the amount of one third of the expense of the repairs, are grounds alleged in favor of deducting the third part. If this deduction is made, then, to entitle the assured to abandon, the whole expense of repairs, without the deduction of a third for new, must exceed three fifths of the whole value of the ship when repaired; and two thirds of the expense of repairs must exceed one half of the value.

The reasons alleged against the deduction of one third before applying the rule, are,[9] that "the rule has no reference to the dis-

[1] Smith *v.* Bell, 2 Caines's Cas. 153.

[2] Pezant *v.* National Ins. Co., 15 Wend. 453.

[3] Sewall *v.* United States Ins. Co., 11 Pick. R. 90; Winn *v.* Columbian Ins. Co., 12 id. 279; Deblois *v.* Ocean Ins. Co., 16 id. 303.

[4] Peele *v.* Merchants's Ins. Co., 3 Mason's R. 27.

[5] Bradlie *v.* Maryland Ins. Co., 12 Peters's Sup. Ct. R. 378. See also Robinson *v.* Commonwealth Ins. Co., 3 Sumner's R. 221.

[6] Comm., Vol. III. p. 330.

[7] See also opinion of Senator Allen, American Ins. Co. *v.* Center, 4 Wend. 45.

[8] American Ins. Co. *v.* Francia, 9 Penn. R. 390.

[9] See Dupuy *v.* United Ins. Co., 3 Johns. Cas. 182; Peele *v.* Merchants' Ins. Co., 3 Mason's R. 27.

tinction of new for old;" that "on abandonment the insurers will have the benefit of the repairs;" that "no case in England has ever recognized any such deductions; yet some of the cases seemed to call for some expression in its favor, if it existed;" that "it must operate with great inequality, and introduce into the rule an element, sometimes of injustice, and generally inconsistent with its professed design;" that "the object of the rule is to ascertain whether the ship be worth repair, and it decides that, if the injury exceeds half the value, she is not worth repair;" and that the value is not in fact enhanced by the repairs.

It is said, in answer, that the insurer has nothing to do with the third, any more than he has with any other expense incurred by the assured until the right of abandonment accrues; and when the rule refers to an expense exceeding half of the value, it has reference to an expense to which the insurer is a party. The object is to distinguish a partial from a total loss; and when this is done by the amount of expense, what can be meant but the expense for which the insurer is liable in partial loss?

There will be some discrepancy in doctrine, and irregularity in the practical application of the rule, whichever mode of adjustment is adopted. If the rule for deducting a third is applied under the English doctrine, that to constitute a total loss the repairs must exceed the value of the vessel when repaired, it will lead to the objectionable consequence, that the assured has no right to abandon in case he can repair and renovate the ship, so that it shall be worth fifty per cent. more than it was before the damage.

The question is respecting the construction of an existing usage, which makes damage over fifty per cent. a constructive total loss. This is the whole length and breadth of the usage. This measure is more obviously applied to the vessel when repaired, and is by general consent so applied. The rule for deducting a third for new does not apply to the value of the vessel so repaired, if we deduct a third, and assume the repairs to exceed the value of the old parts for which they are substituted by one third. Thus, let the repairs, after deducting a third, be $500, the vessel, when repaired, being accordingly worth $1,000. To carry out our

rule as to the extra value of the repairs, they amount, in estimating the repaired vessel, to $750, the sum which they have cost. Consequently, the loss is not constructively total, except in case of the gross repairs being equal to three times the value of the vessel when unrepaired, and three quarters of its value when repaired, and the net repairs, after deducting the third, must be double the value of the unrepaired vessel. Such a construction of a usage to adjust as for a total loss by damage over fifty per cent. seems to be inadmissible, since it is not signified by the phraseology in which the usage is described.

In order, therefore, to put a practical construction on the usage for deducting the third for new, we must suppose the fifty per cent. rule to apply to the value of the vessel previously to the damage. The result is, that, where merely the amount of damage is in question, the loss on the vessel is not constructively total so long as the assured can, at an expense equal to three fifths of the value of the vessel prior to the damage, so repair and restore it, as that it shall be worth one quarter more than it was previously.

This is an improbable and unsatisfactory construction of a usage described to give a right to abandon in case of damage to half of the value.

Another reason alleged against the deduction of a third in case of constructive total loss is, that, since no repairs are proposed to be made, the rule for deducting a third is not applicable.

On the whole, *the more simple and probable construction seems to be, that the rule for a deduction of a third is not applicable to the case of a constructive total loss of the vessel.*

The strongest reason for this construction is, that, where the repairs approximate to the full value of the vessel, the operation of the rule for deducting the third becomes quite anomalous.

The contrary construction is, however, directly inferable from the practice of deducting a third from the repairs in partial loss by damage to the ship;[1] and if its application in total loss, as a matter of usage, — the whole question being one of usage, — is

[1] Such inference is made in the second edition of this work, 1841, Vol. II. p. 278.

considered not to be too improbable, and if it did not tend to objectionable and anomalous results, it might be recommended as the more logically and theoretically correct; and an additional reason in its favor, if it were a matter of legislation, might perhaps be, that it restrains the right of abandonment for constructive total loss, which motive has been sometimes alleged in jurisprudence, though its admissibility in putting a construction upon a law, whether enacted or springing from usage, is questionable.[1]

1544. *The policies of some companies provide expressly for the deduction of a third for new in an adjustment as for a constructive total loss by damage to the ship, and also that such a loss must exceed one half of the value at which the vessel is insured.*[2]

1545. *Whether, in estimating the damage to the ship,* and expense of repairs, *in reference to the loss being total or partial, the loss of a mast, or other damage to the ship by jettison,* subject to be contributed for in general average, *is to be included?*

There seems to be no reason for distinguishing this from any other case of damage over fifty per cent., so long as the contribution has not been made by the cargo and freight, the claim for which will go to the underwriters by abandonment,[3] in the same manner as that against captors, or against the owners of another vessel which has negligently run foul of the vessel insured, or other claim against third parties arising out of the loss. *If the contribution has been made, the amount of loss seems to be thereby reduced by that of the contribution,* and the right of abandonment affected accordingly. *If the loss still continues to be constructively total after the payment of the contribution* to the assured, *there seems to be no reason against abandonment,* where the right is not lost by delay, as in case of a total loss of the ship by voluntary stranding.

Accordingly, so far as the assured on the ship or other subject,

[1] See supra, p. 235, No. 1492.

[2] See clause quoted supra, No. 1539; and see infra, No. 1545.

[3] Columbian Ins. Co. *v.* Ashby, 13 Peters's Sup. Ct. R. 343. See also Maggrath *v.* Church, 1 Caines's R. 196.

a sacrifice of a part of which is to be contributed for, is owner of the cargo or another interest from which a contribution is due, the amount of contribution so due from himself is deducted in estimating the amount of loss as exceeding or falling below fifty per cent.[1]

It has been held in Massachusetts, under the clause against the right to abandon the vessel on account of the amount of damage merely, unless, under an adjustment as of a partial loss, the underwriters would be liable for more than half of the amount insured, that the damage to the ship by voluntary stranding is not to be included in making up the amount of loss of fifty per cent. to constitute a constructive total loss.[2]

The construction was, that the phrase "partial loss" is not used merely in contradistinction to "total loss," as seems to be the more obvious meaning, but in exclusion of all damage that might be the subject of contribution in general average. The provision seems to have reference merely to the "amount" of damage after deducting a third for new, and to the value of the vessel in the policy; and the amount of the damage is the same, whether in general or particular average.

It is also held in the same State, that the same clause excludes the right of abandonment for damage to the ship over fifty per cent., where no cargo or freight is at risk, if the same damage would have been the subject of contribution had there been a cargo and freight at risk.

It was so held under a time policy upon a vessel, on a voyage from Boston to Havana, the masts of which were cut away, and which was otherwise injured by the jettison, and compelled to put into Key West.[3] In this case, the loss by the damage to the ship, adjusted in whatever way it could be, whether as general or particular average, would be the same amount.

1546. *Though the damage to a vessel by perils insured against*

[1] Pezant *v.* National Ins. Co., 15 Wend. 453.

[2] Reynolds *v.* Ocean Ins. Co., 22 Pick. R. 191.

[3] Jordan *v.* Tremont Ins. Co., Sup. Jud. Ct. Mass. Suffolk, March, 1852; Greely *v.* Same Def'ts.

is to parts that had been subject to deterioration by wear and tear or natural decay, still, if the expense of repairs adjusted as a partial loss would exceed half of the value of the vessel, the assured may abandon.[1]

The assured is presumed to have complied with the warranty of seaworthiness, since otherwise there can be no question as to partial or total loss between the parties.

The underwriter is undoubtedly not answerable for wear and tear and decay, from ordinary causes, but he is answerable for the risks insured against, though they may have been enhanced by the ordinary effects of the elements upon the subject.

1547. *The enhancement of the amount of the loss by the negligence or mistakes of the master and mariners in navigating and managing the vessel, will not prevent its being a constructive total loss,* in the absence of fraud,[2] nor will their fraud have that effect where the policy is against barratry.

Mr. Justice Story says, the repairs of rigging, &c., injured by wear and tear, and of decayed timbers, are to be included in the estimate of the amount of the loss in applying the rule of technical total loss by damage exceeding half of the value.[3]

This question came up in a case in New York. At the time of sailing on a voyage from New York to Curaçoa, the vessel's "bottom was a little worm-eaten, but she was a stanch, tight, and strong vessel." She was compelled to put into Kingston, in a damaged state, where, in the opinion of the master and other masters of vessels, it would have cost more than her value to repair her; and she was accordingly sold, and the assured upon her abandoned to the underwriters. A question was made, whether the repairs rendered necessary on account of the vessel's being worm-eaten should be included in the estimate of the expense of repairs, by which the loss should be determined to be partial or total. The jury were instructed, "that if, in calculating the re-

[1] See supra, Vol. I. No. 1137, pp. 676, 677, and cases there cited.

[2] See supra, Vol. I. No. 1049, p. 591, et seq.

[3] Peele *v.* Merchants' Ins. Co., 3 Mason's R. 27.

pairs, they believed any were necessary on account of injuries received from worms prior to the vessel's sailing, the expense of such repairs should not be included in the estimate." And Mr. Justice Livingston gave the opinion of the court, that this direction to the jury was wrong. He cited Millar[1] for the doctrine, that the underwriter "is responsible for preëxistent defect, unless it goes so far as to make the ship not seaworthy."[2] Mr. Justice Livingston proceeds: "It may seem hard to hold an insurer liable for the defective nature of the thing insured; but so long as the subject is seaworthy, is it not a part of his contract, that in case of accident he will defray all the expense of placing her in statu quo? If she be injured, the repairs being rendered necessary by a peril insured against, they ought to be made, without any other examination as to her antecedent state, except to determine the fact of her being seaworthy. I adopt, as a general rule, that, if the old injuries are not such as to render the vessel innavigable, no deduction is to be made on that account from the cost of repair."[3]

The doctrine intended in these cases must be, that if worm-eaten timbers are broken or injured by the perils insured against, still the insurers shall pay for the repairs, although it would have been necessary to have made the repairs very soon, had no damage happened in consequence of these perils. In many instances the qualities of the subject, and the use to which it is put, or the ordinary accidents incident to it in the situation in which it is placed, may concur with the perils insured against in producing damage; still, if the damage can be satisfactorily attributed to the operation of those perils, the insurers are liable, unless they are discharged by some fault or stipulation of the assured.

[1] Page 136, n.

[2] Manning v. Newnham, Millar, 303, was cited by General Hamilton, for the assured, which, however, Mr. Justice Livingston says, "proves nothing either way." Millar, in the passage cited, is attempting to make a distinction as to the liability of the underwriter for the natural and expected deterioration of the subject, and its preexistent, though latent, defect." The passage is obscure, and it is not easy to extract from it any definite practical doctrine. It certainly does not serve to elucidate the doctrine of the above cases.

[3] Depeyster v. Columbian Ins. Co., 2 Caines, 85, confirmed by Depau v. Ocean Ins. Co., 5 Cowen, 63.

The doctrine on this subject is very distinctly laid down in a Louisiana case. An insured steamboat was damaged by running foul of another, so that it would cost more than she was worth to repair her and make her seaworthy, but the expense of the repairs of the damage done would not be equal to half of the amount at which she was insured in the policy. Had the accident not happened, the boat might have run, in the route in which she then was, eighteen months. Mr. Justice Porter, giving the opinion of the court, said: "We apprehend the rule to be, that, in case an injury is received by an old, decayed vessel, which, independent of the accident, might have run for some time, if the repairs cannot be put on her in such a manner that the unsound part can be used as formerly, without an expense equal to one half of the value, or, in other words, where the injury which the insurers are obliged to make good is the cause of the decayed parts requiring repairs, then the assured may abandon. But if repairing the injury which has arisen from one of the perils insured against will replace her in the same situation she was in before, no matter how unsound all the other parts may be, then the insured shall not have this right, for all that they can ask is, that the boat may be placed in statu quo. The underwriters are not obliged to make good the decayed and rotten parts of a vessel, unless the accident which happens within the perils insured against is of such a nature as will not admit of repairs being placed on her, so that the decayed and rotten parts may be used as formerly." The court was accordingly of opinion, that this was not a case of total loss.[1]

1548. *The expense of repairs is to be estimated in reference to the place at which they are to be made. If partial or temporary repairs ought to be made at one place, and complete repairs at another, the expense at both places, and of removal, is to be included.*[2]

The abandonment for damage over fifty per cent. is always

[1] Hyde v. La. State Ins. Co., 2 Martin, N. S. 410.

[2] Center v. American Ins. Co., 7 Cowen, 564; Sewall v. United States Ins. Co., 11 Pick. R. 90.

made from an estimate, since it cannot be made after the assured or his agent has undertaken to repair.

In the Court of Errors in New York, Walworth, Chancellor, one of the judges, said: "The repairs must be estimated at the port of necessity, that being the port at which the vessel put in after the damage. As that is the natural and proper place to make full repairs, the expense is to be estimated with reference to the prices at that place, whether high or low; but if repairs cannot be made there, so as to restore the ship to its former state, it will then be necessary to inquire where the additional repairs would naturally be made, and to add to the expense of such at that place the amount of those which could be made at the port of necessity." In the case under consideration, the ship had, on a voyage from New Orleans to Havre, put back to New Orleans, where copper could not be procured to recopper her. "As the master could not recopper at New Orleans, the ship would have been rendered seaworthy for the voyage insured by wooden sheathing, of a proper thickness to receive the copper afterwards; and there being no copper fastenings at that place, iron fastenings must, from necessity, have been used. After the cargo was discharged at Havre, copper fastenings and copper sheathing would be added to complete the repairs; and an estimate of the aggregate amount of making the repairs in that manner would be the proper criterion for determining whether the ship was injured in such manner as to authorize an abandonment." [1]

So it has been held in Massachusetts, that where the repairs would have cost more than fifty per cent. of the value of the ship at the port into which she was carried after a disaster, yet as she was in fact brought to her home port and there repaired, the right to abandon must be determined, not by what the expense of the repair swould have been at the foreign port, but by what it actually proved to be in the course adopted. It was the case of a ship damaged by running aground on the Florida coast, which put into Key West, where it would have cost more than fifty per cent. of her value to repair her. She was not so damaged as to pre-

[1] American Ins. Co. *v.* Center, 4 Wend. 45.

vent her from being navigated to a port where the repairs would cost less than fifty per cent. of her value; and she was in fact navigated to Boston, and there repaired at an expense of less than that proportion. It was held, that the owner had no right to abandon.[1]

It has been held in the same State, that, where complete repairs could not be made at Malaga, at which place the vessel was, at an expense of less than fifty per cent., but that partial repairs could be made there, so that the vessel could go to Gibraltar, a neighboring port, where complete repairs could be made, at an expense, including the repairs made at Malaga, amounting to less than fifty per cent., it was the duty of the master to make partial repairs at one port, and go to the other and complete the repairs; and if, instead of doing so, he sold the ship at Malaga, the assured would not be thereby entitled to abandon.[2]

1549. *Though the value of the ship* at the time and place referred to in the adjustment *is affected by its register*, the place where it was built, *or other national characteristics, no regard is had to this circumstance in adjusting the loss as partial or total.*

It was so held by Lord Abinger, C. B., and his associates, respecting a Dutch ship insured in England, which was stranded on the Goodwin Sands, and was of less value for sale in England than if she had been an English ship.[3]

1550. *A contribution for which the ship is liable at an intermediate port, to cargo and freight, or either, on account of a jettison, should be included in the estimate of damage over fifty per cent.; but if the contribution does not become due until arrival at the ultimate port* of the pending voyage or adventure insured upon, *this contribution should be excluded.*

The rule of abandonment for damage over half of the value does not, as has already appeared, apply to the port of ultimate destination of the subject of the policy. Though the contribution

[1] Hall *v.* Franklin Ins. Co., 9 Pick. R. 466.

[2] Orrok *v.* Commonwealth Ins. Co., 21 Pick. R. 456.

[3] Young *v.* Turing, 2 Mann. & Gr. 593; S. C. 2 Scott, N. R. 752.

for a jettison constitutes a lien subject to the perils of the sea, upon all the contributory interests, until arrival at the port of discharge of some part or the whole of the cargo, so as wholly or partially to terminate the voyage or adventure, yet as it does not become absolute, at least until such arrival, the lien is no stronger ground of claim for a right to abandon the goods at that port, than a loss of half or three quarters of the goods themselves would be. The voyage is not in such case broken up; it is only partially broken up, that is to say, it is broken up in the proportion of the amount of the contribution, or of the goods lost, to that of the whole quantity insured in the policy, and is to be settled as a partial loss. So far as the contribution is concerned, it does not appear how great a loss, or whether any, will accrue therefrom, until the goods have arrived at the port at which the rule in question does not apply.

Where a shipment and its proceeds successively are insured to successive ports of discharge and loading as one continued adventure, and a contribution for jettison accrues and becomes absolutely due at some of the intermediate ports, then the amount of the contribution ought certainly to be included in the fifty per cent., for it makes no difference to the party insured whether he has lost one half of his goods, or one half of their value in a contribution. His voyage or adventure is as effectually broken up in the latter case as in the former; and there is, therefore, as good ground for abandonment.

1551. *Where expenses are incurred for salvage of a wrecked ship and cargo, the proportion belonging to the ship is to be included with the repairs in making the estimate of fifty per cent.*[1]

The principle is, that the expense of getting off a stranded ship, and removing a damaged ship to a port more convenient for making repairs, are equivalent, in respect to abandonment, to expense for repairs. Under the stipulation against abandonment for "damage merely," unless amounting in "an adjustment as of a partial loss" to more than half of the amount insured, the expense

[1] Sewall *v.* United States Ins. Co., 11 Pick. R. 90; Bradie *v.* Maryland Ins. Co., 12 Peters's Sup. Ct. R. 378.

of raising a submerged ship was put upon the same footing as repairs of damage; that is, the submersion or stranding was considered to be part of the "damage," as it unquestionably was;[1] but this construction is limited by the court to the case of such expense being incurred for the ship only, after the cargo had been discharged; but where it had been incurred for ship and cargo both, to be apportioned upon each pro ratâ, it was decided by the same court that it must be excluded from the estimate of the fifty per cent.[2] The distinction made in the two cases is, that in the first, this expense, though in the nature of general average, yet being incurred for one interest only, was to be put upon the footing of "partial loss" in respect to the right of abandonment; but not so in the latter. The distinction is rather nominal than real, and seems not to have been absolutely necessary. The term "partial," in the clause referred to, is used in contrast to "total." "Particular average," on the contrary, is contrasted to "general average." The phrase, "damage merely," was probably chosen purposely to admit of an abandonment on account of damage over fifty per cent., whether it was general or particular average. That is, if the ship is damaged seventy-five per cent. by jettison of masts, sails, rigging, and scuttling the hull, though twenty per cent. of this amount were reimbursed by contribution from the cargo, still the assured would have a right to abandon according to the general law on this subject, and such right does not appear to be inconsistent with the stipulation in question.[3]

1552. *Whether, in computing the fifty per cent. of the value of the subject in reference to the question of partial or total loss, the premium should be included?*

In case of the vessel insured on time valued at a certain amount, including premium, it was held in Massachusetts, by

[1] Sewall *v.* United States Ins. Co., 11 Pick. R. 90.

[2] Orrok *v.* Commonwealth Ins. Co., 21 Pick. R. 456; Hall *v.* Ocean Ins. Co., id. 472.

[3] The object of the stipulation introduced into Boston policies in 1825 appears to have been (and as an historical fact was) intended to restrict this right of abandonment to a loss amounting to fifty per cent. of the value of the ship in the policy, as distinguished from its value at the time and place of repairs.

Shaw, C. J., and his associates, that, in order to give a right to abandon, the expense of the repairs must exceed half of the valuation, under the provision in the policy, that, to authorize abandonment, the amount of the loss adjusted as a partial one must exceed half of the amount insured.[1] This is deciding that if a vessel worth $1,000, without including the premium, is insured at a premium of five per cent., and valued, including that premium, at $1,052\frac{10}{100}$, the repairs, to constitute a constructive total loss must amount to half of the latter sum. This is to say, the premium is always to be included in the computation, for the phrase "amount insured" means, of course, THAT INSURED UPON THE SUBJECT. The premium is a part of the insurable interest in any policy, and is covered in an open policy if a sufficient sum is insured. It does not appear that expressly including the premium in the valuation will make any difference, except that it will make the insurable value less than if it is excluded under a valuation at the same amount. Our present question is still the same in either case, namely, Is the loss over half of the value of the subject, in whatever way and at whatever rate that value is estimated? It accordingly follows, that,

If the premium is included in determining the value of the subject, it should be included in estimating the amount of the repairs, to ascertain whether it exceeds half of that of the thing repaired, since the amount of one half of a thing should be determined by the same rule as that of the two halves.

It consequently can make no difference in the result, whether the premium is included or excluded in making the adjustment.

1553. *In applying the rule of total loss by repairs amounting to more than half of the value, the wages and provisions of the crew, during the estimated time of detention at a foreign port for repairs, are not to be included* as part of the loss, in addition to the expense of repairs. *So far as they were employed in the repairs, their wages will constitute a part of the expense.*[2]

1554. *Where the ship is bottomried for the expense of repairs,*

[1] Orrok *v.* Commonwealth Ins. Co., 21 Pick. R. 456.

[2] Hall *v.* Ocean Ins. Co., 21 Pick. R. 472.

including interest, under fifty per cent. of its value, the assured cannot abandon, if, before it is sold under the bond, he has an opportunity to discharge the lien.

A ship, on a voyage from Havana to Rotterdam, put into Halifax, where she was repaired, and the expense was paid by a sale of goods, and she was bottomried at Rotterdam, to an amount exceeding half of her value, to secure payment for the goods thus sold, having been previously abandoned in New York. She was subsequently sold in New York under proceedings upon the bottomry bond. The abandonment was held not to be valid, on the ground, that, at the time of its being made, the ship had been "beneficially restored" to the assured, and was prosecuting her voyage, free of any lien.[1] If the above proposition is correct, the decision would have been the same had she been bottomried for money at Halifax for the expense of the repairs, since it was the fault of the assured to permit her to be sold. But if the bottomry is authorized by the circumstances merely for the purpose of raising funds to pay for repairs rendered necessary by the perils insured against, and the ship is subsequently sold unavoidably under the bond, without notice having reached the assured so that he might discharge the bond, this is a total loss independently of the rule of abandonment for damage over half of the value.

1555. *Whether the rule as to abandonment in case merely of damage over fifty per cent., without any other reason, applies under a policy upon the vessel, after its arrival at the ultimate home port of destination?*

It is held in New York, that the rule does not apply in such a case.[2]

Mr. Marshall[3] lays down the doctrine, that, to constitute a total loss and give a right to abandon the ship, there must be a loss of the voyage, and accordingly, that, if the ship arrives at its final port of destination, in specie and as a ship, no abandonment can

[1] Depau *v.* Ocean Ins. Co., 5 Cowen, 63.

[2] Pezant *v.* National Ins. Co., 15 Wend. 453.

[3] Marshall's Insurance, 2d ed., pp. 583–585.

be made.[1] Though he does not make any statement relative to total loss by damage merely, exceeding half of the value, that rule not being adopted in England, he makes a distinction between a case of damage whereby the vessel is prevented from prosecuting the voyage on account of becoming innavigable and unrepairable, and the case of the accomplishment of the voyage to the home port, and the vessel's surviving as such and being repairable. Such a distinction is directly recognized in jurisprudence, in all the cases where a loss of the voyage is held to be a constructive total loss of the subject. Accordingly, notwithstanding a Pennsylvania decision to the contrary,[2] the better doctrine seems to be, that

Damage exceeding fifty per cent. merely, independently of other considerations, does not constitute a constructive total loss, authorizing the making of an abandonment of the vessel after arrival at its home port of destination.

1556. *Whether the offer and readiness of the underwriter to repair and restore a stranded or damaged ship at his own expense, and the result of his experiment therefor, may be used as evidence of the character of the loss as partial or total?*

This inquiry is equally applicable whether damage exceeding fifty per cent. is considered of itself to constitute a total loss, as in the United States; or, as in England, this specific proportion is not adopted, the doctrine in England being that the extent of the damage is to be taken into consideration together with all the other circumstances, in determining the loss to be total or not so, without fixing on any precise proportion of damage.

Lord Mansfield mentioned, among the reasons for considering a loss to be partial, that "the insurer undertook to pay all charges and expenses the assured should be put to by the capture."[3]

[1] He cites to this proposition, Cazalet *v.* St. Barbe, 1 T. R. 187; Furneau *v.* Bradley, Park, 257; Fitzgerald *v.* Pole, 5 Bro. Parl. Cas. 131; S. C., Willes, 641. The marginal notes and the index in Marshall state the doctrine in broader terms than are borne out by the text.

[2] Peters *v.* Phœnix Ins. Co., 3 Serg. & R. 25.

[3] 2 Burr. 1209.

In an early case in Massachusetts, Mr. Chief Justice Parsons, in giving the opinion of the court on the question of partial or total loss, in case of stranding, said: "If the underwriter will engage to pay all the expenses [of an attempt to recover and repair the ship,] whatever may be the event, the owner cannot abandon, until he has used reasonable endeavors to recover his ship, and has eventually failed." [1]

But in the same case the same distinguished judge remarks, that if, in the sequel, the loss appears to be total, an abandonment seasonably made, whether previously or subsequently to such offer, is valid; so that the proposition is merely that the underwriters shall have an opportunity to make an experiment at their own expense to get the vessel afloat, and the question of the right or validity of an abandonment shall be in suspense in the mean time.

It does not appear, however, of what avail such an experiment could be in respect of abandonment, if the right to make it, and its validity when made, is not to be affected by the result. The necessary construction, therefore, seems to be, that, when the vessel is in the vicinity of the parties, the underwriters may, if they so elect, make an experiment at their own expense by way of settling the fact whether the loss is partial or total.

Mr. C. J. Savage intimates that, though an offer by the underwriters to repair will not defeat a vested right to abandon, yet an offer to bear all the expense is a proper ingredient in considering whether the owner has a right to abandon.[2]

This is putting the offer and the experiment upon the same ground as they were put by Mr. C. J. Parsons, namely, as part of the evidence to prove the actual state of the facts.

Mr. Justice Story also assents to the same doctrine.[3]

These authorities give a strong support to the doctrine, that *evidence of an offer to float or repair the vessel, and of the result of an experiment for the purpose, may be given upon the question*

[1] Wood *v.* Lincoln & Kennebec Ins. Co., 6 Mass. R. 479, at p. 484.

[2] Dickey *v.* American Ins. Co., 3 Wend. 658.

[3] Peele *v.* Merchants' Ins. Co., 3 Mason's R. 27.

of partial or total loss, so far as it depends upon the amount of expense *merely.*

The offer or experiment will, however, at the most, merely go to the amount of expense, and the time requisite for it. If the experiment proves that the expense, in making the experiment in the usual way, would be over fifty per cent. of the value of the vessel, or that the vessel could not be repaired and refitted in reasonable time, it will, according to the doctrine in question, establish the claim for a total loss.

It can hardly be supposed that an underwriter on a vessel in an amount much less than its value, would make such an offer as that in question.

Though the expense is below half of the value of the vessel, and repairs can be made in reasonable time, still other circumstances may affect the character of the loss as partial or total; as, for instance, where the vessel is not on a voyage, the distance from its home port, and the season of the year, where these circumstances are material in reference to its advantageous employment.

1557. Some opinions refer to another question, namely,

Whether an offer and readiness on the part *of the underwriters to repair a damaged ship, and their actually repairing* and restoring *it* in time for prosecuting the voyage, or in reasonable time, if no voyage is pending, *at their own expense*, whatever the expense may be, whether over or under fifty per cent., *will annul an abandonment, and* cancel and satisfy and *discharge the claim for the loss?*

Mr. Justice Washington was of opinion that, "if the vessel was injured more than one half its value, the assured had a right to claim for a total loss, unless the underwriter offered to pay the amount of repairs at all events. But he must engage to pay what may be necessary to fit the vessel to prosecute the voyage, although it may exceed what he would otherwise be liable for." [1]

This doctrine was adopted by Mr. Chancellor Walworth, in the Court of Errors of New York, twenty years afterwards, with the

[1] Hart *v.* Delaware Ins. Co., 2 Wash. C. C. R. 346.

more specific qualification, that the repairs must be made seasonably for the prosecution of the voyage.[1]

The same doctrine is also adopted in Pennsylvania.[2]

It does not appear whether it is contemplated, according to this doctrine, that underwriters on a part of a subject may make the experiment, or, if they do so, and succeed, whether they can compel reimbursement from the underwriters on the remainder, or from the assured for the uninsured proportion of the subject.[3]

The doctrine that any offer by the underwriters to make repairs, or any acts of theirs in making repairs, can defeat an abandonment or annul a right to make one, is strenuously opposed by Mr. Justice Story. He says: "I know of no judgment where it has been held that, in a case of capture, or embargo, or blockade, the right to abandon can be intercepted by an offer to indemnify and pay all the expenses; if it could be, then an abandonment in all such cases would be perfectly nugatory, for the policy always imports, on the part of the underwriter, an agreement to this effect. And yet, if the principle be correct, I do not perceive why it is not as applicable to a case of capture as of sea-damage; to a case of blockade, as of shipwreck. It appears to me to be introducing a new element of discord into the law of insurance, to allow the right of abandonment to be a shifting right, dependent on the will of both of the parties, and to be defeated by the act of one, after it has rightfully attached by the act of the other. And I am yet to learn how it is that an offer, made at the time of the abandonment, to pay all expenses, can have more efficacy than the same offer incorporated as it is in the original terms of the policy. The assured may in all cases elect to repair the damage at the expense of the underwriter."[4]

Mr. Justice Smith, of Connecticut, commenting upon this doctrine, says: "*Where there is no express stipulation on the matter* it contradicts the whole current of authorities to permit any sub-

[1] Dickey *v.* American Ins. Co., 3 Wend. 658.

[2] Ritchie *v.* United Ins. Co., 5 Serg. & R. 501.

[3] See infra, Commonwealth Ins. Co. *v.* Chase, 20 Pick. R. 142.

[4] Peele *v.* Merchants' Ins. Co., 3 Mason's R. 27.

sequent transactions to remove the legal effect of abandonment rightly made at the time, except the agreement of the parties. Nor can I admit that the refusal of the insurer to advance money, or undertake to defray the expense, will in any case turn a partial loss into a total loss." [1]

The reasons of Mr. Justice Story are very cogent, and in conformity to the predominating jurisprudence, both direct and analogous, which seems to favor the doctrine, that

Where there is no express stipulation on the matter any offer and readiness of the underwriter to be at all the expense of recovering or repairing the ship, and his actually repairing it and tendering it to the assured, will not divest the assured of his right to recover for a total loss.[2]

It is expressly stipulated in some policies that in case of the neglect of the assured or his agents to repair the ship in case of disaster the underwriters may take possession and repair.[3]

1558. *The neglect or refusal of the underwriters, on notice, to discharge a bottomry bond or other lien, will not render them liable for a total, instead of a partial loss.*

In a case decided by Ashhurst, Buller, and Grose, Justices,[4] evidence of such refusal by the underwriters was admitted, and the decision seems to have turned upon it. But in that case the underwriters had dissuaded the assured from abandoning, and there may have been some ground from which a jury might have been authorized to infer that some obligation on the part of the underwriters had arisen from what had passed between the parties. Otherwise, the case would be a departure from the common principles of jurisprudence, whereby a party, who neglects or refuses

[1] King *v.* Middletown Ins. Co., 1 Conn. R. 184.

[2] Emerigon is of opinion, in the analogous case of a derelict innavigable ship being repaired by the underwriters, that its restoration to the assured does not defeat the abandonment. Chap. 17, s. 6, a. 2. Valin is of a different opinion.

[3] Cincinnati & Firemens' Ins. Co. *v.* May, 20 Ohio R. 211.

[4] Da Costa *v.* Newnham, 2 T. R. 407. See remarks of Story, J., on this case, in Bradlie *v.* Maryland Ins. Co., 12 Peters's Sup. Ct. R. 378, at p. 406.

to meet his legal liabilities on demand, thereby renders himself answerable only for the direct damage, not for contingent, remote, and incidental damage, especially for that which might have been prevented by the other party, as in this case; for if extraordinary loss ensues by reason of the lien not being discharged, as, for instance, by the sale of the ship at a reduced price to satisfy the lien and the expenses incident to the enforcement of it, this could have been prevented by the assured by discharging the lien, for the case supposed him to have had notice of it. The case might occur, in which, in order to prevent the sale of the ship, the lien must be discharged before the loss becomes payable by the terms of the policy, by which it is ordinarily stipulated that a loss is to be paid sixty days after notice and proof. The insurers could not, therefore, be liable to discharge the lien.

In a case that came before the Supreme Court of the United States, a ship, having been bottomried by the master, for the expense of repairs and of salvage, for which the underwriters were answerable, and also for some further funds needed by the master, but for which the underwriters were not liable, returned to Baltimore, her home port, where she was insured, and was there libelled and sold to satisfy the bottomry bond, no claim being interposed either by the assured or underwriters. On the day of the sale, the underwriters offered to pay a partial loss, which was declined by the assured, who insisted on a total loss. It was held by the Supreme Court of the United States, that the underwriters were not liable for a total loss, by reason of their not volunteering to take up the bottomry bond, and thus prevent the sale of the vessel under the admiralty process. Mr. Justice Story, giving the opinion of the court, said: "The underwriters were not liable for the whole amount of the bottomry bond, but for a part only, and the owners were bound to discharge the residue. How, then, can they call upon the underwriters to pay them for a total loss, on account of the sale, which was as much attributable to their own neglect as to that of the underwriters? In case of a partial loss, where money is taken up on bottomry, the underwriters have nothing to do with the bottomry bond, but are simply bound to pay the partial loss, including their share of the extra expenses of

obtaining the money in that mode as a part of the loss. If it were otherwise, any partial loss, however small, might, if money were taken up on bottomry to meet it, be converted into a total loss.[1]

1559. *Whether, if the underwriters take possession of a damaged ship and repair it, without the consent and against the wishes of the assured, the claims and the liabilities of the parties as to total loss, so far as the same depend on the amount of damage merely, shall be decided by the result in making the repairs?*

And whether, in case of the repairs not exceeding fifty per cent. of the value of the ship, the underwriters can, on the ship being returned to the assured, *demand* of him *the reimbursement of the excess of the* expense of the *repairs over* what they would have been liable for in an adjustment of *a partial loss?*

It has already appeared to be a well-supported doctrine, that an offer by underwriters to float a stranded vessel or make repairs, and the result of an undertaking for the purpose, may have weight in reference to the practicability and expense of getting off the vessel, and the expense of repairing it.

Our present inquiry is, whether underwriters have a right, in case of an abandonment, without the consent or against the remonstrance of the assured, and without accepting the abandonment, to take possession of the ship and repair it, and when repaired to return it to the assured, provided they make suitable repairs promptly and within reasonable time.[2]

In a case quite analogous to the one in question, Dr. Lushington decreed against the right of the owners of a vessel which, by collision through the fault of those in charge of it, had sunk another, to take possession of such other and raise and repair it and tender it to its owners in satisfaction and discharge of their liability for damage.[3]

[1] Bradlie *v.* Maryland Ins. Co., 12 Peters, 378, at pp. 405, 406. The case of Thornley *v.* Hebson, 2 B. & Ald. 513, is cited by the court, and that of Da Costa *v.* Newnham, 2 T. R. 407, commented upon at length.

[2] See Reynolds *v.* Ocean Ins. Co., 22 Pick. R. 191, as to reasonable time.

[3] The Columbus, 3 W. Rob. 158. Dr. Lushington remarked, that they might have applied to the court for

There does not appear to be any case, except in the jurisprudence of Massachusetts, which authorizes the underwriters to take possession of a ship insured by them, unless it is in pursuance of a stipulation in the policy, an acceptance of an abandonment, or with the consent of the owner.

The doctrine adopted in Massachusetts, is that the underwriters have a right, in case of an abandonment of a damaged ship, to take possession of it without the consent of the owner, and repair it, for the purpose of proving that it is not a total loss.[1]

It has further been held in the same State, that the underwriters have a right, in such case, to recover against the assured all the expense properly and necessarily incurred by them in recovering and repairing the vessel, for which they would not have been liable in an action by the assured for the loss. It was so held under a Boston policy for one year, against total loss only, containing the clause that "the acts of the assured or underwriters in recovering and saving the property should not be an acceptance or waiver of abandonment." During the year the vessel was stranded in Lynnhaven Bay, on the Virginia coast, and an abandonment was thereupon made to the underwriters, who refused to accept it; and, without the consent of the assured, employed a person to get her off. She was floated and repaired at an expense less that fifty per cent. of her value. The underwriters thereupon brought an action against the assured for the expense, on the ground that it was necessarily incurred for the purpose of determining whether the loss amounted to fifty per cent. of the value, and that it was money expended for the benefit of the assured. The judgment was in favor of the underwriters on the latter ground.[2]

Mr. Justice Putnam, giving the opinion of the court, referred to two precedents in support of the decision. One of them was the case of subtenants who repaired the leased premises to avoid being ousted by the entry of the landlord, in which it was adjudged by

an order for a sale of the sunken vessel as a mode of settling the damage.

[1] Wood *v.* Lincoln & Kennebec Ins. Co., 6 Mass. R. 479; Peele *v.* Suffolk Ins. Co., 7 Pick. R. 254.

[2] Commonwealth Ins. Co. *v.* Chase, 20 Pick. R. 142.

Abbott, C. J., and Bailey, Holroyd, and Best, Justices, that the subtenants were entitled to recover against the superior tenant the amount reasonably expended in the repairs, on the ground that the latter was bound in respect to the subtenants to have made the repairs.[1]

In the other precedent, a carriage left upon leased premises to be repaired was detained by the landlord for rent, which the proprietor paid, not being able otherwise to regain his carriage; and it was adjudged by Lord Kenyon, C. J., and Grose, Lawrence, and Le Blanc, Justices, that he was entitled to recover the amount so paid, against the lessees, on the ground that the latter were bound to have protected the carriage against such a lien.[2]

The deficiency of these authorities arises from the circumstance that the assured, in the case before the court, was under no obligation, in respect to the underwriters or any body else, to float and repair his vessel, whereas, in the cases cited, the defendants were under an obligation to the plaintiffs to do what the plaintiffs were under the necessity of doing to save their property.

Notwithstanding the decisions, therefore, I cannot but deem it to be the better doctrine, that

The underwriters are not authorized to take possession of the insured ship, except on acceptance or as an acceptance of an abandonment, *unless they have authority therefor from the owner, or his consent thereto.*

And *the assured is not liable to reimburse to the underwriters any expense they may incur without his consent in repairing his vessel.*

1560. *Where marine interest has been paid on account of a loss* for which underwriters are liable, they are liable for the reimbursement of such interest as part of the loss,[3] and *the same is* accordingly *included in estimating the amount* of the loss in reference to the question of its being partial or total.

[1] Colley *v.* Streeton, 2 B. & Cr. 271; S. C., 3 Dowl. & R. 522.

[2] Exall *v.* Partridge, 8 T. R. 408. The case of Newman *v.* Walters, 3 B. & P. 612, is also cited, which seems, however, to have but a remote bearing upon the question in discussion.

[3] See supra, No. 1290, 1326, 1357, 1360, 1427.

1561. *The master may hypothecate the ship or cargo, for the purpose of raising funds which are absolutely necessary in order to enable him to prosecute the voyage, and which cannot be otherwise procured.*

Chief Justice Hobart said he "was of opinion clearly, that if a ship be at sea, and take leak, or otherwise want victuals, whereby either herself be in danger or the voyage defeated, in such case the master may impawn."[1] And this doctrine is everywhere acknowledged,[2] and is a matter of familiar practice.

Though the master may bottomry the vessel for the purpose of liberating it from an actual arrest, yet it has been stated that a mere threat to arrest it for a debt contracted previously, wholly upon the personal responsibility of the owners, will not authorize the master to raise funds to discharge the debt and thus prevent the arrest.[3] But it should seem that this ought to depend in some degree, as in cases of jettison and other cases of measures taken to avoid a peril, upon the character and imminency of the peril, and its being otherwise inevitable. If delay could infallibly aggravate an imminently impending peril, it would seem to afford an excuse to the master for anticipating it and taking the necessary measures to escape from it.

The owners may still be personally liable to the master, notwithstanding the invalidity of the bottomry given by the master on account of advances.[4]

1562. If resort is to be had to hypothecation, *the master should, in preference, hypothecate that subject on account of which the funds are needed.*[5] He may, however, as appears in its place, in certain emergencies where it is necessary in order to procure the means of making repairs, sell or hypothecate goods for the purpose. If bottomry would be attended by enormous sacrifice, he may resort to the sale or hypothecation of the cargo for the means of making repairs, if the interest of the owner of the cargo is thereby

[1] Bridgeman's Case, Hob. 11.

[2] Laws of Oleron, a. 22; The Bonaparte, 1 Eng. Law & Eq. & Ad. R. (Press of Little, Brown & Co.) 641.

[3] The Aurora, 1 Wheat. 96.

[4] Hurry *v.* Hurry, 2 Wash. C. C. R. 145.

[5] Wilson *v.* Millar, 2 Stark. R. 1.

promoted. This is a modification of the rule that the subject for which the funds are immediately needed must be resorted to.

1563. *If the master is under necessity to use his own funds or the property of a shipper to repair the ship in a foreign port, he or the shipper has a lien for the same on the ship.*[1]

In general the master must use his own or his owner's disposable funds before resorting to hypothecation,[2] *but whether he is bound to do so, will depend upon the circumstances,*[3] since if other use of what funds he has, is absolutely necessary to the advantageous prosecution of the voyage, it would be absurd to require that he should defeat his voyage by applying them in repairs, when he could, by bottomry, obtain the requisite advances.

1564. As the master derives his authority to procure funds on the credit of the owner of ship or cargo, or by pledging either, solely from the necessity of the case, *the party who makes advances to the master is bound to inform himself of the necessity for so doing, and will have no lien on the subject pledged, or valid claim upon the ship-owner or shipper, unless the necessity justifies the master in resorting to extraordinary proceedings.*[4]

But the validity of a bottomry is not affected by the prior misconduct of the master.[5]

Nor will the lender lose his lien by reason of the captain's misapplication of funds lent.[6]

1565. *It is the duty of the master, before hypothecating the ship or breaking up the voyage and selling the ship or other subject,* for want of the means to proceed, *to communicate with his owners, if the* distance and other *circumstances admit of his so doing.*[7]

[1] American Ins. Co. *v.* Coster, 3 Paige's Ch. R. (N. Y.) 323.

[2] The Aurora, 1 Wheat. R. 96.

[3] The Ship Packet, 3 Mason's R. 255.

[4] Boyle *v.* Atty, 1 Gow, 50. See also Cary *v.* White, 1 Bro. P. C. 284; Milward *v.* Hallett, 2 Caines's R. 77; James *v.* Bixby, 11 Mass. R. 34; The Vibilia, 1 W. Rob. Ad. R. 1; The Aurora, 1 Wheat. 96.

[5] Conizares *v.* The Santissima Trinidad, Hopkins's Ad. R. 35; S. C., Marsh. Ins., by Condy, 741 b. n.

[6] Conizares *v.* The Santissima Trinidad, supra.

[7] Turnbull *v.* Ship Enterprise, Hopkins's Ad. Dec. 17; S. C., Condy's

The authority of the master to bottomry is sometimes said to be limited to foreign ports as distinguished from home ports, and England, Scotland, and Ireland have each of them been held to be foreign ports relatively to each other in this respect;[1] but this is not the true criterion, since a near foreign port may admit of a more ready communication than a distant home port; and it has accordingly been held, that the master may give a valid bottomry in a home port in case of seasonable communication with his owners being impracticable.[2]

1566. *The master cannot resort to the hypothecation of the ship or the cargo to raise funds, if the same can be obtained on the credit of the owner of that subject on account of which the funds are needed. And he is authorized thus to raise funds only so far as the same are reasonably necessary,* for the purposes requiring a resort to hypothecation.

Mr. Justice Story has learnedly investigated this subject. The ship Fortitude was bottomried at Calcutta, by the master, for the expense of repairs. The owners disputed the claim, on the ground that the repairs were not necessary, and were made through the gross misconduct and want of judgment of the master. No imputation of fraud or participation in the misconduct of the master was made against the lender, who was charged, however, with want of due diligence in his inquiries as to the true state of the ship. Story, J.: "It is agreed on all sides, that the master is to be treated as the general agent of the owner or employer of the ship, as to procuring repairs and supplies for the ship in a foreign port, in the absence of the owner or employer. And it is equally agreed, that this power is not unlimited; but is restricted to such repairs and supplies as are, in a just sense, necessary for the ship, under the actual circumstances of the voyage. There is a manifest difference between that necessity which will justify repairs, and that superadded necessity, if I may use such an expression,

Marsh. 741 b. n.; The Ship Louisiana *v.* Barclay, Condy's Marsh. 741 b. n., and see cases generally.

[1] Per Dr. Lushington, case of The Trident, 1 W. Rob. Ad. R. 29; The Rhadamanthus, 1 Dods. Ad. R. 201.

[2] The Ysabel, 1 Dods. Ad. R. 273.

which will justify the giving of a bottomry bond. To justify the giving of a bottomry bond, it is not only essential that there should be a necessity for the repairs, but that there should also be a necessity of resorting to a bottomry bond, in order to procure the proper funds to defray the expenditures. It is only when this is the only, or the least disadvantageous mode of borrowing, that the master is at liberty to resort to it. The giving of a bottomry bond is properly said to be justifiable only in a case of great extremity, of urgent necessity, or of extreme pressure."

"If the repairs made were, in the sense of the law, necessary repairs, for which the owner would have been personally liable if no bottomry bond had been taken, then, if the necessary funds in order to make those repairs could not otherwise be obtained, and the bottomry bond was bonâ fide entered into by the lender, it would be extremely difficult to show that it ought not to be upheld. In relation to what are necessary repairs, in the sense of the law, for which the master may lawfully bind the owner of the ship, a thorough examination of the common text writers, ancient as well as modern, will, as I think, satisfactorily show that 'necessary repairs' mean such as are reasonably fit and proper for the ship, under the circumstances, and not merely such as are absolutely indispensable for the safety of the ship, or the accomplishment of the voyage." [1]

1567. The justification of the hypothecation of the ship or cargo by the master on account of the necessity of the measure for want of funds or credit, or other means to make repairs, is not applicable to the ship-owner himself, when he is present or near enough to be applied to by the master. The usual contract of affreightment, and the whole course of jurisprudence, suppose the ship-owner to keep the ship in repair, and consequently to have sufficient means for that purpose, though he is not presumed to send sufficient funds in the ship, or to have sufficient credit all over the world. Accordingly,

It does not appear that the underwriters will have any concern with the charge for marine interest on hypothecation to raise

[1] The Ship Fortitude, Haven, Claimant, 3 Sumner's R. 228.

funds to meet the expense of repairs, except, perhaps, so far as they are a subject for contribution in general average, if the ship-owner is himself present or near enough to be consulted.

A bottomry by the master to one part-owner for money advanced on account of other part-owners has been held to be void.[1]

1568. The lender on a bottomry by the master is bound to inform himself of the necessity for the loan, or, in other words, to examine into the authority of the master to make the bottomry, without the consent of the owner, which authority can be decided only from the necessity of a resort to this resource. Accordingly,

So far as the bottomry is not authorized by the necessity of the case, it will be inoperative in respect to the underwriters as well as the owner, and so far is put out of the question in the adjustment of a total as well as a partial loss.

A valid bottomry is a conditional transfer of the title to the ship, and the validity of an hypothecation of the ship or cargo by the master, rests upon the same principle as the sale of either, namely, its necessity.[2]

It is requisite to the validity of the hypothecation for more than the ordinary legal rate of interest at the place where the loan is made, that the lender should be at some risk of loss.[3] Consequently, the master cannot hypothecate a subject, whether ship or goods, and at the same time make his owners absolutely personally liable for the amount advanced.[4] Nor can he give a bottomry to secure a prior debt of his owners,[5] though it is a debt which he has

[1] Patton *v.* Randolph, Gilpin's U. S. Cir. Ct. R. 457.

[2] See infra, No. 1569, et seq.

[3] Jennings *v.* Ins. Co. of Pennsylvania, 4 Binn. R. 251; Rucker *v.* Conyngham, 2 Peters's Ad. R. (Penn.) 295; Wilmer *v.* Smilax, id. n.; The Mary, Paine's R., U. S. Court, New York, 624; Thorndike *v.* Stone, 11 Pick. 183.

[4] The Virgin, 8 Peters's Sup. Ct. R. 538; Rucker *v.* Conyngham, 2 Peters's Ad. Dec. 295; S. C., Condy's Marsh. 741 b. n.; Forbes *v.* The Hannah, Bee's R., U. S. Court, South Carolina, 348; Conizares *v.* Santissima Trinidad, Hopkins's Ad. Dec. 35; S. C., Condy's Marsh. 741 b. n.; Turnbull *v.* Ship Enterprise, Hopkins's Ad. Dec. 17; S. C., Condy's Marsh. 741 b. n.

[5] Abbott on Shipping, Part II. s. 3; The Minstrel Boy, 7 Notes of Ad. Cas. 341; The Osmanli, 3 W. Rob. 198.

just contracted for necessary repairs on their mere personal responsibility.[1] But if the advances were made without any personal credit being intended, and while the vessel still remains in the port where the advances were made and the repairs were done, and the owners dishonor a draft for the amount, it is held by Dr. Lushington that a bottomry for the amount by the master is valid;[2] and it is no ground of objection to a bottomry by the master that the money had been previously advanced from time to time, if advanced with the intention to give a bottomry.[3]

The master may, however, give a bottomry as collateral security for his bill on his owners, given at the time for an amount advanced for necessary repairs, conditioned to be void in case of his bill being honored, or in case of the amount advanced being repaid within a certain time.[4]

A bottomry, whether by the master or otherwise, is subject to posterior contingencies, since a subsequent bottomry for the necessities of the voyage is preferred to a prior one, and the lien of captors is preferred to that of lenders on bottomry,[5] and the lender may lose his lien by laches.[6] So the amount may be cut down by a court of admiralty.[7]

A bottomry in favor of an enemy lender on a cartel given in an enemy port, is not invalid on account of his national character.[8]

1569. The authority of the master in case of extremity to sell a disabled ship, rests upon much the same principles as that to raise funds by bottomry. The doctrine adopted by Lord Mansfield,[9] and recognized in jurisprudence ever since, is, that, *on occasions of disastrous circumstances and extraordinary impediments*

[1] The Augusta, 1 Dods. Ad. R. 283.

[2] The Oriental, 2 Eng. Law & Eq. R. (Press of Little, Brown & Co.) 549; S. C., 14 Eng. Jur. 336.

[3] The Virgin, 8 Peters, 538.

[4] The Jane, 1 Dods. Ad. R. 461; The Tartar, 1 Hagg. Ad. R. 1; The Nelson, 1 id. 167; The St. Catherine, 3 id. 250; The Emancipation, 1 W. Rob. 124; The Hunter, Ware's R. 249; The Zephyr, 3 Mason's R. 341.

[5] The Mary, 9 Cranch, 126; The Francis, 8 id. 420.

[6] Blaine *v.* The Charles Carter, 4 Cranch, 338.

[7] Supra, No. 1249.

[8] The William Penn, Peters's C. C. R. 106.

[9] Milles *v.* Fletcher, Doug. 219.

to the voyage, the master is authorized to manage or dispose of the ship and cargo, in the same manner as a prudent owner would do in like circumstances, being influenced by predominating motives to prosecute the voyage.[1]

1570. *The master derives his authority to make any such sale,* as to make an hypothecation, *wholly from the necessity for such a proceeding, and if there is no such necessity, there is no such authority.*

1571. *The character of the loss as being total does not result from the sale, but from the circumstances rendering the sale necessary,* and if those circumstances do not constitute a total loss, a sale by the master[2] will not make it such, unless it is a case of barratry.[3]

1572. *The practicableness of repairs at the place of the disaster, so that the vessel may continue the pending voyage,* is of greater or less weight in reference to the alternative of selling instead of repairing; it *is not,* however, *conclusive,* for, as we have seen, a loss of the voyage in respect to the cargo is not necessarily such in respect to the ship, and though the ship cannot be so repaired at the place as to carry on the same cargo to its destination, yet *if it* is in a repairable condition, and *can be* there *so repaired as* to be seaworthy to take another cargo or *to return in ballast* to its home port, *by expense* and sacrifice on the whole, including the home passage, *not exceeding its* whole *value* by the English rule, *or half of its value* by the American rule, *the loss* on the ship *is not a total one.*

It was so ruled in England under a policy on time upon an English vessel stranded in the River Plate.[4]

[1] See Roux *v.* Salvador, 3 Bing. N. C. 266; Green *v.* Royal Exch. Ass. Co., 1 Marsh. R. 447; S. C., 6 Taunt. 68; Somes *v.* Sugrue, 4 C. & P. 276; Schooner Tilton, 5 Mason's R. 475; Gordon *v.* Mass. Fire & Mar. Ins. Co., 2 Pick. R. 249; Robinson *v.* Commonwealth Ins. Co., 3 Sumner's R. 221.

[2] Orrok *v.* Commonwealth Ins. Co., 2 Pick. R. 256.

[3] Hall *v.* Franklin Ins. Co., 9 Pick. R. 466; Deblois *v.* Ocean Ins. Co., 16 id. 303; Howell *v.* Philadelphia Mut. Ins. Co., per Taney, C. J., Hunt's Magazine, July, 1851.

[4] Doyle *v.* Dallas, 1 Moody & Rob. 48.

1573. It follows from the propositions just stated, that, *if the owner himself sells the vessel, or orders its sale*, in case of sea-damage or other loss, *the sale will not render that a total loss which, by the other circumstances, was not such.*[1]

1574. *A sale of the ship by the master gives no title to the purchaser unless it is justified by the circumstances, though the master may have acted bonâ fide in making it.*[2]

1575. *Where the circumstances independent of merely the expense* of the repairs, or of floating or recovering the vessel, *constitute a total loss, a sale by the owner*, being present, or by his order where he can be communicated with, *will leave his claim for a total loss unimpaired.* He is bound only to take such steps as a prudent uninsured owner would take in like case:

As in case of sale, by a part-owner.[3]

1576. *In case the loss, as partial or total, depends wholly upon the amount of the expense, if the owner is present*, or can be communicated with, *the loss will not be total* and support an abandonment, *unless*, under the American rule, *the expense exceeds half of the value of the vessel, or under the English rule* exceeds *its full value*, when repaired. Though the master may allege the impossibility of raising funds as one of the reasons for selling, instead of repairing the vessel, it does not appear that the owner himself can allege such ground for claiming a total loss, when the expense is within these limits respectively.

1577. *A sale*, whether by the owner or master, *will be justified or not so*, in respect of the underwriters, *according to the apparent circumstances*, when attentively and fairly examined and considered, the estimates, opinions, and advice of competent persons who can be consulted being first obtained, *and not according to the result*

[1] Martin *v.* Crockatt, 14 East's R. 465.

[2] Idle *v.* Royal Exch. Ass. Co., 3 B. Moore, 115; Hayman *v.* Moulton, 5 Esp. 65; Hunter *v.* Princep, 10 East, 378; Gordon *v.* Mass. Fire & Mar. Ins. Co., 2 Pick. R. 249.

[3] Pierce *v.* Ocean Ins. Co., 18 Pick. R. 83. See opinion of Walworth, Chancellor, in American Ins. Co. *v.* Center, 4 Wend. 45; Idle *v.* Royal Exch. Ass. Co., 8 Taunt. 755; S. C., 3 B. Moore, 115; and see 3 Br. & Bing. 151, n., respecting that case.

of an experiment by the purchaser *in* floating, recovering, and *repairing* the vessel.[1]

1578. *Where the master can*, under the circumstances, *communicate with the owners, if he neglects to do so his sale may be repudiated* by them, and accordingly, in respect to the underwriters, *the loss will be adjusted* in the same manner *as if there had been no proceeding purporting to be a sale :* [2]

As in case of a Philadelphia vessel which was under charter at a certain rate per month to the master, and wrecked on the Maryland coast, and sold by the master without consulting the owner : [3]

And of a ship stranded on the Florida coast, and got off by wreckers from Key West, and sold there by the master with consent of part-owners residing at New Orleans without consulting the part-owners residing in Boston, in which case the sale was held by Shaw, C. J., and his associates, to be void in respect to the latter part-owners.[4]

The obligation to consult the owners depends not merely upon their distance from the place, and the time requisite for communicating with them, but also upon the situation of the vessel and urgency of the case. "If there is a probability of loss, and it is made more hazardous by every day's delay, the master may then act promptly." [5]

Lord Stowell says, that in case of a ship cast away in a foreign country, where there is no correspondent of the owners, and no money to be had on hypothecation to put her in repair, at such a distance from the home port that the ship may rot before the master may hear from the owners, a sale by the master without consulting his owners would be justified.[6]

[1] Fontaine *v.* Phœnix Ins. Co., 11 Johns. 293; Gordon *v.* Mass. Fire & Mar. Ins. Co., 2 Pick. 249; and see Cambridge *v.* Anderton, 2 B. & Cr. 691; S. C., 1 R. & M. 60; 4 D. & R. 203; 1 C. & P. 213, and see infra, No. 1643.

[2] Tanner *v.* Bennett, 1 R. & M. 182.

[3] Scull *v.* Briddle, 2 Wash. C. C. R. 150.

[4] Peirce *v.* Ocean Ins. Co., 18 Pick. 83.

[5] New England Mar. Ins. Co. *v.* Brig Sarah, 13 Peters's Sup. Ct. R. 387; S. C., 2 Sumner, 206, nom. Brig Sarah Ann.

[6] The Fanny and Elmira, Edw. Ad. R. 117.

1579. *The exercise of the authority conferred by extraordinary emergencies on the master, to act as agent for all parties* concerned, *is regarded with* jealousy and *watchfulness by the courts; and the necessity of the sale must be clearly made out, and it must appear that no other course could be reasonably taken.*

Tindal, C. J., instructing the jury, remarks on the question of the amount of the expense, admitting the possibility of raising the necessary funds, that a sale by the master, to be valid, "must not be a mere measuring cast, not a matter of doubt whether the expense would have exceeded the value, but it must be so preponderating an excess of expense that no reasonable man could doubt as to the propriety of selling instead of repairing." [1]

If the master has funds of the owners, or can avail himself of their credit, or can raise funds by bottomry, on reasonable terms, in such case, so far as the mere matter of expense is concerned, he is not authorized to sell the vessel.[2]

1580. *If the master buys in the vessel on his own account, or that of his owners, or if any other person buys it on their account, they may assume the purchase, and then the case, in respect to the underwriters, will be the same as if there had been no ceremony of sale.*[3]

1581. *In case the owners, having a right to adopt* or assume *a purchase* of the vessel *decline to do so, the underwriters will have the right* to adopt or assume it as salvage.

1582. *In case of the death, absence, or incapacity* of the master, the *mate may use a like discretion as to selling the vessel in emergencies rendering it impracticable to consult the master or owners or their agents.*[4]

[1] Somes *v.* Sugrue, 4 C. & P. 276. See The Catharine, Admiralty Court, per Lushington, J., 1851, 1 Eng. Law & Eq. R., (Press of Little, Brown & Co.) p. 679.

[2] Underwood *v.* Robinson, 4 Camp. 138; Dodge *v.* Union Ins. Co., 17 Mass. R. 471; Gardner *v.* Salvador, 1 Mood. & Rob. 118.

[3] Hall *v.* Franklin Ins. Co., 9 Pick. R. 466; Dane's Dig., tit. Assumpsit, art. Abandonment; Ralston *v.* Union Ins. Co., 4 Binn. 386; Robertson *v.* Western Fire & Mar. Ins. Co., 19 La. R. 227; Storer *v.* Gray, 2 Mass. R. 565, contra, 1802.

[4] The mate in such case becomes master. Abbott on Shipp. by Story, 147, n.

And a similar authority, though more restricted, *is vested in any other person being legally in charge of the vessel.*[1]

1583. *A mistake by the master in respect to his authority to sell the vessel in an emergency, is* not at the risk of the underwriters, as in the navigation and management of the vessel in conducting the voyage, but is *at the risk of the owners*, and if he makes sale of the vessel without necessity, the underwriters are not affected thereby.[2]

The authority of the master to sell the ship or the whole of the cargo under any circumstances whatsoever, has been denied in divers cases.[3] In other cases judges admit such authority with much hesitation, and sometimes with apparent doubt, as Lord Ellenborough,[4] and Dallas, C. J.[5]

When it is said that the master may sell if a prudent owner not insured would have done so, as by Gibbs, C. J.,[6] and Story, J.,[7] they suppose the owner or master to be acting under a predominating motive to promote the voyage, since a prudent owner, not insured, might be influenced by other paramount motives to sacrifice the voyage, and one of the interests at risk, on account of the advantages resulting on the other interests.

1584. *So far as the state of the property insured, and the degree of the loss, are affected by the acts of the master, it must appear, in order to make the insurers liable, that he has acted within the limits of his duty and discretion as master, or within the authority necessarily conferred upon him by the extraordinary*

[1] Doyle *v.* Dallas, 1 Mood. & Rob. 48.

[2] Ibid.

[3] Tremenhere *v.* Tresilian, 3 Keb. 91; S. C., 1 Sid. 453; Johnson *v.* Shippen, 2 Ld. Raym. 982; S. C., 1 Salk. 35; per Radcliff, J., in Robertson *v.* Union Ins. Co., 2 Johns. Cas. 250. See also Warder *v.* Goods Saved, &c., 1 Peters's Adm. Dec. 37; The French Ord. Marine forbids the master to sell the ship in any case, Lib. 2, tit. Du Capitaine, a. 19. And Valin cites other Ordinances to the same effect, (Tome I. p. 444,) but the Code of Commerce permits him to sell in case the ship cannot be made seaworthy. Lib. 2, tit. 4, art. 48.

[4] Hayman *v.* Moulton, 5 Esp. 65.

[5] Idle *v.* Royal Exch. Ass. Co., 3 B. Moore, 115; S. C., 8 Taunt. 755.

[6] Green *v.* Royal Exch. Ass. Co., 1 Marsh. R. 447; S. C., 6 Taunt. 68.

[7] The Brig Sarah Ann, 2 Sumner, 206.

circumstances consequent upon the operation of the perils insured against. So far as he exceeds these limits, the insurers are not answerable for the consequences of his acts,[1] except under the risk of barratry, or so far as they are themselves subrogated to the assured as owners on abandonment being made to them.

1585. Where the sale of the ship by the master is necessary, and fully justified by the circumstances, no question arises whether he acted honestly, and in good faith, and prudently, in making the sale. *Where a question arises as to the master being authorized by the exigency to sell the ship or cargo, much stress is always put upon the fact of his having acted fairly, with due deliberation, and with an honest view to the benefit of all concerned; and if it appear that he did so, a favorable construction is put upon his acts; if it appear otherwise, his proceeding is judged of with rigid scrutiny.*[2]

1586. *What is a case of necessity*, and what is not so, *depends upon the particular circumstances, and is a question of fact to be determined by the jury.*

1587. *A decree of a foreign vice-admiralty court, ordering a sale of the ship by the master, on his application, is not conclusive evidence of its necessity.*[3]

1588. *In case of a decree for a sale of the vessel by an admiralty court of competent jurisdiction, on libel by salvors, the sale will not constitute a total loss, if the owner has an opportunity to discharge the lien* by paying the salvage, and if the amount of the salvage, and the damage to the ship and necessary expenses, do not constitute a total loss independently of the sale.[4]

1589. *So the report of surveyors in a foreign port, that a vessel is not worth repairing, is not conclusive as to the fact.* But the report is presumed to be made in good faith and fairly, unless

[1] Robertson *v.* Clarke, 1 Bing. 445; S. C., 8 B. Moore, 622; and see cases passim.

[2] Vide supra, c. 13, s. 2.

[3] Idle *v.* Royal Exch. Ass. Co., 8 Taunt 755; S. C., 8 B. Moore, 115; Van Omeron *v.* Dowick, 2 Camp. 42; Andrews *v.* Glover, Abbott on Shipp., 5th ed., 11. Lord Ellenborough denies the authority of an admiralty court to make such an order in such case. Reid *v.* Darby, 10 East, 143.

[4] Williams *v.* Suffolk Ins. Co., 3 Sumner's R. 510.

the contrary appears; and so in regard to the proceedings of the master in selling the vessel on account of damage, the presumption will rather be in favor of their correctness and good faith.[1]

1590. *In case of capture and condemnation and sale of the ship or cargo, if the master buys it, and the owner adopts the purchase, the loss will be the amount so paid;* and the transaction is equivalent to a compromise with captors, without any adjudication or sale, in case of the compromise being legal.[2]

The schooner Topaz, being insured at Providence, on the 2d of April, was stranded on the 12th of that month, about thirty miles below Wilmington, North Carolina. On the 20th of the same month, the schooner and her appurtenances were sold by the master, who was also a part-owner, at public auction, and bid off by a person who, on the same day, conveyed his interest to the master, who immediately took measures to get her off, and she was got afloat again on the 22d of the same month, having sustained but little damage, and was soon repaired, and prosecuted her voyage. On the 29th of April, she was abandoned to the underwriters in Providence. On these facts Mr. Justice Story said: "I am decidedly of opinion, there is no color to claim for a total loss. The vessel was stranded, it is true; and if she had been abandoned while she remained in that state, the plaintiffs might have been entitled to claim for a total loss."[3] That is, the

[1] Gordon *v.* Mass. Fire & Mar. Ins. Co., 2 Pick. 249. See also Dickey *v.* New York Ins. Co., 4 Cowen, 222.

[2] M'Masters *v.* Schoolbred, 1 Esp. 237; Queen *v.* Union Ins. Co., 2 Wash. C. C. R. 331; Abbott *v.* Sebor, 3 Johns. Cas. 39; Story *v.* Strettell, 1 Dall. 10; Oliver *v.* Newburyport Mar. Ins. Co., 3 Mass. R. 37; United Ins. Co. *v.* Robinson, 2 Caines, 280. A different doctrine is asserted in Maryland and Phœnix Ins. Co. *v.* Bathurst, 5 Gill & Johns. 159, on the ground that the owner holds the subject under a new title; which distinction seems to be of a very technical character, since the case appears to be substantially the same, whether the owner regains possession of the subject directly by paying salvage to salvors, or indirectly through a public sale occasioned by the perils insured against, except so far as the national character and the value of the ship are changed by the fact of a title coming through such channel.

[3] Church *v.* Marine Ins. Co., 1 Mason's R. 341; and see Chamberlain *v.* Harrod, 5 Greenleaf's R. 420.

circumstances may have been such as to have justified a bonâ fide sale; but as it was a purchase of which the assured was entitled to the benefit, and the vessel had been actually got off, this presented a different case.

1591. *As the assured has the option to adopt the master's purchase* of the subject of the insurance, *if it is his own fault, by neglecting to do so, that the loss is made total, the underwriters will be liable only as they would have been had he adopted the purchase.*[1]

Mr. Chief Justice Parker remarks, in a Massachusetts case, that "it has not been decided that the right to abandon shall be devested by an unauthorized purchase by the master, avowedly made on his own account."[2] But surely the master, who has the property in charge and is acting at his own discretion, cannot, by any such purchase, deprive the owner of his property. We have already seen, that, according to the general course of jurisprudence, the master is not only authorized, but bound in emergencies, to act for the benefit of the owners.[3] It follows that the owners are entitled to avail themselves of the benefit of his acts relating to the property, on the same principle as a cestui que trust may avail himself of those of a trustee.

1592. *Where the owner has the option to adopt the repurchase of the vessel,* however sold, *and declines* so to do, having still a right to abandon, and insisting upon his abandonment, *the underwriters will succeed to the owner's privilege* of electing to adopt the repurchase.[4]

1593. *The sale of the vessel* being *ratified by the owner,* it *is valid* in respect to him.

As in case of the owner's receiving from the master the proceeds of the sale of a ship sold abroad by an auctioneer, by parol

[1] See Wilson *v.* Foster, 6 Taunt. 25; S. C., 2 Marsh. R. 425.

[2] Sawyer *v.* Maine Fire & Mar. Ins. Co., 12 Mass. R. 291. See also to the same effect, Oliver *v.* Newburyport Ins. Co., 3 Mass. R. 37.

[3] See, among other cases, Boyle *v.* Atty, 1 Gow, 50; Cary *v.* White, 1 Bro. P. C. 284; Millward *v.* Hallett, 2 Caines, 77; James *v.* Bixby, 11 Mass. R. 34.

[4] Per Kent, C. J., Jumel *v.* Marine Ins. Co., 7 Johns. 412, at p. 423.

authority from the master, on account of damage by perils of the seas.[1]

1594. There can be no doubt upon the general doctrine, that, if the ship has been recovered or repaired, and the expenses of the salvage or repairs paid by the assured, and the ship restored to his possession, the loss has ceased to be total. But a question has been made, *whether, if the ship is still subject to a lien for the expenses of salvage or repairs, where the circumstances constituted a total loss, the loss still continues to be total on account of such lien?*

Though the lien in such case is usually by bottomry, yet it does not appear that there is any distinction in this respect between a lien by bottomry and any other lien. And the question seems to be limited to the case of a specific and distinct lien; for if advances are made for recovering, or saving, or repairing the ship, upon the mere personal responsibility of the owner, or upon any other security than the pledge of the ship itself, there seems to be no room for any question, since such a case does not appear to be distinguishable from one where the advances were made by the assured himself.

In case of a ship destined to Boston being repaired at Lisbon at an expense exceeding half of its value, and bottomried by the master for the expense, the assured made an abandonment in Boston while the ship was on its passage to that port. Mr. Justice Story held the abandonment not to be valid, on the ground that, if the assured had paid the expense of the repairs, or been merely personally liable for it, it would have been only a partial loss, and that the pledge of the ship and the assured's contingent liability for the repairs did not change the character of the loss from partial to total.[2]

A decision similar in principle, in case of a lien for salvage, was given by the same judge in a subsequent case. An American vessel on a sealing voyage being seized by order of Vernet, acting governor, by authority of Buenos Ayres, at the Falkland Islands,

[1] Hunter *v.* Parker, 7 Mees. & Wels. 322.

[2] Humphrey *v.* Union Ins. Co., 3 Mason's R. 429.

was rescued by a part of the crew left on board, and, not having at the time sufficient outfits, or an adequate crew for pursuing the voyage, was brought by them to her home port, and there libelled for salvage, this was held by Mr. Justice Story not to be a total loss.[1]

A vessel insured in New York upon a voyage from the East Indies to Antwerp, having sustained damage, was repaired at the Isle of France at an expense exceeding one half of its value, the funds for the purpose being raised by the master, partly by sale of a part of the cargo belonging mostly to the assured, and partly by hypothecating the remainder of the cargo. The vessel having been fully repaired, and while it was on its passage from the Isle of France to Antwerp, was abandoned to the underwriters in New York, the cause assigned being "the disaster and the injury sustained to the voyage." Woodworth and Sutherland, Justices, were of opinion that, if the vessel was under an encumbrance in consequence of the damage, this would be a good cause of abandonment notwithstanding that it had been repaired; but that, since the assured had not assigned this cause, he could not avail himself of it in the case. Mr. C. J. Savage was of opinion, that, though the loss was constructively total before the repairs were made, it ceased to be such on the vessel being repaired, as it had been at the date of the abandonment, notwithstanding its being subject to an encumbrance, if it were so for the expense of the repairs.[2]

The opinions are accordingly divided; Mr. Justice Story and Mr. Chief Justice Savage being of opinion, that an outstanding lien on the ship for expense of repairs exceeding half of the value of the vessel is not a good ground for abandonment; Messrs. Justices Woodworth and Sutherland contra.

A decision by the Court of King's Bench in England relative to the effect of the sale of goods under an hypothecation in respect to total or partial loss,[3] though it does not distinctly involve this question, seems to favor the opinion of Mr. Justice Story and Mr.

[1] Williams *v.* Suffolk Ins. Co. 3 Sumner's R. 270.

[2] Dickey *v.* New York Ins. Co., 4 Cowen's R. 222.

[3] Naylor *v.* Taylor, 9 B. & C. 718.

Chief Justice Savage. On the other hand, the decision of the same court in case of a ship that returned to Liverpool, its port of destination; encumbered with liens exceeding its value,[1] seems to have a different aspect.

The bottomry bond is usually made by the master so as not to become absolute until the arrival of the vessel at the home port, where the rule of abandonment for damage merely, exceeding half of the value, does not prevail, and where the owner has an opportunity to discharge the lien. The bottomry was such in the cases above referred to.

But if the bottomry bond becomes absolute at a foreign port by its terms, and the ship is unavoidably sold to satisfy it, while the owner has no opportunity to discharge the lien, this affords a ground of distinction.

So if the amount of the bottomry on account of loss on the vessel by the perils insured against exceeds its whole value, as the same is to be estimated between the parties to the policy, then the ship cannot be said to arrive so as to be available to any practical purpose to the assured, and the direct consequence of the perils insured against seems to make the loss actually total, and to authorize abandonment on such arrival, no less than if the vessel had arrived a mere unrepairable wreck; and even more so, since in the latter case there would be a salvage of the materials at least.

These considerations seem to authorize the doctrine, that,

Where the assured has notice so that he may discharge a bottomry bond given on account of loss on the vessel for which the underwriters are liable, and the amount of the bottomry does not exceed the whole value of the vessel, as between the parties to the policy, it is a partial loss; otherwise it is a total loss.

1595. *Where a ship has not been heard from for a period during which it would in all probability, have been heard from had it been afloat, it is inferred that the ship has been totally lost.* How soon such a presumption arises depends upon the voyage she was on, and the particular circumstances.[2] Where it is between European ports, Mr. Benecke states the period to be

[1] Holdworth *v.* Wise, 7 B. & C. 794. [2] Houstman *v.* Thornton, Holt, 242.

six months;[1] but in another place[2] he implies that the period is indefinite.

1596. *An abandonment of a bottomried vessel to the holder of the bottomry bond does not affect the character of the loss*, so as to render one total which, under the condition of the bond, would otherwise not be so.[3]

1597. *A sale by the master, though necessary, does not defeat a prior bottomry lien*, to the discharge of which the proceeds must be first applied.[4]

SECTION VI. OF THE CARGO.

1598. *A total loss of goods is where they are destroyed by the perils insured against, or so injured as to be of inconsiderable value for the purposes of the intended destination and use, or the voyage or adventure upon which they are insured is thereby broken up.*

1599. *There may be a total loss of only a part of the goods insured by a policy.*[5]

1600. *In respect to the cargo, as well as any other subject of insurance,*[6] *where the subject, or some remnant of it, or outstanding claims against third parties accruing on account of it, survive, — that is, something to be transferred or assigned in distinction from some specific amount to be accounted for, — the assured, in order to recover for a total loss, should make an abandonment.*

1601. A total loss of the vessel may occasion a total loss of the cargo, but this is not a necessary consequence, since it may not necessarily prevent the goods from being carried to the port of destination. *Where the vessel is prevented from proceeding to the port of destination, but the goods are forwarded thither by another vessel, the assured on the goods cannot abandon, for the voyage is not necessarily lost.*[7]

[1] Edition of 1824, p. 11.

[2] Ibid., p. 385.

[3] Per Lushington, J., in the High Court of Admiralty, in case of The Catharine, 1 Eng. Law & Equity R. (Press of Little, Brown & Co.) 679.

[4] Ibid.

[5] Vandenheuvel *v.* United Ins. Co., 1 Johns. 406, and cases passim.

[6] Supra, s. 1, No. 1491.

[7] Per Lord Mansfield, Manning *v.* Newnham, 3 Doug. 130; Ludlow *v.*

1602. *The owner of goods cannot abandon on account of the ship's being disabled* in the course of the voyage, *if upon the whole*, taking into view the nature of the voyage, the kind of cargo, its condition, and the time, expense, and risk of sending it on, *it is the duty of the master to hire another vessel* for that purpose,[1] although he may not be able to hire one at the port of distress, or one contiguous, and although it should be necessary to resort to land-carriage.

In a case of insurance from New York to Bremen, the vessel being captured and carried into England, both vessel and cargo were acquitted, but the cargo had been landed, and the full freight for the whole voyage had been necessarily paid by the person to whom it was delivered. The loss was held to be total on the goods, because, under the circumstances, it was not the duty of the master to forward the cargo to the port of destination.[2]

In a case upon a policy on wheat, from London to Lisbon, the vessel put into Dover in a disabled state. Lord Ellenborough said: "If the voyage was not worth pursuing, and there was no means of pursuing it, I think it must be considered a total loss. It appeared, however, that, although the ship was unable to pursue the voyage, there was a brig lying in Dover harbor at the time, in which the wheat might have been carried on to Lisbon;" for which reason, among others, he was of opinion that it was not a total loss.[3]

"It is understood," says Chancellor Kent, "to be the duty of the master, when his vessel is disabled in the course of the voyage, to procure another, if he can, to take on the cargo."[4]

Insurance being on coffee, sugar, and tea, from Havana to Cas-

Columbian Ins. Co., 1 Johns. 335; Low *v.* Davy, 5 Binn. 595; 2 Serg. & Rawle, 553.

[1] Lawrence *v.* New Bedford Com. Ins. Co., 2 Story's R. 471.

[2] Dorr *v.* New England Mar. Ins. Co., 4 Mass. R. 221.

[3] Wilson *v.* Royal Exch. Ass. Co., 2 Camp. 626.

[4] Searle *v.* Scovell, 4 Johns. Ch. R. 218. See 1 Emer. 427, c. 12, s. 16; Ord. Louis XIV., tit. Du Fret, a. 11, 21, 22; Val. sur Ord. de la Mar., tit. Du Fret, a. 11; Pothier, des Charte-parties, n. 68; Saltus *v.* Ocean Ins. Co., 12 Johns. R. 107.

tine in Maine, on the 28th of December the vessel was stranded at the Washwoods, on the coast of Virginia, about forty miles from Norfolk, and the goods were landed without damage. The assured received a letter from the master on the 8th of January, giving intelligence of the accident, and on the same day an abandonment was made in Boston, which the underwriters refused to accept. The master, without waiting to hear from the assured, on the 11th of January, sold the goods on the beach for $11,544, their invoice value being $11,850. The duties ($5,390,) the wreck-master's commission on sale ($577,) and the expense of saving the goods ($300,) amounted to $6,267. The goods might have been conveyed to Norfolk by land in three or four days after the accident, and thence shipped in another vessel to the port of destination, for $3,859. It was held in Massachusetts, that the loss was not affected by the duties, and that the master was not authorized to make the sale, and that the assured had no right to abandon, as the expense of saving the goods and sending them on to the port of destination would have been less than fifty per cent. of the invoice value.[1]

A similar case occurred in New York, on a policy upon grain from North Carolina to New York. The vessel was run aground upon Cape Hatteras Bank, to prevent a total destruction of vessel and cargo, and loss of the lives of the crew. On the question whether it was the duty of the master to have transshipped the cargo, Woodworth, J., giving the opinion of the court, said: "The question is not whether the master, by going to a distant place, might have procured another vessel, nor whether, by carrying the cargo some distance over land, it was possible to effect a shipment. If there be a vessel in the same or a contiguous port, which is substantially the same thing, his duty is clear." If he must send to distant places, and encounter other impediments, the rule is not obligatory. Accordingly, in the case under discussion, as there was no port "within a number of miles," and a vessel could not come near to the wreck, and the wheat must have been transported across the beach, and then carried several miles in boats

[1] Bryant *v.* Commonwealth Ins. Co., 6 Pick. 131.

with great hazard in tempestuous weather, the court held that the master was justified in not attempting to reship the cargo.[1]

1603. *Where only a part of the cargo is saved* in case of shipwreck or other accident, *and where* the whole, or surviving part, of *the cargo is materially damaged; whether it is the duty of the captain to carry on the goods to the port of destination depends,* not only upon the facility or difficulty of procuring another ship, but also *upon the quantity* of goods *saved, and the additional damage* to which they would be liable *by being* reshipped and *carried on* in their damaged condition.

Where a shipment of flour and pork was insured from Waterford, in Ireland, to Newfoundland, and the ship, after sailing on the voyage, was compelled to put back to Cork, and was there condemned, it was held by Lord Ellenborough, C. J., and Bayley and Holroyd, Justices, that the assured had not a right to abandon the cargo, because the goods might have been kept until the following spring, and sent on in another ship; but the court said, if the goods had been of a kind that could not have been so kept, until they could have been forwarded by another ship, the assured would have had a right to abandon.[2]

Chief Justice Dallas says: "Where the ship has been lost, and the cargo materially damaged, is the assured bound to send on the goods taken from the wreck? And if so, is he bound to send only when half is saved, or a third, or a quarter? Is he bound to send them on at all events, or only under certain circumstances? That the rule on this subject differs, is clear from the various text-writers; some stating it at a fourth, some at a third, and some at a half; we must therefore act on the custom of the country in which the loss happens."[3]

An insurance being on two hundred and forty-one pipes and seventy-one half-pipes of wine, for a voyage from the Cape of

[1] Treadwell *v.* Union Ins. Co., 6 Cowen, 270. See also 2 Valin, 105.

[2] Hunt *v.* Royal Exch. Ass. Co., 5 M. & S. 47.

[3] Hudson *v.* Harrison, 3 Brod. & Bing. 97; 6 Moore, 288.

Good Hope to Bristol and Dublin, one hundred pipes of the wine were intended to be delivered at Bristol, and the remainder at Dublin. In the course of the voyage the ship was driven upon the rocks near Portishead, about thirteen miles from Bristol, and soon afterwards fell over upon her side, and, at high tide, nearly the whole of the cargo was under water, and the greater part of it was under water about nine hours each tide. Eleven casks of the wine being taken out of the vessel, the remainder of the cargo was discharged through a hole cut in the side for this purpose, and was carried to Bristol in lighters. Two hundred and twenty-nine pipes and sixty-seven half-pipes were saved. About one quarter of the whole number saved came out sound and full, one fifth part were impregnated with salt water, about one thirteenth part were entirely empty, and the others were partially empty, or had more or less salt water, but were thought by some of the witnesses to be merchantable. The ship was afterwards floated, and towed to Bristol, but was not worth repairing. Chief Justice Dallas, of the English Common Pleas, said: "The cargo was so damaged and reduced as to render the loss total;" and Justices Park, Burrough, and Richardson concurred. Mr. Justice Richardson said: "It is material, that the part of the cargo which was damaged by salt water must have become worse by delay, and consequently by carriage on to Ireland." [1]

1604. *Where a ship destined* and insured *to divers ports is prevented, by the perils insured against, from arriving at one of them, this gives a right to abandon a shipment of goods intended for the market at such port*, where they are the only goods insured in the policy which remain at risk, and do not arrive at the port to which they were destined.

A policy being on a cargo of flour from New Orleans to Key West and Havana, when near to Key West, on the voyage, the vessel encountered a gale which prevented her from making Key West, and the master deemed it necessary to proceed directly to Havana, where the flour was sold. Mr. Justice Martin, giving the opinion of the court, said: "The loss is a total one, because

[1] Hudson *v.* Harrison, 3 Brod. & Bing. 97; 6 Moore, 288.

the intended voyage to Key West has been necessarily abandoned." [1]

Assuming that the ship was disabled by the perils insured against from returning from Havana to Key West, this decision was no doubt correct, for the successive ports to which the ship is insured are all essential points in the voyage, and it can make no difference whether the vessel makes the first or last from necessity, and can neither proceed forward or backward, as the case may be, to the others, nor transship the cargo thither, by other vessels; in either case, it will be equally a total loss of the remaining part of the cargo deliverable there.

1605. The fact *whether an article remains in specie or not has been* sometimes *considered a criterion by which the loss is distinguished to be partial or total;* it being assumed as a rule, that, if the thing is so changed, by the peril insured against, as to be no longer the same that was insured, the loss is total.

Thus, the body of a coach that was insured being thrown overboard, it was held to be a total loss, because the wheels, and what else remained, did not constitute a coach.[2] The same principle has been recognized in other cases.[3]

The question whether an article retains its identity is, however, in some cases, very perplexing, and of a subtle and metaphysical character.

1606. *Where the goods are so damaged by the perils insured against that they cannot be forwarded to the port of destination so as to arrive in a merchantable condition, the assured may abandon.*

In case of insurance upon sugars, from Liverpool to Calais, the vessel sailed on the 2d day of December, but having encountered

[1] Aikin *v.* Miss. Mar. & Fire Ins. Co., 4 Martin, N. S. 661.

[2] Judah *v.* Randall, 2 Caines's Cas. 324.

[3] 15 East, 559; 3 B. & P. 474; 15 Mass. R. 343. See also 2 Arnould's Mar. Ins. 1029; supra, in respect to insurance on the ship, No. 1528, and 1532; and also American Ins. Co. *v.* Francia, 9 Penn. R. 390; and infra, c. 18, insurance free of average. See also Emerigon, tom. 2, c. 17, s. 2, ed. 1783, p. 182; Valin, tom. 2, p. 94, ed. 1760, sur Ord. 1681, tit. Assurance, a. 46; and Pothier, Assurance, n. 121.

severe weather, and struck upon a bank, was compelled to return to Liverpool on the 20th. The sugars were all more or less damaged, and were accordingly sold, and the assured abandoned. Gibbs, C. J.: "The assured are not justified in abandoning, unless the property be in such a state that it cannot be applied to the original purpose of the voyage. Was it in such a state as to be sent to its original destination? It is in evidence, that no part of it was in a merchantable state. If it was not in a proper condition for the market, I am of opinion that the assured were entitled to abandon."[1] And the other judges subsequently concurred in the opinion that it was a total loss.[2]

Hides of the value of $1,117 were shipped at Valparaiso for Bourdeaux. The vessel, having sprung a leak, put into Rio de Janeiro for repairs, where the hides, being found to be damaged, and to have become what is called "greased," and, on account of the incipient putrescency, must have been thrown overboard before arriving at Bourdeaux, had they been reshipped, were landed, and sold for $273. And the question, in the English Court of Common Pleas, was, whether this was a total loss. Tindall, C. J.: "We are of opinion that the loss is a constructive total loss. In consequence of damage from one of the perils insured against, it became impracticable to carry the hides, in specie, to the termination of the voyage; and if it had been possible to have taken them to Bourdeaux, they would have arrived in a state of putridity, having altogether lost the character of hides. We do not hold the loss to be total, upon the ground that the hides, if carried to Bourdeaux, would have arrived in so bad a state that they would have sold for less than the freight and expenses, or would have been altogether unsalable there; that state of circumstances might not be sufficient to make a constructive total loss, where the underwriter has guarded himself from being answerable for average losses; but we hold it to be total on the ground, and that ground only, that upon the evidence they never could have arrived as hides at all. The present case appears to agree so

[1] Gernon *v.* Royal Exch. Ass. Co., Holt, 49.

[2] S. C., 2 Marsh. R. 92; 6 Taunt. 383.

nearly with that of Dyson *v.* Rowcroft (3 B. & P. 474,) that no sound distinction can be made in this respect between them." [1]

1607. *The submersion of the cargo does not, as a matter of course, give a right of abandonment; whether it gives such right or not depends upon the circumstances.*

A vessel being aground, so that the cargo of corn was submerged at high water, Lord Ellenborough remarked, that the assured might have abandoned while it was in this condition; and before any part of it had been raised and dried.[2]

This position, if just in respect to this particular article, under the circumstances, would not be so in respect to many others, to which the damage, by being under water would be trifling, and the expense of raising and forwarding them very inconsiderable. It has been distinctly held, that submersion is not per se a total loss of the ship,[3] and still less would it be so of many species of cargo. The question here, as in other cases, is, whether the article, in the particular circumstances, is either actually or constructively destroyed, or the voyage broken up, by the disaster? And in the case before Lord Ellenborough, it might have been so considered while the cargo continued to be submerged and the case desperate, just as a capture is held to be a total loss, and to justify an abandonment, so long as the subject remains in the hands of the captors.

1608. *In the United States, the assured on goods damaged to more than half of their value has a right to abandon and recover the whole amount insured, as well as in case of a policy on the ship.*[4]

1609. If the assured on goods may claim immediately against his underwriters a loss by jettison of the goods, without waiting for

[1] Roux *v.* Salvador, 1 Bing. N. C. 526; S. C., 3 Bing. N. C. 266.

[2] Anderson *v.* Royal Exch. Ass. Co., 7 East, 38.

[3] Supra, p. 262, No. 1526; Sewall *v.* United States Ins. Co., 11 Pick. 90.

[4] Gardiner *v.* Smith, 1 Johns. Cas. 141; Judah *v.* Randall, 2 Caines's Cas. 324; Ludlow *v.* Columbian Ins. Co., 1 Johns. 335; Moses *v.* Columbian Ins. Co., 6 id. 219; Marcardier *v.* Chesapeake Ins. Co., 8 Cranch, 39; 1 Wheat. 228, n.; Gilfert *v.* Hallett, 2 Johns. Cas. 296. See Le Guidon, c. 7, a. 1.

the contingency of the arrival of the ship at the port of destination, and without first demanding contribution from the other contributory interests, as it seems to be the better doctrine that he may,[1] then *the jettison, as between the parties to the policy, is either a partial salvage loss or a total loss*, according as the amount jettisoned is more or less than half of the value of all the goods in respect of which the adjustment is made.

The French Code[2] restricts the right to cases of damage to three quarters of the value.

Valin[3] supposes this rule not to apply to a case of the absolute loss of a part of the goods insured, the rest remaining sound, but only to cases of injury and deterioration in value by sea-water or otherwise, where the goods remain in quantity. And he says also, that if a part of the goods are thus damaged, the assured may abandon the damaged goods, provided the damage exceeds that proportion of the value, but that he cannot abandon the sound goods, though the damage exceeds such part of the value of all the goods insured.

But the rule is, in general, differently understood, and it is held, that if half of the value of the goods is lost, whether by the destruction of a part of the goods, or deterioration in value of a part or the whole, the assured may abandon.

In applying the rule of damage or loss of one half, three quarters, or any other proportion of the value, as the criterion of total loss or not of goods, it will evidently not, as in case of a vessel, make a difference whether the value is taken high or low, since the damaged and sound, or lost and saved goods, are estimated at the same rate. Accordingly, the provision already mentioned in the policies of some companies, that the underwriters shall not be liable for total loss on the ship on account of the amount of damage merely, unless the amount adjusted as a partial loss would exceed half of the amount insured, would be inoperative as applied to the cargo unless it were construed to have some effect in reference to including contribution in general average in making the estimate.

1610. *In deciding on the right of abandonment under the rule*

[1] See supra, c. 15, s. 7. [2] Lib. 2, tit. 10, s. 3, a. 180. [3] Tome II. p. 201.

of loss or damage to fifty per cent., a loss of a part of the goods subject to be adjusted as a salvage loss, is equivalent to the absolute destruction of such part, though the salvage is to be accounted for, of course, or transferred, whether the loss be total, or only a partial salvage loss.

In case of insurance upon 300 barrels of flour, from New York to London, 123 barrels were thrown overboard in making jettison, and 30 more were sold on account of sea-damage, at Norfolk, where the vessel put in for the purpose of refitting in the course of the voyage. The assured abandoned and claimed for a total loss. After the abandonment, the 147 barrels of flour remaining on board arrived at the port of destination. If the whole value of the 123 barrels thrown overboard, and also the whole value of the 30 sold at Norfolk, were to be considered as lost, there had been a loss of more than half of the value insured. But as the damaged flour was sold at Norfolk for more than half of its invoice value, if only the damage was considered to be included in the loss, and not the whole value of these 30 barrels, there had not been a loss of fifty per cent. Van Ness, J., for the court: "Of the 300 barrels of flour insured, not more than 147 barrels arrived at the port of destination. The 30 barrels sold at Norfolk were as much lost to the assured, within the meaning of the contract, as though they had been cast into the sea. The insurer undertook that the whole article insured should arrive at the port of destination. The plaintiffs are entitled to judgment as for a total loss."[1]

1611. *After any considerable part of the goods insured, though less than half in value, arrives at a port of final destination, so as to be landed, being of any considerable value as goods of the kind for which they were shipped, the assured cannot abandon and recover for a total loss that occurred previously to arrival.*[2]

[1] Moses *v.* Columbian Ins. Co., 6 Johns. R. 219.

[2] Seton *v.* Delaware Ins. Co., 2 Wash. C. C. R. 175. See also Mr. Binney's remarks, 4 Binn. 506; and see Roux *v.* Salvador, 3 Bing. N. C. 266; also 2 Burr. 683. So decided by Professor Simon Greenleaf, Hon. Franklin Dexter, and Professor Theophilus Parsons, as referees, 1850, in the case of jettison of more than half of an invoice of teas from on board the Paul Jones, the remainder arriving sound at New York, the port of des-

But *this doctrine* has not been applied, and seems *not* to be *applicable to* an insurance on a cargo and its proceeds for *a trading voyage to successive ports* of destination for discharging and investing the proceeds in a new cargo.

Such a case ought to be considered to be one entire voyage to the port of final destination, and subject to be frustrated and broken up by a loss of over fifty per cent. on the passage between any of the previous ports.

1612. *The doctrine of* CONSTRUCTIVE *total loss of the whole cargo is not applicable to a loss at the port of its final destination. So long as the risk continues, an* ABSOLUTE *total loss may occur*, of the whole cargo, or of what remains at risk after a part of it has been discharged.

1613. *A loss of more than fifty per cent.* upon goods, *by compromise with captors*, has been held to be a total loss, no less than sea-damage in that proportion.[1]

Where a part of the goods insured were condemned, and the master, to prevent an appeal, agreed to pay the captors $5,000, to raise which sum he sold more than half in value of the goods insured, it was held to be a total loss.[2]

1614. *Whether, where part, or the whole, of the goods insured by a policy, are insured free from average, the right of abandonment ought to be the same as if the policy contained no such exception?*

The principle upon which an abandonment is permitted in case of damage over fifty per cent. is, that the voyage is thereby broken up, the subject is constructively and in contemplation of law, for the specified use or commercial adventure, destroyed; what remains of it being merely its relics. Analogy and consistency, therefore, seem to require, that the rule should be the same under an exception of average; but the jurisprudence is otherwise.[3]

tination, where the teas were at a lower rate than that at which they were valued in the policy.

[1] Clarkson *v.* Phœnix Ins. Co. 9 Johns. R. 1; Waddell *v.* Columbian Ins. Co., 10 id. 61.

[2] Vandenheuvel *v.* United Ins. Co., 1 Johns. R. 406.

[3] Under insurance "free from average," or what is equivalent, "against total loss only," this question will be considered. Infra, No. 1767. The

1615. The rule, as now established by jurisprudence and practice, *is, that the criterion of* damage over *fifty per cent. is not applicable to articles insured free from average;* and "*where the case embraces some articles within and some without the memorandum, no abandonment for mere deterioration* in value *can be valid, unless the damage to the non-memorandum articles exceeds a moiety of the value of the whole goods insured,* including the memorandum articles." [1]

1616. *Where goods are thrown overboard in jettison, the claim of the assured against the underwriters for a partial or total loss rests upon the same grounds as if the goods had been lost by the immediate operation of the peril* on account of which the jettison is made, and without the intervention of any act of the master and crew.[2]

1617. *The assured whose goods have been jettisoned is not obliged first to demand contribution from the other interests, but may resort in the first instance to his underwriters.*[3]

1618. *A delay of the voyage by perils of the seas, evidently of only a temporary nature, does not give a right to abandon the cargo.*

This rule is also applicable to the other interests in marine insurance.[4]

embarrassment and inconsistency in this branch of jurisprudence can be remedied only by the introduction of a stipulation into the policy.

[1] Per Story, J. giving the opinion of the Supreme Court, Marcardier *v.* Chesapeake Ins. Co., 8 Cranch, 39. See also Aranzamendi *v.* Louisiana Ins. Co., 2 La. R. 433; Morean *v.* United States Ins. Co., 1 Wheat. 219.

[2] 1 Emerigon, 659, 670; Judah *v.* Randall, 2 Caines's Cas. 324.

[3] Maggrath *v.* Church, 1 Caines, 196. See supra. c. 15, s. 7. A contrary opinion was expressed in Pennsylvania by Chief Justice Tilghman, in Lapsley *v.* United States Ins. Co., 4 Binn. 502; but from his saying that "it did not appear that the assured ever applied to the persons bound to contribute, or that there was the least difficulty in procuring payment from them," the decision seems to have been, in effect, merely that the assured is answerable for his own neglect, or that of his agents, to collect a contribution due at the port of destination, of which there can be no question.

[4] See supra, Vol. I. p. 632, No. 1102.

A quantity of iron, copper, and nails, being insured, "free from average," on a voyage from London to Quebec, the vessel sailed on the 15th of September, but, having encountered severe gales in her passage to Newfoundland, was found to make so much water as to render it necessary to put back to Kinsale, in Ireland, where she arrived on the 25th of October. The copper had not been damaged, but some of the boxes of nails were damaged seventy-five per cent., and others only ten per cent. It was necessary to discharge the cargo for the purpose of making a thorough repair of the vessel. The repairs could not be completed soon enough to enable the vessel to reach Quebec that season, and no other vessel could be procured at Kinsale or Cork to carry on the cargo; and besides, it was too late to prosecute the voyage that season. The voyage was accordingly given up, and the captain sailed on another voyage, and the goods insured were sold.

Lord Ellenborough said: "The ship was under a temporary disability; though the means of repairing her were no doubt easily attained at so commodious a harbor as Kinsale, and it does not appear that the necessary repairs could not have been made before March. However, she could not be repaired in time for the voyage that season. This then is a case of the loss of the voyage for that season. The only description of loss is a temporary suspension of the voyage. But an interruption of the voyage does not warrant the assured in totally disengaging himself from the adventure, and throwing this burden upon the underwriters."[1]

This insurance was "free from average," but the opinion of the court, in respect to breaking up the voyage, does not appear to turn at all upon that exception.

1619. *Other circumstances attending a disaster may be taken into consideration, together with the delay in deciding the question of partial or total loss of the cargo.*

A case before Abbott, C. J., and Bayley, Holroyd, and Best, Justices, was held one of total loss, where a fifth part of a shipment of logwood insured on a voyage from Sierra Leone toL on-

[1] Anderson *v.* Wallis, 2 M. & S. 240. See also supra, No. 1525, as to delay in reference to total loss of the ship.

don, was sold to defray the expense at Barbadoes, whither the ship had been barratrously carried, arriving there April 20, the remainder being forwarded by another ship to the assured in London in the August following, without his order.[1] The abandonment was, no doubt, duly made, as no negligence in this respect is mentioned in the case. The decision is put partly upon the fact that the assured did not himself order the transshipment; but this, if it has any bearing, only goes to the point of his not having renounced or invalidated his claim for a total loss. Considering the case as one of delay merely, it would clash with that in which it had been held by Lord Ellenborough and his associates, that a postponement of a voyage to the following season did not authorize an abandonment. The delay, the transshipment, and the sale of part of the shipment to meet expenses, were all considered as going together to make a case for abandonment.

1620. *An embargo, or other arrest or detention, evidently intended for only a short duration, does not give a right to abandon;*[2] *but if it purports to be for a long or indefinite continuance, it is such a breaking up of a voyage, or interference with the use and control of the subject insured, as constitutes a constructive total loss.*[3]

1621. In the early cases on capture, in determining whether the loss was total, it was considered whether the captors had carried the vessel within the jurisdiction of their own government, — "infra præsidia," — and whether the property was changed; the principle being assumed, it seems that the loss was not total until the assured was divested of his property in the subject.[4]

But it is now universally held, that, where the policy contains no stipulation to the contrary, *a capture gives the right of aban-*

[1] Dixon *v.* Reid, 5 B. & Ald. 597.

[2] See supra, No. 1525.

[3] 2 Burr. 696; 4 Cranch, 43. See Odlin *v.* Ins. Co. of Pennsylvania, 2 Wash. C. C. R. 312; 4 Cranch, 44; Lee *v.* Boardman, 3 Mass. R. 238. See also M'Bride *v.* Marine Ins. Co., 5 Johns. R. 299.

[4] Assievedo *v.* Cambridge, 10 Mod. 77; ——— *v.* Sands, id. 79; Goss *v.* Withers, 2 Burr. 683; Dean *v.* Dicker, 2 Str. 1250; Hamilton *v.* Mendes, 2 Burr. 1198.

doning immediately; and this right subsists so long as the property is detained by the captors or by their government, whether in port or at sea.

The character of total loss, and the right of abandonment, continue after the condemnation of the property and an appeal by the assured to a superior court;[1] and after acquittal and an appeal by the captors which prevents the decree of restitution from being executed.[2] And Chief Justice Tilghman says, "While the case remains open to an appeal, and the property is held by the captors, the peril cannot be said to be over."[3]

1622. *A loss of goods by capture or other arrest ceases to be total on the decree of acquittal and for the restoration of the property, unless by reason of the damage, or some hindrance in consequence of the capture or arrest, or other peril insured against, the prosecution of the voyage,* or other contemplated destination or use of the subject of the insurance, *is still prevented.* The right to abandon may, in such case, have ceased before the assured is restored to the actual possession of the subject.

Insurance being made on goods from Philadelphia to St. Jago de Cuba and back, the property was captured by the French, but acquitted in the Court of Admiralty, in St. Domingo, on the 6th of June, 1806, from which decree the captors appealed, and the decree was affirmed by the court having final jurisdiction on the 10th of the same month. The master could not return to the vessel with the order of restitution until the 21st of June. On the 22d, the officer in possession of the vessel and cargo, so soon as the order of acquittal and restitution was shown to him, delivered them to the master. The assured having intelligence of the capture, had abandoned on the 21st of June. This was held in Pennsylvania not to be a total loss at the time of the abandonment, nor at any time after the final decree of restitution.[4]

[1] Dorr *v.* Union Ins. Co., 8 Mass. R. 494; Rhinelander *v.* Ins. Co. of Pennsylvania, 4 Cranch, 29.

[2] Bordes *v.* Hallet, 1 Caines, 444.

[3] 3 Binn. 293, where he cites for this, Dutilgh *v.* Gatliff, 4 Dall. 446; 4 Cranch, 31, n.

[4] Adams *v.* Delaware Ins. Co., 3 Binn. 287.

A similar decision had been previously made by the Supreme Court of the United States, under a policy on the brig Rolla, which had been captured, and a final decree of restitution awarded on the 9th of July, 1806, and restitution was actually made on the 19th of that month. The assured had made an abandonment on the 17th. Mr. C. J. Marshall, in giving the opinion of the court, said: "A detention by capture or embargo may be of such long continuance as to defeat the voyage. Those detentions, therefore, are for the time total losses, and they furnish reasonable ground for the apprehension that their continuance may be of such duration as to break up the voyage, or ruin the assured by keeping his property out of his possession. Such a case, therefore, upon the true principles of the contract, has been considered as justifying an abandonment, and a recovery for a total loss. But when a final decree has been awarded, the peril is over. On no reasonable calculation can it be supposed that such a delay of restitution will ensue, as from that time to break up the voyage." [1]

1623. *Where, by reason of the direct operation of the perils insured against, the sale of the cargo is rendered necessary, and is made by the master, the assured has a right to abandon.*

In reference to cargo as well as the ship, it is not the sale itself, independently considered, which gives the right to abandon, for this is not one of the risks expressly insured against; but it is the occasion of making it, namely, the operation of the perils insured against.[2]

A sale is authorized in case of the cargo being so damaged that

[1] Marshall *v.* Delaware Ins. Co., 4 Cranch, 202; 2 Wash. C. C. R. 54. Under a policy on a cargo of teas from New York to Bremen, where the ship was captured and carried into an English port, and restoration was decreed on the 16th of June, and abandonment made in Boston on the 18th of July, and the cargo was transshipped for Bremen on the 28th of that month, the abandonment was held in an early case, by the Supreme Court of Massachusetts, to be valid. Dorr *v.* New England Mar. Ins. Co., 4 Mass. R. 221. This case does not accord with the subsequent jurisprudence on the subject.

[2] Vide supra, s. 5, No. 1571.

it cannot be carried on to the port of destination and be of any value on arrival there ;[1] or if it cannot arrive in specie.[2]

If a part only of the cargo is damaged, this does not justify the sale of what is saved, if it can be forwarded to the port of destination.[3]

A master may also sell or hypothecate goods, in a pressing emergency, to raise funds to repair in a foreign port ;[4] but this is the appropriation of them by the ship-owner, and not a loss by the perils of the sea.

A ship insured from Carlscrona in Sweden to Deptford in England, free from average, was compelled, on account of damage by collision, to put into Warberg Roads, a small fishing place on the coast of Sweden, where, on being surveyed, it was reported that she could not proceed without expensive repairs. The assured, on receiving intelligence of the disaster, without making a formal abandonment, laid it before the underwriters, who declined to interfere, and denied his right to abandon. He thereupon ordered the master to sell the vessel, and also the cargo, which was insured in the same policy with the same exception and remained undamaged, and the proceeds of the sale were not sufficient to pay the expenses of salvage. Lord Ellenborough and his associates held that the assured could not recover for either ship or cargo, because the ship remained in specie and no abandonment had been made to the underwriters to enable them to elect whether to repair it, and the goods were undamaged.[5]

The true ground of the decision, if there was such ground, seems to have been, that, according to the English rule, the ship was not proved to be so damaged that she could not have been repaired at less cost than her value, or that other conveyance for

[1] Jordan *v.* Warren Ins. Co., 1 Story's R. 342 ; Pope *v.* Nickerson, 3 id. 466.

[2] Fleming *v.* Smith, 1 House of Lords Cases, 513, per Lord Campbell.

[3] Pope *v.* Nickerson, 3 Story's R. 466.

[4] Vide supra, No. 1569.

[5] Martin *v.* Crockatt, 14 East, 465. See remarks upon this case by Parker, C. J., in Gordon *v.* Mass. Fire & Mar. Ins. Co., 2 Pick. R. 249.

the cargo might not have been had. As to the assured's not abandoning, his laying the case before the underwriters implied a demand for a total loss, since he had no claim for any other; and besides, the denial by the underwriters of his right to abandon seemed to imply that they understood him to claim a total loss, and such a claim, if distinctly made, is in effect an abandonment. Their denial of his right to make an abandonment seems to have been a sufficient refusal to accept one; and as to their having an opportunity to repair the vessel, the laying of the case before them seems to have given them sufficient opportunity to do so, if they chose. But it does not appear that the assured is required to give the underwriters such election in any case whatsoever, except in those cases where his obligation to make an abandonment without delay incidentally gives it to them.

The master's authority to sell the cargo has been admitted by courts, with rigid restrictions, and Lord Ellenborough is, in one case, reported to have denied the master's authority under any circumstances to sell the whole of the cargo;[1] but such a doctrine would be extremely prejudicial to the interests of both shippers and underwriters, and this authority has been established beyond question.

"Though in the ordinary state of things," says Sir William Scott, "the master is a stranger to the cargo beyond the purposes of safe custody and conveyance, yet in cases of instant and unforeseen and unprovided necessity the character of agent and supercargo is forced upon him by the general policy of the law; unless the law can be supposed to mean that valuable property in his hands is to be left without protection and care. Suppose the case of a ship driven into port with a perishable cargo, or suppose the vessel unable to proceed, or to stand in need of repairs. What must be done? The master must in such case exercise his judgment whether it would be better to transship the cargo, if he has the means, or to sell it. It is admitted, in argument, that he is not absolutely bound to transship; he may not have the means of transshipment; but even if he has, he may act for the best in decid-

[1] Wilson *v.* Millar, 2 Stark. 1.

ing to sell. If he acts unwisely, still the foreign purchaser will be safe under his acts. If he has not the means of transshipping the cargo, he is under an obligation to sell, unless it can be said that he is under an obligation to let it perish."[1]

1624. *Where, in case of the ship being disabled, the cargo is in a condition fit for transshipment*, and an opportunity to transship offers, or will offer within a reasonable time, *it is the duty of the master*, or supercargo, *to transship ;* and the same obligation would rest upon the ship-owner as between him and the insurers if he were in charge of the cargo.[2]

1625. *If the master sells the cargo when* he is bound to transship, or *the circumstances* otherwise *do not authorize him, the sale is void*, and the goods may be reclaimed by the owner.

Where some indigo, part of the cargo of a wrecked ship, was sold by the master at the Cape of Good Hope, in trover, in England, by the owner of the indigo, Lord Tenterden and his associates adjudged the sale to be void, and the vendee to be liable.[3]

It is suggested by Mr. Justice Story, that the proceedings of the master in selling the cargo in an emergency are presumed to

[1] The Gratitudine, 3 Chr. Rob. 240. See also The Betty Cathcart, 1 Chr. Rob. 220. In the former case Lord Stowell's doctrine, that, "If the master acts unwisely, still the foreign purchaser will be safe under his acts," is not sustained in the common-law jurisprudence.

[2] See infra, No. 1625.

[3] Freeman *v.* East India Company, 5 B. & Ald. 617. See also Morris *v.* Robinson, 3 B. & Cr. 196; S. C., 5 Dowl. & Ryl. 35. The ship-owners were held by Mr. Justice Story to be answerable to the shipper for a cargo destined to Velasco, where the consignee refused to receive it, which was thereupon carried to New Orleans, and there sold by the master. Arthur *v.* Schooner Cassius, 2 Story's R. 81. And Dallas, C. J., and his associates of the English Common Pleas, made a similar decision in case of the master's neglecting to forward the cargo by transshipping it or repairing his own vessel. Cannan *v.* Meaburn, 1 Bing. 243. This liability will be subject to the general limitation of the liability of ship-owners to the value of the ship, or other amount, according to the laws of the place to which the ship belongs. Pope *v.* Nickerson, 3 Story's R. 466. It is not to be supposed that the ship-owner is bound to transship at his own expense at a freight for the remainder of the voyage above that stipulated for the whole voyage. Vide supra, No. 1463.

be proper until the contrary appears,[1] corresponding with the remark of Lord Stowell, that the title of the foreign purchaser will be good notwithstanding the mistake of the master in making the sale ;[2] but the better doctrine seems to be, in respect to the cargo no less than in respect to the ship,[3] that the maxim caveat emptor is applicable.

1626. *The cargo may be hypothecated by the master in an emergency where such measure is necessary.*[4] *In case of the pledge of the cargo for advances to extricate it from the perils insured against*, bearing directly upon it, the respondentia or other lien does not constitute a total loss, any more than the bottomry of a vessel constitutes a loss on the vessel. *The loss is the amount expended*, including the interest, ordinary or extraordinary, and if the total loss is occasioned by a sale under proceedings to satisfy the lien, of which the assured had notice, and an opportunity to discharge it, any aggravation of the loss by his neglect to discharge it will be at his own risk, without enhancing the liability of the insurers.

So far as the hypothecation of the cargo is for funds to repair the ship, it is a matter between the shipper and the ship-owner, not affecting the underwriter on the cargo.[5]

1627. *In case of the master's hypothecation of the cargo* for advances, which is a conditional authority for a sale, *the lender is bound*, as the purchaser is in a sale, *to see that there is a necessity for the measure*, and the validity of the hypothecation or other pledge will depend upon the necessity of the advance.[6]

1628. *Where the cargo is sold* in consequence of the operation of the perils insured against in breaking up the voyage, *the claim for a total loss is not defeated by the supercargo's investing the proceeds for the purpose of remittance, and not as a new commercial adventure merely for profit.*

[1] Robinson *v.* Commonwealth Ins. Co., 3 Sumner's R. 221.

[2] The Gratitudine, 3 Chr. Rob. 240.

[3] Vide supra, No. 1569, 1570; also Gardner *v.* Salvador, 1 Mood. & R. 118.

[4] The Zephyr, 3 Mason's R. 341.

[5] The repayment of such forced loans is held by Walworth, C. J., to be secured by a lien on the ship. American Ins. Co. *v.* Coster, 3 Paige's Ch. R. 323.

[6] Vide supra, s. 5, No. 1569, 1570.

A ship on a voyage from the United States to Canton put into the isle of France, at which place the voyage was given up on account of sea-damage sustained by the ship, and an abandonment of the cargo, consisting of Spanish dollars, was seasonably made. It was held that the abandonment was not defeated in consequence of an investment of the dollars in cotton by the supercargo at the Isle of France, to be shipped to England, as the best mode of remittance. In this case the supercargo was himself interested in the profits of the voyage, but he was not insured in the policy in question. It was held that his interest in the profits did not affect the character of the investment in cotton so as to defeat the abandonment, as he did nothing more than it would have been the duty of the master to have done, or at least than he would have been justified in doing, if no supercargo had sailed with him. It does not appear, however, that, if one of the parties insured in the policy had been supercargo, and invested the dollars in cotton as the best mode of remittance, it would have defeated his right of abandonment.[1]

1629. *In case of sale of the cargo under foreign admiralty or other proceedings, and purchase of it by the master, the shipper or his underwriters have a right to adopt his purchase.*[2]

SECTION VII. OF THE FREIGHT.

1630. *One of the grounds of abandoning freight is a total loss of the ship,*[3] by its becoming a wreck or being innavigable.

An indefinite detention of the ship, or one for so long a period as to break up the voyage, is also a total loss of freight.

A policy being made on freight, from New York to Havana, the vessel was driven ashore at Sandy Hook, and was so much damaged, that it required about a fortnight to repair her and fit her for sea. The voyage was relinquished, and the assured de-

1 Pacific Ins. Co. *v.* Catlett, 4 Wend. 75; and see Catlett *v.* Pacific Ins. Co., 1 id. 561, and 1 Paine, 594.

2 See supra, s. No. 1580.

3 Idle *v.* Royal Exch. Ass. Co., 3 Moore, 115; Parmeter *v.* Todhunter, 1 Camp. 541.

manded a total loss. Mr. Justice Kent said, — and Chief Justice Lewis and Mr. Justice Livingston concurred in his opinion, — "It appears to me, that the same peril, and to the same extent, ought to exist, to authorize a recovery on a policy on freight, as on a policy on the ship." [1]

1631. *In case of a constructive total loss of the ship by damage over fifty per cent. of its value* under the American rule, *the assured* on freight is not obliged to waive his right to abandon the ship, and make repairs, or incur charges exceeding half of its value, for the purpose of prosecuting the voyage and earning the whole freight, but *may abandon both ship and freight*, and recover for a total loss against the respective underwriters on each.[2]

1632. *If the ship is rendered innavigable, and cannot be repaired for the prosecution of the voyage, and another can be procured within a reasonable time and distance, and the master has means to procure such other at an expense materially less than the amount of the original freight for the voyage, the underwriter on freight or profits is not liable to be prejudiced by the master's neglect to transship*, any more than the underwriter upon the cargo,[3] *and the loss will be adjusted as if the cargo had been transshipped* and forwarded; and will be partial or total according to the amount of the loss.[4]

In case of neglect to transship, the question is, whether it was the master's duty to procure another ship; that is, whether he had, or should have had, the means to procure a suitable one, and whether it could have been procured within a reasonable time, and at a freight materially less than that for the whole original voyage.

1633. *If, notwithstanding the disaster to the ship, the master is ready to, and can repair the damage so as to carry on the cargo within a reasonable time, to the port of destination, and so earn freight, he has a right to do so, unless the shipper will pay him full freight.*[5] In such case, therefore, there is not any loss of freight, total or partial.

[1] Herbert *v.* Hallett, 3 Johns. Cas. 93.

[2] American Ins. Co. *v.* Center, 4 Wend. 45.

[3] See supra, No. 1625.

[4] See Jordan *v.* Warren Ins. Co., 1 Story's R. 342.

[5] Herbert *v.* Hallett, 3 Johns. Cas. 93.

The freight of a cargo of flour being insured from New York to Barcelona, the ship was stranded on Long Island soon after sailing, in consequence of which the cargo was so much damaged, that it was not in a fit state to be reshipped, and would not, if carried on, have been worth the freight at Barcelona. It was sold at New York, for about double the amount of freight. The damage to the ship was repaired in a few days. This was held not to be a total loss. Mr. Chief Justice Kent said: "The assured had a right, on refitting the ship in due season, to insist on taking the cargo, or to be paid their full freight. Whether it would have been wise or foolish in the shipper to have sent on the flour, in the condition it was in, was a question not to be put by the assured." Accordingly, the whole freight would have been earned and due from the shippers, if the cargo had been transported in compliance with the charter-party, although it should have been of no value at the port of destination.[1]

Freight being insured from Richmond, Virginia, to Nice, in Piedmont, the master was obliged, by stress of weather and damage, to put into Kennebunk, in Maine, to refit, which could not be done in less than two months. The shipper of some tobacco, being afraid of being too late for the public sales if he waited, insisted on shipping his tobacco by another vessel, offering to pay the freight pro ratâ if any was due, to which the ship-owner consented, and it was accordingly shipped by another vessel. The rate of freight from Kennebunk to Nice was the same as from Richmond, so that no freight pro ratâ was earned. The freight was abandoned. It was held not to be a total loss of freight; but that the master had a right to detain the cargo until the vessel could be repaired, unless the shipper tendered him the whole freight; and that, in such a case, the master is allowed a "reasonable" time to repair; and that what is a reasonable time must be determined by all the circumstances, taking into consideration what a prudent shipmaster would do in a similar case, without regard to the state of the markets.[2]

[1] Griswold *v.* New York Ins. Co., 1 Johns. 205; 3 id. 321.

[2] Clark *v.* Mass. Fire & Mar. Ins. Co., 2 Pick. 104.

1634. *Where the ship is wrecked or disabled, and the shipper, himself, or by his agent, prefers to take his goods at an intermediate port rather than to have them forwarded to the port of destination, and the ship-owner, himself, or by his agent, chooses to deliver the goods to the shipper rather than to reship them for the port of destination, this is a case of freight pro ratâ earned, and accordingly a case of partial loss of freight.*

In such cases the whole transaction is frequently in the hands of the master, who must represent both parties, and he must, therefore, be presumed to represent each, according as one or the other, or both, being prudent men, would have acted had they been present.

If the distance to go for another vessel is great, the chance of finding a suitable one doubtful, or the freight to be paid nearly equal to that for the whole voyage, or if the undertaking might be subject to embarrassments and contingencies, it may well be presumed that he acts in behalf of the ship-owner in deciding not to reship.

If the market for the cargo is as good at the intermediate port as at that of destination, or better, and the proceeds of the sale there can conveniently be made available to the shipper, or if the cargo is not in a good condition to be forwarded, then the master may reasonably be supposed to represent the shipper in deciding not to transship.

In case of the concurrence of the interests of both parties in terminating the adventure at the intermediate port, and of its being actually there terminated, it should be presumed to have been so terminated by their mutual consent, and, accordingly, that pro ratâ freight is to be allowed in the proportion of the voyage performed.

If the motives of the master's course are wholly on the side of one party, then he must be presumed to have acted in behalf of such party.[1]

[1] See Hurtin *v.* Union Ins. Co., 1 Wash. R. 530; Callender *v.* Ins. Co. of North America, 5 Binn. 525; Herbert *v.* Hallett, 3 Johns. Cas. 93; supra, No. 1630; Griswold *v.* New York Ins. Co., 1 Johns. 205; 3 id. 321; supra,

1635. *If the ship is wrecked or so damaged as to be irreparable, or if it is reparable, but not within reasonable time to carry on the cargo, the master may retain the cargo to forward it by another suitable ship in due time, unless the shipper will pay him the amount of salvage that he might thus realize on freight for the original ship.*

In such case, therefore, there is a chance of saving pro ratâ freight for the original ship, but whether any such freight can be realized is contingent until the goods arrive at the port of destination. During this period, therefore, the loss on freight continues to be total, if the second freight is over half of the original one, and the case is a good one for an abandonment made immediately on receipt of intelligence and before the arrival of the substituted ship at the port of destination. After arrival there, an abandonment is too late.

Freight being insured from New York to Bremen, the vessel put into the Texel, where the master stranded his ship, to avoid running foul of other ships that were adrift, by which she was so much damaged as to make it expedient, in the opinion of surveyors, to sell her. The cargo was seized by the order of the government, while it was in lighters, after the ship had been stranded. The assured claimed a total loss. Mr. Chief Justice Kent, giving the opinion of the court, said: "To have entitled the assured to freight, there must have been a delivery of the cargo at Bremen, or a voluntary acceptance of it at the Texel by the consignees, or a refusal by them, upon an offer made, to have the goods sent on in another vessel. Neither of these events happened. The freight was, therefore, lost to the assured. The next inquiry is, by what means it was lost, and whether the goods might have been sent on to Bremen by another vessel. If this might have been done, and the omission to do it arose from the voluntary act of the master, it

No. 1633; Clark *v.* Mass. Fire & Mar. Ins. Co., 2 Pick. 104; supra, No. 1633. These cases do not specifically assert the doctrine laid down in the text, but will be found to involve it, and, in general, incidentally imply it, or, at least, they afford good ground from which to infer it, if it needs to be supported by any authority.

appears to be reasonable and consistent with the principles of the contract, that the insurers should be discharged, and they were accordingly held to be so.[1]

1636. Where, as in the case just mentioned of a vessel stranded at the Texel, the original ship, to which the charter-party and policy of insurance both relate, has been lost, and the cargo remains in a condition to be transshipped and arrive to its destination in specie and of marketable value as the same article for the same uses, the question arises whether the master has a *right to retain the cargo for the purpose of reshipping it*, in order to save to the ship-owner salvage on the freight, *against the* wishes and *demand of the shipper* to have it delivered to him at the intermediate port, without payment or offer of payment by him of pro ratâ freight in the proportion of the part of the voyage performed ?

In favor of the demand by the shipper, it may be said that the contract is for the transportation of the cargo by a certain ship for a specific voyage, the dangers of the seas excepted, the fulfilment of which contract on the part of the ship-owner by so transporting the cargo by the ship agreed on has become impossible, and that, the contract being thus at an end, he is entitled to his goods. But it is to be borne in mind, that this demand may be made after the transportation of the cargo for long passages, and the proportional enhancement of the value of the goods by bringing them nearer to their destined market, and it would accordingly be inequitable to deprive the ship-owner of all compensation for such service. Though he cannot claim freight under the contract, yet he can, by a familiar principle, claim it on quantum meruit, for wherever a service has been rendered on the application or with the consent of a party though it be on a contract, the literal execution of which has become impossible, by circumstances which excuse the contracting party, an implied agreement arises to make reasonable compensation, according to the benefit done. There appears to be no reason why he should not have a lien on the subject-matter to secure this compensation, just as he would have had for the

[1] Bradhurst *v.* Columbian Ins. Co., 9 Johns. 17.

whole freight, if the original contract could have been executed. This is a ground for the inference that

The ship-owner may retain possession of the goods, and reship them, in order to realize the proportion of the freight according to the part of the voyage performed by the original ship; and the shipper cannot make an effectual demand for his goods without payment of the pro ratâ freight for the part of the voyage performed.

1637. *Where, in consequence of damage to the ship, the ship, cargo, and freight are hypothecated for the expense of repairs to an amount exceeding the value of ship and freight, this is a total loss of freight.*

Under a policy upon freight, at and from Pernambuco to Liverpool, the vessel, being damaged by striking upon a rock in coming out of the harbor of Pernambuco, put back for repairs; to pay the expense of which the master was under the necessity of hypothecating ship, freight, and cargo, for £7,132, at a premium of twenty per cent. On arrival at Liverpool, the assured refused to take up the bond, and the ship was thereupon sold to satisfy it, and the freight was paid to the obligee, the proceeds of ship and freight being less than the amount of the bond.[1] This was held to be a total loss.

1638. *If the ship and cargo are damaged by the perils against which freight is insured, but the ship can be repaired* in reasonable time, *and a proportion of the cargo on which over half of the* stipulated *freight is to accrue, remains* in such a condition that it may be forwarded in the same ship, to the port of destination, *it is not a total loss of freight* for which the assured can abandon.

It was so held under a policy on freight from New Orleans to Havre, where, the vessel and cargo being damaged in going out of the Mississippi, the master put back to New Orleans.[2]

1639. *Where the ship is wrecked or damaged irreparably, or so much that it cannot be repaired in reasonable time to carry*

[1] Benson *v.* Chapman, 6 Mann. & Gr. 792.

[2] M'Gaw *v.* Ocean Ins. Co., 23 Pick. R. 405.

forward the cargo, and the master unjustifiably neglects to procure another to carry it on, and earn freight, *the loss on freight will be only the amount which must have been paid to such other ship.*[1]

1640. *If the charterer is insured on freight, and a constructive total loss of the ship takes place, for which the owner of the ship abandons to his underwriters, who repair the ship within a reasonable time, and pursue the voyage, or are able and ready to do so, in compliance with the stipulations of the charter, this is not a total loss of freight,* since it is the same thing to the charterer who insures his freight, whether he is enabled to resume the voyage by the party of whom he chartered the ship, or by the underwriters of that party, who are, in effect, his representatives. If the same course had been pursued by the owner himself, then it would not have been a case of total loss of the ship. In this case, therefore, in respect to the charterer, it is not a total loss of the ship; though, as between the owner of the ship and his underwriters, it is a total loss of the ship.

1641. *In case of delay for repairs, if the master, instead of retaining the cargo unless full freight is paid, delivers it to the shipper without any payment of freight, the assured on freight will have no claim upon his underwriters for a loss.*[2]

1642. *The absolute loss of the cargo,* as of the ship, *is a total loss of freight,* although the ship may be in a condition to continue the voyage.[3]

[1] 15 Mass. R. 345; Bradhurst *v.* Columbian Ins. Co., 9 Johns. R. 17; Saltus *v.* Ocean Ins. Co., 12 id. 107. In this latter case, Mr. Justice Yates says, the master's search may be confined "to the same or a contiguous port;" but this is a quite inadequate definition of the master's duty, which can hardly be defined more definitely than by saying that he is bound to reship the cargo if he can find a suitable ship within reasonable time and distance. The decision in Bradhurst *v.* Columbian Ins. Co. is not in accordance to the doctrine stated in the text, but the attention of the court was probably not directed to the question whether the case was one of partial loss.

[2] See Herbert *v.* Hallett, 3 Johns. Cas. 93; Griswold *v.* New York Ins. Co., 1 Johns. R. 205; 3 id. 321; Clark *v.* Mass. Fire & Mar. Ins. Co., 2 Pick. R. 104; all cited supra, No. 1633.

[3] Whitney *v.* N. Y. Firemens' Ins. Co., 18 Johns. R. 208, and cases passim.

Though the cargo is not wholly destroyed, yet if it is so damaged by the perils insured against that it cannot be carried on without endangering the health or lives of the crew, or so as to arrive at the port of destination as continuing to be the same description of goods as at the beginning of the risk, this constitutes a total loss of freight.[1]

If the goods are sold by the master at an intermediate port, with the consent of the shipper, or under circumstances rendering the sale binding upon him, as being made in pursuance of the authority with which the master is invested by the emergency, a right to freight pro ratâ accrues, which is salvage under the policy on freight.[2]

1643. Since the ship-owner is responsible only for the transportation of the cargo, the freight will be due on its delivery at the port of destination, and *in whatever degree goods may be diminished in value by decay or damage* from perils of the sea, and *though* they may have become *of no value on arrival at the port of destination*, still, *if they are delivered in specie*, being articles of the same kind as those shipped and not mere remains of its destruction or decay, freight is due; and accordingly, though the goods may be totally lost to all the purposes for which they can be available to the shipper, *there is not a total loss of freight.*[3]

1644. *If the cargo is wholly lost, and the ship can take another for the same voyage or the remainder of it, the freight so earned is salvage on that originally agreed for.*

This proposition is applicable only to the case of a prosecution of the same voyage as distinguished from undertaking a different one.[4]

A ship, having sailed upon a voyage on which the freight was

[1] Hugg *v.* Augusta Ins. Co., 7 Howard's U. S. Sup. Ct. R. 595.

[2] According to Vlierboom *v.* Chapman, 13 Mees. & Wels. 230, the entire freight is forfeited in such case, unless the shipper consents to the sale; meaning direct, and not merely constructive and implied consent. But the better doctrine seems to be as stated in the text.

[3] Hugg *v.* Augusta Ins. Co., 7 Howard's U. S. Sup. Ct. R. 595.

[4] Charleston Ins. & Trust Co. *v.* Corner, 2 Gill's (Md.) R. 410; Jordan *v.* Protection Ins. Co., 1 Story's R. 342.

insured, was compelled to put back; and the captain, supposing it to be necessary and for the benefit of the owners, sold both ship and cargo. Gibbs, C. J.: "If the ship had brought home another cargo, that would have been a salvage on the original freight; for though, when the cargo was taken on board, the insurance was on that specific cargo, yet if the ship, having been driven back to her original port of lading, had taken another full cargo on board at a lower freight, the assured would have been entitled to have recovered the difference." [1]

In the preceding case the policy is said to attach to the freight of a particular cargo, when it is taken on board; that is, the freight cannot be lost within the policy in consequence of the loss of the cargo, until the cargo is exposed to the risks insured against in the policy on freight.

Accordingly, it was held, that, when the loading of an intended cargo was prevented by a temporary detention of the ship, and another cargo was subsequently procured, and the freight of this cargo earned, it was not a total loss; the freight earned was not considered to be salvage.

Freight was insured from a port in the Baltic to Great Britain, and the vessel was detained in Russia so long, by an embargo, that the opportunity of earning the freight of a cargo intended to have been shipped was lost, and no other cargo could be procured before the frost set in, by which the vessel was detained until the following spring, when other freight was obtained. In the mean time an abandonment was made. Lord Ellenborough said, giving the opinion of the court: "A mere retardation of the adventure is not a substantive cause of loss, where the thing insured has not received damage; and whether the freight earned be the particular freight contracted for, or a posterior freight, makes no difference." [2]

1645. *A constructive total loss of the cargo by capture, arrest, or detention, is a constructive total loss of freight.*

[1] Green *v.* Royal Exch. Ass. Co., 1 Marsh. R. 447; S. C., 6 Taunt. 68.

[2] Everth *v.* Smith, 2 M. & S. 278. This case is referred to supra, p. 330, where, in the twelfth line, the word "not" is omitted, as will be obvious.

In case of insurance on the freight for a voyage to a port which proved to be blockaded, and the vessel was accordingly ordered off, Mr. Justice Washington held it to be a total loss of the freight, the policies at that time (1806) not containing the particular stipulations on the subject which have since been introduced in many ports of the United States.[1]

1646. The interest of the owner, as well as that of the charterer in a chartered ship, depends on the terms of the charter-party. Accordingly, it must depend upon the same instrument, whether the whole, or what part, of a loss on freight falls upon the interest of the owner or charterer. Consequently, *if the owner or charterer is wholly prevented, by the ship being wrecked, or by other perils insured against, from realizing the freight agreed for by a charter-party or by the bills of lading for shipments by third parties to which the policy is applicable, it is an absolute total loss:*[2] *and so also the loss to either will be partial, or constructively total, as in other cases.*

1647. *A total loss of freight*, as of goods, *is* not necessarily *a loss* of the whole subject insured, but *of all that is at risk at the time.*

A vessel was chartered for a voyage from Bourdeaux to New York, and thence to the river La Plata, and thence to Hamburg, for the sum of $18,000, one half of which was to be paid on arrival in the river La Plata, and the remainder on arrival at Hamburg. The freight was insured in New York. The vessel arrived at Buenos Ayres, where one half of the charter-money was paid according to the agreement. She was there detained by an embargo, and during the detention the freight was abandoned in New York. The interest in the whole freight was considered as having accrued, and it was held to be a total loss.[3]

As the half of the freight earned was paid, it made no difference whether it was considered to be a total loss of the whole, or of only half, of the freight agreed upon by the charter-party, suppos-

[1] Simmonds *v.* Union Ins. Co., 1 Wash. 382, 443.

[2] Atty *v.* Lindo, 4 B. & P. 236.

[3] Livingston *v.* Columbian Ins. Co., 3 Johns. R. 49. See also Robertson *v.* Majoribanks, 2 Stark. R. 573.

ing the value in the policy to be the same as by the charter, since, if it was considered to be a loss of the whole, the assured was charged with one half, as so much salvage received by him. But if the freight due at Buenos Ayres had not been paid there, it might have been of importance whether it was considered to be a total loss of the whole freight, or only of the part then pending; since what had become due might not eventually have been paid by the freighters. It evidently was a total loss of only the part of the freight that was pending, that is, of one half of the whole freight. It was like a total loss of goods, where half of the cargo insured has been safely landed, and delivered to the consignee.

The case is similar where part of the voyage is performed, and the cargo in part delivered. A ship-owner having let his vessel on charter for a voyage from Monte Video to Cape Corrientes and thence to Boston, "freight payable on a right delivery of the cargo at Boston," effected a policy on freight valued at $4,000. After the cargo taken at Monte Video had been partly discharged at Cape Corrientes, and a part of that for Boston taken on board, the vessel was forcibly taken possession of by a French ship-of-war, on the 14th of February, and carried back to Monte Video, and there detained for some time; and when she was restored, Cape Corrientes being under blockade, the voyage could not be resumed, and the subject of claim for freight and cancelling of the charter-party being referred to arbitrators, they awarded $1,200; and on the 2d of May the master chartered the vessel for another voyage. This was held by the Court of Errors in Maryland to be a total loss of the freight insured, with a salvage of $1,200.[1]

1648. *In respect to a policy upon freight, as well as to one upon the ship or cargo, the assured and those representing him are justified in acting according to circumstances, as they appear at the time and place, and the right to recover for a total loss of freight will not be defeated by subsequent events.*[2]

Where a ship stranded at the Cape of Good Hope was sold by

[1] Charleston Ins. & Trust Co. *v.* Corner, 2 Gill's R. 410.

[2] See supra, No. 1577.

the master, her being got off by the purchaser, and repaired, did not prevent its being a total loss of freight.[1]

1649. It has been held that an abandonment of the ship does not take away the right of abandoning the freight, in case of a constructive total loss by capture or detention, or sea-damage.[2] It is plain, that if the ship were not abandoned, in these cases, and, being released or repaired, performed the voyage, and if the assured had a right to abandon the freight, and should avail himself of the right, the insurers would be entitled to the freight eventually earned, as salvage. The question then occurs, *whether the assured can, by abandoning the ship, affect the rights of the insurers on freight;* that is, whether he can, by this means, make what is a constructive, equivalent to an actual, total loss of the ship, in its effect under the policy upon freight.

Mr. Chief Justice Kent, giving the opinion of the court, upon an abandonment of freight during a detention, by capture, of a vessel which was also abandoned to the underwriters upon it during the capture, but was subsequently acquitted, and earned freight, said, that the loss of the freight pro ratâ, earned subsequently to the capture, must fall upon the underwriters upon that interest. "There are in this case conflicting rights, and some one must yield. The owner of ship and freight is authorized to insure each of them distinctly, and the law must have intended that each of the policies should have a full and effectual operation, according to the established principles of insurance. It would be to maintain a paradox, to contend, that by an abandonment of the ship, in such a case, the remedy upon the policy upon the freight was for ever gone. One contract cannot be destroyed by the operation of another contract, inter alios. The insurer on freight must therefore submit to a total loss in every such case, with the exception of the ratable freight, which does not go with the abandonment. The abandonment of the ship is an act in which he has no direct concern; and his contract with the assured contains no control of that act. The loss of any chance of recovery of

[1] Mount *v.* Harrison, 4 Bing. 388; 1 M. & P. 14.

[2] Coolidge *v.* Gloucester Mar. Ins. Co., 15 Mass. R. 341.

the freight is a consequence incidental merely to the abandonment of the ship, and arises from meeting the paramount claims of the insurer on the ship." [1]

It does not appear upon what ground the circumstance that this consequence is incidental is of importance; nor can it be said, consistently with this doctrine, that the insurance upon freight is not affected by that upon the ship, for it is quite evident that the doctrine makes the insurers on the freight liable to pay a greater amount of loss on the whole, taking the salvage into consideration, than they would be liable to pay in case the ship had not been insured and abandoned.

The only principle upon which the doctrine can be supported, seems to be that which is virtually assumed in the above case, namely, that the insurers upon freight made their contract with the knowledge that the ship might be insured, and in case of a constructive total loss, abandoned, whereby it would in fact be absolutely and totally lost to the assured on freight. The absolute total loss of the ship, under these circumstances, is therefore a direct legal consequence of a capture or other constructive total loss, of which the insurer on freight may be presumed to have had notice, and in reference to which he may be supposed to have made his contract. The assured, by the exercise of a legal right, of which the insurer on freight had notice, makes the constructive total loss of the ship an absolutely total loss. By a direct consequence of the peril, therefore, the chance of completing the earning of freight subsequently to the accident is gone.

The English cases assume, that freight may be abandoned in case of a constructive total loss of the ship; though, in some instances, the judges intimate that the liability of the insurers upon freight cannot be affected by the act of the assured in abandoning the ship. But as the general implication of the English decisions is, that the rights of the assured under a policy upon one interest are not impaired by insuring another, and as the judges in many instances, speak of the question as being one between the different

[1] Davy *v.* Hallett, 3 Caines's R. 16.

sets of underwriters, and not between either set and the assured,[1] the necessary consequence is, that the insurers on freight are affected by the fact of the ship being also insured and abandoned.

Lord Ellenborough distinctly lays down the doctrine of the Court of K. B., that where freight is abandoned and a total loss recovered, and freight afterwards earned, if the ship is insured and abandoned too, the freight will go to the underwriters on the ship; but if the ship is not insured, the owner shall account for the freight as salvage, without being permitted to charge the expense of navigating her to earn it.[2]

It is a necessary consequence of the right of abandoning both ship and freight, that the underwriters on the latter shall be deprived of salvage by the earning of freight after the event to which the abandonment relates; for the underwriters, to whom the ship is assigned by abandonment, certainly ought not to be held to account for the freight subsequently earned by it.

1650. But so, on the other hand, the underwriters ought not to have the benefit of the freight previously earned. Accordingly, *where the abandonment of both subjects relates to an event that took place when a part of the voyage was performed, and the same ship afterwards performs the voyage, the insurers of the ship ought to be entitled to freight pro ratâ after the event, and those on freight to freight pro ratâ before the event, for which the abandonment is made. And such is the doctrine in the United States.*[3]

Accordingly, there may be a salvage on freight in the United States, though the ship is also abandoned, though not the same as if it had not been abandoned, whereas there is no salvage on freight in England in case of the ship being abandoned.

The fact that the underwriters on freight may be affected by the circumstance of the ship being also insured and abandoned, is an irregularity in jurisprudence. The doctrine adopted in the United

[1] Davidson *v.* Case, 8 Price, 542; 5 Moore, 116; 2 B. & B. 379; 5 M. & S. 79.

[2] Thompson *v.* Rowcroft, 4 East, 34. See also Leatham *v.* Terry, 3 B. & P. 479. See also M'Carthy *v.* Able, 5 East, 388; Case *v.* Davidson, 5 M. & S. 79; 5 Moore, 116; 8 Price, 542; 2 B. & B. 379.

[3] See infra, s. 19.

States is preferable in this case, as it makes the irregularity less than it is under the English doctrine.

An embargo, being laid when a ship destined to Leghorn was at Falmouth in July, 1796, was continued until October, 1798. This was held to be only a temporary suspension of the voyage, which did not dissolve the contract of affreightment.[1] In such a case, accordingly, if the assured is authorized by the terms of the policy to abandon, the underwriters would, in the United States, be entitled to salvage, if the freight could be subsequently earned; and so they would in England, unless the ship was insured and abandoned also.[2]

1651. *The amount allowed for demurrage* in case of capture by a Columbian privateer, and condemnation, and sale, and subsequent restoration of the proceeds, was considered to be instead of freight.[3] It would accordingly be *considered as salvage on the freight* in case of its total loss, and the abandonment of both ship and freight in the United States.

1652. *Where part of the freight is earned absolutely, though payable on a future event, but not conditionally so payable, and by the loss of the ship the event becomes impossible, as this is not a loss of the freight so payable,*[4] though the subsequent freight insured by the same policy may be lost, *the case may be either a partial or total loss.* If the adjustment includes the amount so previously earned, it will be partial or total, according as it exceeds or falls short of fifty per cent.; if that is excluded, the case will be one of total loss.

1653. *The assured on freight at a high valuation,* who has abandoned, *accounts for,* as salvage, only *the amount of freight actually received from other shippers* for delivery of their goods, *but for his own shipment he accounts* for freight of goods that arrive, *at the rate of the valuation.*

Freight being valued at $7,500, the ship was captured and the

[1] Headley *v.* Clarke, 8 T. R. 259.

[2] See also Lorillard *v.* Palmer, 15 Johns. R. 14, and Palmer *v.* Lorillard, 16 id. 348.

[3] Coggeshall *v.* Read, 5 Pick. R. 454.

[4] Mackrell *v.* Simon, 2 Chit. 666.

freight thereupon abandoned. The ship and cargo were subsequently restored, and the voyage was performed. The assured owned two thirds of the cargo. The question was how much salvage was to be allowed. The assured was willing to allow salvage on the freight of his own part of the cargo at the same rate at which it was valued. On the part of the underwriters it was insisted that the whole freight in salvage should be estimated at the rate at which it was valued in the policy ; but the assured was willing to allow as salvage on the other third of the cargo only what he actually received. The court, in Pennsylvania, decided in favor of the assured.[1]

So far as the amount received from other shippers was concerned, the assured received it instead of the underwriters, and on that account it was immaterial whether it was more or less, provided he accounted fairly ; and any other adjustment would be, in effect, setting aside the valuation. In respect to his own shipment, it was not inconsistent with the valuation to account for the freight at the rate at which it was valued, but, on the contrary, was exactly in conformity to it.

SECTION VIII. OF PROFITS AND COMMISSIONS.

1654. *In respect to* a policy upon *profits*, as *it does not appear that any thing can be transferred by an abandonment* of this interest, it seems to be questionable how far the principles of constructive total loss are applicable to such an insurance, except by some specific stipulation in the policy.

A policy being made upon the "imaginary profit" of goods shipped at Bourdeaux for Hamburg, the ship was totally lost in the course of the voyage ; but the cargo, except a barrel of indigo, was saved, and carried to Hamburg in another ship at the expense of the underwriters. This was held to be a total loss. Lord Mansfield said : "The meaning of the policy seems to be, that the ship and cargo shall arrive at the destined port, and is on the profit of that particular ship and cargo ; but the market varies and

[1] Dumas *v.* Union Ins. Co., 12 Serg. & R. 437.

may depend on twenty-four hours sooner or later; so that unless the very ship and cargo arrive, the profit may fail, and the insurance is lost." [1]

In this case the goods were insured on board of a Bremen vessel, which took the case out of the statute against wagering policies. Mr. Marshall considers it a wager, and the principles of the decision are plainly those which are applicable only to wagering policies; though it does not appear that Lord Mansfield spoke of the policy as being a wager.

1655. *A loss of part of the goods of which the profit is insured, is a proportional loss on profits.*

A different doctrine was adopted in a case in the English K. B., where Lord Ellenborough said it did not appear that, if the property had arrived, there would have been any profit, implying that the insurable interest depended on the state of the market.[2] But the American jurisprudence distinctly recognizes the doctrine just stated.

The profits of a cargo were insured from New York to Havre. The ship and cargo were captured and carried into England, where over half of the cargo was restored, but the voyage was relinquished. Under a policy on the cargo the assured had recovered a loss of three eighths. Under the policy on profits it was the opinion of the court that "the assured were entitled to a partial loss only. Profits are necessarily incidental, and subject to the final disposition of the goods. The assured have received five eighths of the goods. Whether they yield a profit is not material, since the assured chose to accept them at London, and take the benefit of the market there. They are therefore entitled, at most, to a loss of three eighths only." [3]

1656. *Whether a loss of over fifty per cent. in value of the goods of which the profit is insured, is a constructive total loss of the profits?*

The profits of goods being insured from Batavia to New York, the vessel was compelled to put into St. Kitts, on account of sea-

[1] Henrickson *v.* Margetson, Marsh. Ins. 101; 2 East, 549, n.

[2] Hodgson *v.* Glover, 6 East, 316.

[3] Loomis *v.* Shaw, 2 Johns. Cas. 36.

damage, where she could not be repaired to be made fit to bring the cargo on to New York, and both ship and cargo were sold there at auction, but it seems that both were bought in on account of the owners. The cargo was brought to New York in another vessel, the original vessel not being suitable for bringing it. Upon the question whether this was a total loss, Mr. Justice Kent said: "Considering this an interest policy, I think it follows that there may be a partial loss. What shall be the criterion of an average or total loss in respect to profits, I cannot at present with clearness decide. Perhaps the established rule in respect to ship and cargo, of a loss of more than half the value, may be applicable. If so, the question here will be, whether the more profitable half of the cargo might not have been brought in the same ship to New York. I suggest this as a rule, which may perhaps apply, but without giving any opinion upon it." [1]

The judge probably alludes to what had been said by Lord Mansfield,[2] as to the cargo being brought in the original ship. But as it seems that the goods arrived at the port of destination, where the assured had the opportunity of making profits, it does not appear that any part of the specific interest insured had been lost. The thing had happened which the insurers undertook should not be prevented by the perils insured against. In respect to the distinction as to the arrival of the more or less profitable part of the cargo, this seems not to be a criterion of total loss. A policy upon profits has no relation to the state of the markets, any more than a policy upon goods.

On the whole, *it does not seem that the rule of constructive total loss of over fifty per cent.* of the value *is applicable to a policy on profits*, in favor of the owner of the goods, under any circumstances.

1657. *The abandonment of the cargo to the underwriters on that subject does not preclude an abandonment under another policy on the profits of the same cargo, to other underwriters.*

In case of the capture of a cargo, of which the profits were insured, the goods and the profits were abandoned to the respective

[1] Abbott *v.* Sebor, 3 Johns. Cas. 39. [2] 2 East, 549, n.; supra, p. 354.

underwriters upon each. Both the parties and the court appear to take for granted, that a constructive total loss of the goods constitutes a total loss of profits. The underwriters on profits objected, that the abandonment of the goods deprived the assured of the right of abandoning the profits, since, as the profits were a part of the goods, the assured had thus disposed of the whole subject of the policy upon profits. Mr. Justice Livingston, giving the opinion of the court, said: "This is a dilemma which the underwriter should have foreseen at the time of his subscription. He must have supposed the cargo, in case of disaster, would naturally be abandoned to those who had insured it; nor is it reasonable in him to expect, that, for the purpose of recovering on a small policy on profits, a merchant should, by not abandoning the cargo, forego his insurance on that subject. A double abandonment, as in this case, does not deprive the assured of his remedy on a profit policy." [1]

The abandonment, in this case, transferred nothing to the insurers; it was of no effect, except as a notice of a claim for total loss. The court consider the loss of profits to have been not constructively, but actually, total. They say that the profits were insured, subject to the right of the assured to abandon the goods in case of a constructive total loss. The principle assumed is, that the abandonment of the goods, whereby the loss of profits is made absolutely total, is one of the direct consequences of the arrest and detention, for which the underwriters on profits are liable. The court say, the insurer must be presumed to have anticipated the abandonment of the goods in this case, by which is evidently meant, that it is one of the consequences of the risks insured against, for which he is liable. According to this doctrine, the principle of constructive total loss indirectly affects an insurance upon profits, by the right of abandonment which it gives in relation to the policy upon the goods.

1658. *Under a policy on commissions*, although the assured cannot assign to his underwriters the right to earn the commissions, it being a trust reposed in him, personally, by his principal;

[1] Mumford *v.* Hallett, 1 Johns. R. 433.

nor the demand for commissions earned and due, for so far as the commissions are earned and have become absolutely due, the insurers are discharged, since the assured has so far gained what it was guarantied he should not be prevented by the specified perils from gaining; yet, *where the assured has done all that he was to do under the contract, to entitle himself to commissions, and the perils in the policy are still in the way of his being finally entitled to receive them, there may be something to be abandoned,* since, in such case, he has an interest in the goods equal to the rate per cent. of his commissions.

A policy was effected "upon the interest of William I. Robinson, being the allowance made with him as supercargo, as per agreement with the owners of the ship," and the ship became innavigable during the voyage, and the cargo was sold at St. Kitts. The right of the assured to recover upon the policy was considered by all the judges to turn upon the point, whether the assured, under the circumstances, had earned, and was absolutely entitled to, his commissions. If his demand against the owners had become absolute, there could be no question as to any constructive total loss.[1]

SECTION IX. OF DIFFERENT SUBJECTS INSURED IN THE SAME POLICY.

1659. If only a part of the property insured is at risk, and a total loss happens upon this, it may be abandoned. This is a matter of daily practice. It has been made a question, *whether the assured can abandon a part only of the property at risk* under the policy.

Ship, cargo, and freight being insured in the same policy, the assured abandoned the ship only; and it was contended on the part of the underwriters, that he could not abandon this interest separately. The court, however, gave no opinion on this point.[2]

A policy being made upon ship and freight, valued separately, both were abandoned. The insurers accepted the abandonment

[1] New York Ins. Co. *v.* Robinson, 1 Johns. R. 616. [2] 3 Mass. R. 413.

of the ship, but refused that of freight, which implied an opinion on their part, that they might be separately abandoned. The court had no occasion to express an opinion upon the point.[1]

In a case before Mr. Justice Washington, upon a policy on the vessel and cargo, the cargo was abandoned separately, and the abandonment accepted by the insurers. The parties and the court appear to take it for granted, that such an abandonment may be made.[2] These cases favor the doctrine, that, *where the amount insured is insured indiscriminately upon the different interests of ship, cargo, and freight, one of those interests may be separately abandoned.* But the point cannot be considered as settled. In most parts of the United States, the question is not likely to arise, since different forms of policy are used for the ship and cargo.

1660. As to a policy upon the cargo, *if one sum is insured indiscriminately upon different kinds of merchandise, the assured cannot abandon a part only of the merchandise* at risk under the policy.

Insurance was made upon a part of a cargo, consisting of beef, butter, soap, candles, apples and potatoes, on a voyage from New York to Charleston, against "general average, and such total loss only, as might arise from the absolute destruction of the property." The vessel was stranded, in the course of the voyage, on Barnegat Shoals, near Sandy Hook, and subsequently wrecked and totally lost. Some of the articles insured were saved from the wreck, but a part of them were stolen. The assured claimed the right of recovering for the articles stolen, or otherwise destroyed, in consequence of the accident. The court said: "The idea that for each item or article of the cargo, which was totally lost, the underwriters are liable, is not well founded. The insurance was upon so much of the cargo as an integral subject."[3]

It is said in Le Guidon,[4] that, in case of insurance upon different kinds of goods in the same policy, the assured may make a

[1] Coolidge *v.* Gloucester Mar. Ins. Co., 15 Mass. R. 341.

[2] Hurtin *v.* Phœnix Ins. Co., 1 Wash. C. C. R. 400.

[3] Guerlain *v.* Columbian Ins. Co., 7 Johns. 527.

[4] Chap. 7, s. 7, 8, and 9.

separate abandonment of the whole of the same kind, if the damage exceeds half of the value, or renders the article unsalable. Casaregis says, the sound and damaged goods must be abandoned together,[1] and he does not make the distinction as to the insurance being upon different articles. According to the French Ordinance, the assured "could not abandon one part and retain the other;"[2] and the French Code provides against a "partial abandonment."[3] These provisions make it necessary to abandon all the goods that are insured together without any distinction.

But it is said, if different parts of a cargo belonging to one shipper are insured by the same underwriters in different policies, the assured may abandon upon one policy only; for says Valin,[4] the contracts have no connection with each other; and, upon the same principle, Emerigon[5] and Estrangin[6] say, that, notwithstanding the provisions of the Ordinance and Code, if a certain sum is insured on sugar, and another certain sum, in the same policy, on indigo, either of the articles may be abandoned separately, since this mode of insuring is equivalent to two policies.

1661. *Whether a separate abandonment may be made of an article separately valued?*

Mr. Marshall says: "If, in the same policy, articles be separately valued, I may abandon one article and retain the rest."[7] He cites Valin[8] and Pothier[9] for this doctrine, but nothing is said of a valuation by those writers in the places cited. It has been decided in New York, upon the authority of this passage in Marshall, and that of Le Guidon, Valin, and Emerigon, as cited above, in the absence of other authority, that a separate valuation gives the right of making a separate abandonment.

Under an insurance for a voyage from New York to Falmouth, "on 150 boxes of sugar, valued at $6,650, 5 hampers of mace, valued at $5,700, and 4 tons of logwood, valued at $250, the vessel was compelled, by stress of weather, to put into the port of Philadelphia, where 131 boxes of the sugar were found to be

[1] Disc. 1, n. 109 and 110.
[2] Des Assur. a. 47.
[3] Lib. 2, tit. 10, s. 3, a. 183.
[4] Tome II. p. 109.
[5] Page 214, c. 17, s. 8.
[6] Pothier, Ins., No. 132, n.
[7] Page 600.
[8] Article 42.
[9] Note 132.

damaged, and wholly unfit to be carried on to the port of destination. The assured abandoned the sugar. It was decided that he might make a separate abandonment of each article separately valued.[1]

Mr. Marshall, and the court in New York after him, take the ground that a separate valuation of parts of the merchandise is equivalent, in respect to abandonment, to the insuring of different sums upon distinct parts of it; since, otherwise, the authorities cited are not applicable. But this admits of doubt. There is evidently no material distinction between insuring in the same policy $1,000 upon indigo and the same sum upon sugar, and insuring $2,000 upon so many chests of indigo valued at $1,000, and so many boxes of sugar valued at a like sum. Where the policy is so made that the sum insured may be applied to either subject to any extent, the circumstance of a separate valuation of some articles seems not at all to distinguish the contract from an open policy upon articles, the cost of which should be equal to the amount at which they are valued; and under such a policy, a part of the merchandise cannot be separately abandoned.

I therefore conclude, that,

Where divers kinds of articles of the same cargo are indiscriminately insured in the same policy, against the same risks, *a separate abandonment of any of them cannot be made, though they are separately valued.*[2]

SECTION X. THE EXISTING FACTS CONSTITUTE THE LOSS.

1662. Abandonment is usually of property at a distance, and so must necessarily be made upon intelligence of a state of things liable to be changed before the intelligence is received. In order to authorize an abandonment, the facts learned by the assured and communicated by him to the underwriters must be such as to constitute a total loss, actual or constructive. But suppose the circumstances to have changed in the mean time, so as to change

[1] Deidericks *v.* Commercial Ins. Co. of New York, 10 Johns. R. 234.

[2] See infra, No. 1687.

the character of the loss to a partial instead of a total one, will the validity of the abandonment depend upon the state of the facts of which the assured has information, or the state of the facts at the time of the abandonment being made? This question has heretofore been the subject of considerable discussion. It is now settled that

The validity of the abandonment depends upon the facts existing when it is made.

Where property captured had been released before the abandonment, but was not known to the assured to be so, it was urged by the assured's counsel (afterwards Mr. Justice Jackson,) that "the right of the assured to abandon must depend upon the state of facts at the period of the last intelligence. The abandonment is made in reference to that period. If it refers to the actual state of facts at the time of the offer, whence arises the necessity of speedy election after the receipt of the intelligence? If the obligation of the insurer depends upon the state of the case, as it actually exists in a distant country, although unknown to either party, then the obligations and the rights of the assured must depend upon the same facts; and it is then of no importance whether he abandons sooner or later after receipt of the intelligence, since his right depends on the facts at the moment of his offer, not on those existing at any former period."

It was urged, that the same principles ought to govern in abandonment as in effecting insurance. "An insurance, made after the sailing of the ship, is predicated upon the state of facts last known to the parties, and whether she was actually lost at the time of making the contract, or afterwards arrives in good safety, the parties are equally bound."

Chief Justice Parsons stated, in the same case,[1] that, according to the custom then existing in Boston (1808,) the assured had a right to abandon according to the facts of which he had intelligence, and that the Circuit Court of the United States had acted upon that custom in one instance.

It seems to have been the law in Scotland, that an abandon-

[1] Dorr *v.* New England Mar. Ins. Co., 4 Mass. R. 221.

ment may be made according to the state of the intelligence received by the assured at the time of the abandonment, although the actual circumstances may have changed, and the loss in the mean time have ceased to be total.[1]

But the settled jurisprudence gives the assured the right to abandon only according to the facts at the time of abandonment. This question was considered in a case which occurred in England in 1808. The assured, hearing of the capture of his vessel, abandoned her; but she had in fact been recaptured before that time, and was then in safety, subject only to the claim for salvage. Lord Ellenborough said, that to give effect to the abandonment under these circumstances would "grievously enlarge the responsibility of the underwriters; it would be to make them answerable, not for the actual loss, but for a supposed total loss, which had in fact ceased to exist." And he and his associates, Grose, Le Blanc, and Bayley, were of opinion that an abandonment could be made only according to the facts at the time of making it. They thought it inexpedient to extend the right of abandonment, and they supposed that limiting the right to the state of facts was more conformable to the principles of indemnity.[2]

This opinion has been confirmed by other decisions.[3] But Lord Eldon seems to have entertained doubts on this subject, respecting which he reserved his judgment, by "protesting against being considered as giving an opinion agreeing or not agreeing with these decisions."[4]

This question was particularly considered by the Supreme Court of the United States in 1808. A vessel having been captured, a decree of restoration was passed on the 9th of July, and on the 19th of the same month restoration was actually made. The assured, having heard of the capture but not of the restoration, abandoned to the underwriters on the 19th of that month.

[1] Robertson *v.* Stewart, Bell's Com. 520.

[2] Bainbridge *v.* Neilson, 10 East, 329; 1 Camp. 237.

[3] Parsons *v.* Scott, 2 Taunt. 363; Falkner *v.* Ritchie, 2 M. & S. 290.

[4] Smith *v.* Robertson, 2 Dow, 474, at p. 482.

In giving the opinion of the court, Marshall, C. J., said : "It appears to us to consist with the nature of the contract, which is a contract of indemnity, that the real state of the loss, at the time the abandonment is made, is the proper and safe criterion of the rights of the parties. Might they depend absolutely on the state of information, a seizure, which scarcely interrupted the voyage, might be, and frequently would be, converted into a total loss; and the contests respecting the real state of the information might be endless." [1]

In New York it was decided, in divers cases, that abandonment might be made according to the facts of which the assured had knowledge; [2] but this opinion was overruled in the Court of Errors, prior to 1808, where it was held that an abandonment must be authorized by the facts existing at the time of making it; [3] and the courts of that State have adhered to this rule in subsequent cases.[4] "The rights of the parties," says Mr. C. J. Kent, "will be determined by the state of things existing at the time of the abandonment." [5] And the same rule is adopted in Pennsylvania.[6]

A question was formerly made by Mr. Justice Washington, whether the right to abandon depended upon the state of the facts, or the intelligence received by the assured at the time of the abandonment.[7] But shortly afterwards the same judge held the doctrine now fully established, that the right of abandonment depends upon the state of the facts at that time.[8]

[1] Marshall *v.* Delaware Ins. Co., 4 Cranch, 202; 2 Wash. C. C. R. 54. See also Alexander *v.* Baltimore Ins. Co., 4 Cranch, 370.

[2] Mumford *v.* Church, 1 Johns. Cas. 147; Slocum *v.* United Ins. Co., id. 151; Murray *v.* United Ins. Co., 2 id. 263; Livingston *v.* Hastie, 3 id. 293.

[3] Church *v.* Bedient, 1 Caines's R. 21; Hallett *v.* Peyton, id. 28.

[4] Penny *v.* New York Ins. Co., 3 Caines's R. 155.

[5] Schieffelin *v.* New York Ins. Co., 9 Johns. R. 21, at p. 26.

[6] Adams *v.* Delaware Ins. Co., 3 Binn. 287.

[7] Beale *v.* Petit & Bayard, 1 Wash. C. C. R. 241.

[8] Marshall *v.* Delaware Ins. Co., 2 Wash. C. C. R. 54. See also Queen *v.* Union Ins. Co., id. 331. So in respect to a vessel that has been repaired before the abandonment. See Dickey *v.* New York Ins. Co., 4 Cowen, 222;

1663. In the United States the validity of the abandonment depends upon the state of the facts at the time when the abandonment is made; [1] in England it depends upon the state of facts when the action for the loss is commenced.

Lord Tenterden says upon this subject: "The abandonment is to be viewed with regard to the ultimate state of the facts as appearing before the action brought." [2]

SECTION XI. UPON WHAT INTELLIGENCE ABANDONMENT MAY BE MADE.

1664. As the assured must, at the time of abandoning, state the grounds upon which he makes the abandonment, *it is necessary* in order to make the act valid, *not only that the existing facts should constitute a total loss, but also that the assured should be informed of the accident which occasions the loss.*

He cannot abandon merely upon the apprehension that a total loss may have taken place, and afterwards establish his right so to do, by facts that subsequently came to his knowledge, and which were wholly unknown to him at the time of making the abandonment. This raises a question as to the kind of information which will authorize an abandonment.

1665. Although an abandonment may be made upon true intelligence of a total loss, yet, *if the intelligence prove to be false, the abandonment will be a nullity.*

Lord Ellenborough says: "The effect of an offer to abandon is, that, if the offer appear to have been properly made upon supposed facts, which turn out to be true, the assured has put himself in a condition to insist upon his abandonment. But it is not enough that it was properly made upon supposed facts, if it turn out that no such facts existed. It may be said to be properly

Dickey *v.* American Ins. Co., 3 Wend. 658; Church *v.* Marine Ins. Co., 1 Mason, 341; Humphrey *v.* Union Ins. Co., 3 id. 429.

[1] See cases passim.

[2] Naylor *v.* Taylor, 9 B. & C. 718; and cites Bainbridge *v.* Neilson, 10 East, 329; Patterson *v.* Ritchie, 4 M. & S. 393; and Brotherston *v.* Barber, 5 id. 418.

made upon notice received, and bonâ fide credited, by the assured, of his ship having been wrecked, whether such intelligence were true or not, and though the letter conveying it turn out to be a forgery; and yet clearly no right of action would rest in him, founded upon an abandonment made upon false intelligence. If the facts be all imaginary or founded in misconception, the whole foundation of the abandonment fails." [1]

1666. *Abandonment* may be made upon information received through any channel entitled to credit; but *is not permitted to be made speculatively upon mere conjecture.*

Abandonment is very frequently made upon intelligence received through the public newspapers; [2] but vague, imperfect intelligence of this sort has been held not to be sufficient ground for abandonment.[3]

A ship insured from Rotterdam to Baltimore was driven aground in Helvoet Roads, on the 5th of December, 1822, and not got off until about the middle of February following. On the 4th of February, the assured abandoned in Baltimore, in the form following: — "To the President, &c.: I observe by a Boston newspaper of the 29th of January, that the ship General Smith, insured at your office, was driven ashore in a heavy gale of wind on the 6th of December, and by a Charleston paper of the 26th of January, that on the 13th she was not got off. In so dangerous a situation as the Helvoet Roads, it is to be feared that a total loss has ensued. I therefore, as a measure of precaution, for both your interest and my own, do hereby abandon to you and claim a total loss." It was held by the Maryland Court of Errors, that this was not a sufficient abandonment, even if the facts subsequently ascertained had shown the loss to be total, and given the right of abandonment. Mr. Justice Dorsey, giving the opinion of the court, said: "The mere stranding of a vessel forms not of itself a substantive ground of abandonment. The right to

[1] Bainbridge *v.* Neilson, 10 East, 329, at p. 341.

[2] Bosely *v.* Chesapeake Ins. Co., 3 Gill & Johns. 450.

[3] Muir *v.* United Ins. Co., 1 Caines's R. 54.

abandon on such an occurrence depends on the concurrent circumstances. If a mere stranding be not a total loss, there is no total loss disclosed by the notice. The only facts disclosed by the notice on which such a conclusion can rest, are, that in a gale of wind the ship was driven on shore and had remained there seven days. But whether she remained there from choice, to make some inconsiderable repair, or from necessity; whether she was thrown one foot or one mile from the channel of the river; whether she lay high and dry, or in ten feet of water; whether she had sustained damage by the accident; whether any effort had been made to get her off; or whether the accomplishment of the objects were impracticable, or could be accomplished for ten dollars or for ten thousand dollars, — were matters on which the insurers were left to speculate in utter darkness." [1]

The assured abandoned upon a report that the property was captured. Lord Ellenborough said: "No certainty existed as to the capture at the time of the abandonment; but in cases like this, men must act upon probable information, and leave the effect of their acts to be determined by the eventual truth or falsehood of the intelligence they receive. If I hear of my ship's being taken in the East or West Indies, I am not obliged to wait till I certainly know the event by the testimony of those who were present. Provided the thing has once existed, what I do, believing it to have taken place, must be valid and effectual. Assuming the fact, then, that the assured had reason to believe that their ship was captured, and they were acting bonâ fide, I think they were authorized to abandon, and that, as the ship proves actually to have been captured, the abandonment stands good." [2]

1667. It follows from the rule just stated, that, *where the information received by the assured is doubtful* and unsatisfactory, *he may delay making an abandonment for the purpose of obtaining more reliable or more specific intelligence, without prejudice to his right.*[3]

[1] Bosely *v.* Chesapeake Ins. Co., 3 Gill & Johns. 450.

[2] Bainbridge *v.* Neilson, 1 Camp. 237.

[3] Duncan *v.* Koch, J. B. Wallace's R. 33.

SECTION XII. WITHIN WHAT TIME ABANDONMENT MUST BE MADE.

1668. *In all cases of total loss the assured may abandon*, if he avails himself of the right in due time. *While the total loss still continues*, he may abandon *immediately on having intelligence of it*, unless the policy contains some stipulation to the contrary.

1669. It is frequently provided, that, in case of capture or restraint, the assured shall not abandon unless the property shall be condemned, or until it shall be proved to have been under detention ninety days, or six months.[1]

If the policy contains no provision for the delay of an abandonment, *the assured must, on receiving sufficient intelligence of the loss, "make his election speedily, whether he will abandon or not;"*[2] he must "give notice to the underwriters within reasonable time."[3]

Mr. Justice Ashhurst says, he must "signify his election the first opportunity;"[4] and Mr. Chief Justice Gibbs: "He must elect in the first instance; the first instance means after the assured has had a convenient opportunity of examining into the circumstances, to ascertain what is the degree of damage."[5]

"The law is," says Mr. Chief Justice Dallas, "that the assured shall abandon in reasonable time, that he may not lie by to see whether it may be more for his interest not to abandon."[6] But "what is the reasonable time within which the notice should be given, must, in every case, depend on the circumstances of that individual case."[7] "This is a question," says Mr. C. J. Mar-

[1] Dorr *v.* Union Ins. Co., 8 Mass. R. 494; Ogden *v.* Columbian Ins. Co., 10 Johns. R. 273; and see 10 Mass. R. 112, 347; and 8 Johns. R. 237; 9 id. 1.

[2] Allwood *v.* Henkell, Park. 280; Teasdale *v.* Charleston Ins. Co., 2 Brevard's (S. Car.) R. 190.

[3] Mitchell *v.* Edie, 1 T. R. 608.

[4] Ibid.

[5] Gernon *v.* Royal Exch. Ass. Co., 6 Taunt. 383; 2 Marsh. R. 88. See also Calberath *v.* Gracy, 1 Wash. C. C. R. 219.

[6] Hudson *v.* Harrison, 3 B. & B. 77.

[7] Read *v.* Bonham, 3 B. & B. 147, at p. 154; also 6 Moore, 397.

shall, "which has not yet been reduced to such certainty as to enable the court to pronounce upon it, without the aid of a jury."[1]

The assured has, in different cases, been held to lose the right of abandonment by a delay of forty-five,[2] thirty-eight,[3] thirty,[4] or nine days,[5] where no admissible reason could be given for the delay. But a delay of five months was in one case held not to be a forfeiture of this right, it appearing that, during a very considerable part of that time, business was suspended, in consequence of an epidemic, in Philadelphia, where the insurance was made.[6]

A delay of ten days, by the agents of the assured, while the despacheur translated and prepared the documents to lay them before the underwriters, was not considered to be a forfeiture of the right to abandon.[7]

The captain of a vessel which had been lost arrived in London, where the assured resided, on the 25th of April. The papers relating to the loss were handed to the assured on the 3d of May, and the abandonment was made on the 5th of that month. Dallas, C. J.: "There is no evidence of any communication to the owner of the circumstances of the loss, previously to the arrival of the captain; and the notice, having been given on the day but one after the owner was furnished with the full means of knowing all the facts of the case, must be deemed sufficient." Burrough, J.: "No case has gone so far as to say, that not a single day must elapse between a knowledge of the loss and the notice of abandonment." But Mr. Justice Richardson thought, that, if the captain had any communication with the owner, after his arrival, before the 3d of May, the abandonment was not seasonable.[8]

Where the assured in Waterford had intelligence of the loss, so that he might have abandoned in London on the 17th of Septem-

[1] Chesapeake Ins. Co. *v.* Stark, 6 Cranch, 268, at p. 273.

[2] Smith *v.* Newburyport Mar. Ins. Co., 4 Mass. R. 668.

[3] Barker *v.* Blakes, 9 East, 283.

[4] Savage *v.* Pleasants, 5 Binn. 403.

[5] Mellish *v.* Andrews, 15 East, 13.

[6] Bell *v.* Beveridge, 4 Dall. 272.

[7] Duncan *v.* Koch, J. B. Wallace's R. 33.

[8] Read *v.* Bonham, 3 B. & B. 147; 6 Moore, 397.

ber, and the abandonment was not made until the 22d of that month, it was held to be too late.[1]

Where the ship arrived at the port of Kinsale, in Ireland, on the 24th of November, and a second survey was made upon her on the 14th of December, by which it was reported that the expense of repairs would exceed the value, and an abandonment was made in London on the 6th of January, Lord Ellenborough instructed the jury that it was too late.[2]

The assured in the United States received notice, in September, of the seizure of the insured cargo at Cuxhaven, and then, or not long afterwards, of its condemnation, but continued to correspond with their agent at Hamburg respecting its release or restoration, the market price of the cargo being very high at the time; and an abandonment was made in the following June. Mr. Justice Washington instructed the jury that this was too late.[3]

The case turned upon a noncompliance with the warranty against illicit trade, so that no specific decision was made by Mr. Justice Washington, whether all remedy was gone, or what remedy remained to the assured, after too long delay of abandonment, where there should be an unquestionable total loss by the perils insured against.

Where the vessel puts into a port, and is there condemned as not worth repairing, the assured on the cargo, in order to recover for a total loss, must abandon within a reasonable time; and he is not excused for delaying to abandon on the ground that the underwriters are not thereby prejudiced.[4]

In this case all the facts had been ascertained, and the cargo still subsisted, the question depending on abandonment being which party should be at the risk of the market and the solvency of agents, neither of which, independently of the direct effect of the perils insured against, concerns the insurers. Any delay will, therefore, forfeit the right of abandonment, where there is no other motive for it except those risks.

[1] Hunt *v.* Royal Exch. Ass. Co., 5 M. & S. 47.

[2] Aldridge *v.* Bell, 1 Starkie, R. 498.

[3] Smith *v.* Buchanan, 3 Wash. C. C. R. 127.

[4] Mellon *v.* La. State Ins. Co., 5 Martin, N. S. 563.

Where the assured, having heard, at Philadelphia, of the prohibition of entry of the vessel at Gothenburg, the port of destination, and defeat of the voyage, omitted to make abandonment, it was held to be too late when the vessel returned to Philadelphia, the port of departure.[1]

A vessel insured by a time policy having sustained damage on a voyage to India, in consequence of which, in the month of May, she put into the Mauritius for repairs, which could be made only by raising funds on bottomry; and it being impracticable so to raise the funds except on condition that the master should return to England instead of proceeding to India, the vessel was hypothecated on that condition. The owners had notice of the disaster and measures proposed by the master, from time to time, from September until December. The vessel arrived in England on the 27th of the following March, when the assured took possession of her, and gave notice to the underwriters of her arrival. They abandoned on the 30th of March. It was decided by the House of Lords, that the assured could not recover for a total loss without abandonment, and that by not abandoning between September and December, after receiving intelligence of the disaster and the steps taken, he had elected to treat the case as a partial loss, and the abandonment was too late.[2]

Insurance was made in England on flax-seed from America to Limerick. The assured at London received intelligence, February 11th, 1808, that the vessel was detained at Philadelphia by an embargo, but he did not abandon until the 11th of June following. Lord Ellenborough instructed the jury, that the abandonment was too late. The flax-seed was intended for sowing, and would have been in season at Limerick at any time before the 10th of May. After that time it was of no value. The judge said that the abandonment would have been good at any time before the 10th of May.[3]

These cases concur in the doctrine, that, where the facts are

[1] Krumbhaar *v.* Marine Ins. Co., 1 Serg. & R. (Penn.) 281.

[2] Fleming *v.* Smith, 1 House of Lords Cas. 513.

[3] Kelly *v.* Walton, 2 Camp. 155.

sufficiently ascertained, the assured will, by delay, lose the right of abandoning on the same state of the facts, relative to the extent and degree of the operation and effects of the perils insured against.

1670. *Though the assured may not abandon immediately on hearing of a capture, but delays for the purpose of claiming the release of the property and prosecuting the voyage, or having the advantage of the markets, yet, on the property being condemned, he may abandon without making an appeal from the decree, though an appeal is open to him.*[1] In such circumstances, the case is changed, and an additional ground for abandonment has occurred.

1671. *Where the operation and the effects of the perils insured against are not sufficiently ascertained, the abandonment may be delayed until they can be so.*

In case of a vessel being stranded, if its condition and possibility or probability of its being got off cannot be judged of by the first intelligence, the assured may delay for further information.[2]

Abandonment as soon as the assured receives intelligence sufficient for preliminary proof, has been held to be early enough.[3]

1672. *So in case of stranding, submersion, or other disaster, the abandonment may be delayed for the purpose of making an attempt to extricate the subject.*[4] For the underwriters cannot object to endeavors to exonerate them from a total loss.

1673. Underwriters have nothing to do directly with the high or low market price of the insured goods. Though a low market price is a motive to the assured to take advantage by abandonment of the higher value at which they may be insured, which he has a right to do if the effects of the perils insured against constitute a constructive total loss, yet *where the assured has neglected to make an abandonment on the earliest sufficient information of*

[1] Mullett *v.* Shedden, 13 East, 304; Dorr *v.* Union Ins. Co., 8 Mass. R. 494; Dorr *v.* New England Ins. Co., 11 id. 1; Maryland & Phœnix Ins. Co. *v.* Bathurst, 5 Gill & Johns. 159; Earl *v.* Shaw, 1 Johns. Cas. 313; Bohlen *v.* Delaware Ins. Co., 4 Binn. 444.

[2] Reynolds *v.* Ocean Ins. Co., 22 Pick. 191, per Shaw, C. J., at p. 193.

[3] Gardner *v.* Columbian Ins. Co. of Alexandria, 2 Cranch, C. C. R. 550.

[4] Reynolds *v.* Ocean Ins. Co., 22 Pick. R. 191.

a loss, the courts will deny a subsequent exercise of the right, unless there has been some supervening material effect of the perils insured against, by the long continuance of its operation, or additional aggravating events.[1] That new material supervening circumstances will give a right subsequently to make an abandonment, after delaying it at first, is clearly shown in case of capture, and subsequent condemnation, where the assured delays abandonment in order to avail himself of a market price above the rate at which the subject is insured.

1674. In the incidental expressions of this doctrine in the English courts, no distinction is made of a *case of capture or detention* from any other constructive total loss;[2] and some of the American cases imply that there is no such distinction.[3] Many of the American cases however, and particularly those decided in New York, seem to adopt a different doctrine. Mr. Justice Radcliff, giving the opinion of the court in a case of capture, says: "If the loss continues total, the insured may at any time abandon;"[4] and Mr. Justice Livingston, in a case of detention, where the assured did not abandon until fifteen months after the vessel was seized, said: "It has been decided by this court,[5] that an abandonment may be made at any time after the accident, provided the loss continues total at the date of the abandonment;"[6] and Mr. Chief Justice Kent said, in another case: "The time of abandonment is not material, since the loss remained total when the abandonment was made."[7]

The judges in New York profess to deviate from the English doctrine. Mr. Justice Livingston, in giving the opinion of the

[1] Pacific Ins. Co. *v.* Catlett, 4 Wend. R. 75; Gernon *v.* Royal Exch. Ass. Co., 6 Taunt. 383; S. C., 2 Marsh. R. 88.

[2] 9 East, 283; 15 East, 13.

[3] 6 Cranch, 280; 5 Binn. 403; 4 Dall. 272; Calberath *v.* Gracy, 1 Wash. C. C. R. 219; Livermore *v.* Newburyport Mar. Ins. Co., 1 Mass. R. 264.

[4] Roget *v.* Thurston, 2 Johns. Cas. 248.

[5] Earl *v.* Shaw, 1 Johns. Cas. 313.

[6] Steinbach *v.* Columbian Ins. Co., 2 Caines's R. 132.

[7] Lawrence *v.* Sebor, 2 Caines's R. 203. See also Bohlen *v.* Delaware Ins. Co., 4 Binn. 444; Brown *v.* Phœnix Ins. Co., id. 445; Montgomery *v.* United States Ins. Co., id. 445 and 469, n.

court, said: "In opposition to the positive regulations or practice of most maritime countries, and of England among others, where abandonment must be made in reasonable time after notice of loss, we permit the assured to lie by for years, in case of a capture or other technical total loss, provided the capture or other accident continues." [1]

Whatever general expressions may have fallen from the American judges at different times, no direct opinion appears to have been given in the United States in favor of the validity of an abandonment, where the assured delayed making it on the first news of the loss, not for the purpose of ascertaining the nature and extent of the loss, or probable continuance of the peril, but merely for some reason with which the insurers had no concern; and then abandoned on the same state of facts relative to the loss, for the purpose of throwing upon the insurers the loss by a change of the markets, or by agents, or for any purpose not arising out of the extent of the operation of the peril, or the nature and degree of the loss. The doctrine that the assured must abandon immediately, is recognized repeatedly in the American courts, and never denied in any instance, as a general doctrine; and if there is any such doctrine, it follows, that the continuance of a constructive total loss does not give a continued subsisting right of abandonment. The assured can abandon only while the loss is total, and to say that he may abandon at any time while the loss continues to be constructively total, is completely to shut out any doctrine as to seasonable abandonment.

Notwithstanding some apparent discrepancy in the general expressions used by the judges, I think the decisions, both in England and the United States, may be reduced to the principles before laid down, making allowance for some diversity of opinion in the application of those principles to a given state of facts. Where the courts have considered the loss to be absolutely total, the property being, in the opinion of the court, swept away and destroyed by the peril, they have held the time of abandonment to be of no importance, since no abandonment was necessary; but

[1] Tom *v.* Smith, 3 Caines's R. 245.

they have not, in all instances, agreed as to the facts which amount to such a total destruction of the subject as renders an abandonment unnecessary.

Where the assured has neglected to abandon, on the first news of the loss, and has afterwards abandoned on hearing of the condemnation of the property captured, or of any other fact showing that the damage was greater, or that the detention was likely to be of longer continuance than he had reason to presume on the former intelligence, the abandonment has been held to be valid. But here, again, the courts have not, in all instances, agreed in their construction of the facts. In the application of this principle, as well as of all others, different judges may make different inferences from the same testimony. The difference of opinion, so far as there has been any, has related to the construction of the evidence, as matter of fact, rather than as matter of doctrine.

It is held in England, that on capture, as well as in other cases of constructive total loss, the assured must abandon immediately, or he loses the right to abandon on the same state of the facts.[1] But this decision can only be applicable so long as no material new or additional consequence of the perils insured against, gives new or additional cause of abandonment. In case of capture, the English, as well as the American jurisprudence, gives the privilege of abandoning on condemnation, though the assured neglected to do so on news of the capture, for here was a further effect of the peril.[2] It cannot be supposed that, if the assured neglects to abandon immediately on intelligence of an arrest, he thereby loses all remedy if it continues indefinitely, with no other aggravation of the loss than the mere continuance. There must be some lapse of time that would satisfy any court of the right of the assured to abandon, or to recover for a total loss without abandonment. At least, we ought not to admit such a reproach to jurisprudence as the contrary doctrine, while there is any apology for denying it.

The difference between the American and English jurisprudence, so far as there is a difference, seems to be, that a less considerable

[1] Mullett *v.* Shedden, 13 East, 304; Mellish *v.* Andrews, 15 id. 13.

[2] See cases supra, No. 1669, p. 371.

new or additional effect of the perils insured against will suffice to give a new occasion for abandonment in the American jurisprudence, than in the English; and there is apparently some divergency of the jurisprudence of the different States in the same respect. But it can hardly be doubted, that any advantage from this privilege would be denied by every tribunal, where the real motive for the abandonment at a period subsequent to the first intelligence of the loss should be some other circumstance than the direct effect of the perils insured against.[1]

Where it has appeared to the court that the state of the markets, or any other reason, having no relation to the extent of the peril or damage, was the inducement for delaying to make an abandonment in the first instance, and for making it subsequently, they have considered the abandonment as having no effect, and have held that the assured could recover only the amount of the actual loss.

1675. *In respect to a case of capture or detention, it surely cannot be held that, by neglecting to abandon on the first news of the arrest, the assured forfeits the right of recovering for the loss.*

If the arrest continues, without any condemnation of the property, or any proceedings respecting it, and without any prospect of its release, a court must either hold that a valid abandonment may be made subsequently to the first news of the loss, or that the assured may recover without any abandonment, since the contract is otherwise defeated. There are not wanting authorities in support of the questionable doctrine, that the assured cannot re-

[1] See supra, pp. 272, 273, No. 1673; Mitchell *v.* Edie, 1 T. R. 608; and Livermore *v.* Newburyport Mar. Ins. Co., 1 Mass. R. 264. Mr. Arnould (Marine Ins. Vol. II. p. 1167,) is of opinion, that the comparison of the English and American jurisprudence in the second edition of this treatise, intended to be, in substance, the same as the above, was inaccurate. This is a reason with me for stating more specifically in the text what I understood to be the difference, namely, in estimating the degree of effect or importance of the subsequent operation of the peril, a matter upon which it is not surprising that jurists adopting the same general principles should not precisely agree. The adjudications of the same courts of the highest authority will not always bear a rigid application of a test of their consistency by exacting precise uniformity in this respect.

cover for a loss in such case without making an abandonment, unless the hope of recovering the property is wholly gone. If there is any hope of its being recovered, Chief Justice Kent says: "The assured ought to renounce it in favor of the insurers, or not recover at all" for the loss.[1] Whatever doctrine may be adopted in this respect, the rule permitting an abandonment is certainly more convenient, and more conformable to the principle of indemnity. Or, at least, where the prospect of recovering the property is indefinitely remote, the assured ought to have the right to recover the amount insured as for a total loss, and the fact of such recovery transfers to the underwriter an equitable claim for the salvage in the event of any thing being recovered.

This case is distinguishable from those in which it has been held that the right of abandonment and recovery for a total loss has been forfeited by delay. In one of those cases the ship and cargo had been captured by the English, 1801, for an alleged violation of the blockade of Havre, the port of destination, and carried into Portsmouth; and the assured delayed making an abandonment in the expectation of obtaining a release of the ship and cargo, whereby he would have the benefit of a high state of the market at Havre, but on the occurrence of the peace, the price fell, and he thereupon made an abandonment on the 20th of November, and the ship and cargo were released on the 28th of the same month. The abandonment was held to be void.[2] And the decision was undoubtedly right, for it was not a case in which the assured lost both his goods and his policy; the goods subsisted, and the only question was, which party should be subject to the disadvantage of the low market.

So, in another case, the goods had been sold and the proceeds were in the hands of an agent, the question being which party should be at the risk of his solvency; and it was held that the assured had, by delay to abandon, made that risk his own.[3]

[1] Gracie *v.* New York Ins. Co., 8 Johns. 237. See supra, No. 1507, where this case is stated.

[2] Livermore *v.* Newburyport Mar. Ins. Co., 1 Mass. R. 264.

[3] Mitchell *v.* Edie, 1 T. R. 608. See also Savage *v.* Pleasants, 5 Binn. 403.

1676. *The right of abandonment* is sometimes *kept in suspense by an agreement of the parties.*[1]

Where the underwriters agreed, in case of capture, that the assured might take such measures as they should judge best for the interest of the parties, "without prejudice to their rights," the court understood this to be an agreement, on the part of the insurers, that the right of abandonment should be in suspense, and remain so, while the property continued to be detained, unless the agreement should be sooner determined by one of the parties; and, accordingly, that the assured might abandon at any time during the continuance of the detention by capture.[2]

Where the policy on cargo contained the clause, "The insured shall not abandon until sixty days shall have elapsed after having given notice to the insurers of his intention so to do, and of the loss or event which may entitle the assured thereto;" the vessel was wrecked at Cape Haytien, and the cargo, consisting of flour, being damaged, was sold at that place. On the 5th of July, when the assured received information of the loss at Alexandria, he wrote to the insurers: "Having received a letter from Capt. M., informing me that the ship Commerce was lost, I abandon the proportion of the cargo that your office was interested in." Forty days afterwards he exhibited at the office the captain's protest and the survey of the ship. The insurers did not accept the abandonment, but sundry negotiations took place between the parties, the assured claiming a total loss, and the underwriters declining to pay it. The question was, whether the circumstances constituted a notice and abandonment within the terms of the policy. It was objected that, under the above clause in the policy, the notice of the abandonment should precede the abandonment by sixty days, and that the abandonment must be made at the expiration of the sixty days after the notice; and that, if the letter of the 5th of July was merely a notice, there had been no abandonment; if it was an abandonment, then it was made too early, and was not valid. Mr. Justice Story, giving the opinion of the court, said:

[1] See supra, No. 1507, p. 247.

[2] Livingston *v.* Maryland Ins. Co., 6 Cranch, 274; S. C., 7 id. 506.

"The letter gives notice of an intention to abandon, because in its terms it includes an actual abandonment. It has a tacit reference to the clause in the policy, and must be deemed as a notice to abandon, and at the same time a declaration that it shall operate as an abandonment in the case as soon as by law it may. In our judgment, it was a continuing act of abandonment, and became absolute at the end of the sixty days." [1]

A similar case has occurred in Massachusetts. Insurance was made on the brig Leonidas, with a stipulation, that, in case of capture or detention, the owner should not have the right to abandon until after notice of the condemnation of the vessel, or of the continuance of the capture or detention for sixty days. The brig was captured and carried into Rio de Janeiro, in June, of which the assured had intelligence within about three months, and soon after made a formal and unqualified abandonment. The next intelligence was on the 5th of December, when information was received of the continuance of the detention, which was communicated to the underwriters. It was held that the abandonment thus made in September, and confirmed and insisted on in December, was a good continuing abandonment to take effect in December.[2]

1677. Under the provision that the "*loss shall be paid in sixty days after* proof and *adjustment* thereof," the condition as to "adjustment" is implicitly *waived* by the underwriter where he disputes the loss.[3]

SECTION XIII. FORM OF ABANDONMENT.

1678. *No particular form of abandonment is prescribed*, and the form is said not to be material.[4]

[1] Columbian Ins. Co. *v.* Catlett, 12 Wheat. 383.

[2] Lovering *v.* Mercantile Ins. Co., 12 Pick. 348.

[3] Per Story, J., Columbian Ins. Co. *v.* Catlett, 12 Wheat. 383.

[4] Bell *v.* Beveridge, 4 Dall. 272; S. C., 1 Binn. 52, n.; Emerigon, tom. 2, p. 175; Suydam *v.* Marine Ins. Co., 1 Johns. R. 191; Marsh. Ins. 599; 1 Yeates, 406.

It has not been considered requisite, as a general rule, that an abandonment should be made in writing.[1]

Mr. Justice Story, speaking of abandonment and notice of abandonment in a case where notice was required by the policy, but neither the form of the notice nor of the abandonment was prescribed, said: "They may be in one or two instruments; they may be in direct terms, or by fair and natural inference. It matters not how they are given or executed."[2]

Lord Ellenborough thinks: "It would be very well to prevent parol abandonments entirely."[3]

"It is singular," says Mr. Marshall,[4] "that an abandonment is not accompanied by any of those solemnities which such an act would seem to require."

Although it would certainly be more convenient that abandonments should be in writing, since, in all transfers of property, the purchaser wants some evidence of the purchase, yet an abandonment, by a mere oral declaration, is held to be valid and effectual.[5] The written contract of the parties may render it necessary to abandon in writing. But policies of the usual form contain no provision in this respect. It is the usual practice to make abandonments in writing; it does not, however, appear by any decided case, that such a custom authorizes the insurers to demand that it should be so made.

1679. In whatever manner an *abandonment* is made, it *must be positive and absolute.*[6]

The French Code provides against any conditional abandonment.[7]

The rule is the same in England and the United States.[8] Lord Ellenborough says: "An abandonment must be express and direct.

[1] Duncan *v.* Coates, 3 Yeates, 378; Duncan *v.* Koch, J. B. Wallace, 33.

[2] Columbian Ins. Co. *v.* Catlett, 12 Wheat. 383.

[3] Parmeter *v.* Todhunter, 1 Camp. 541.

[4] Page 599.

[5] Read *v.* Bonham, 3 Brod. & Bing. 147; 6 Moore, 397.

[6] Fuller *v.* M'Call, 1 Yeates, 464, and cases passim.

[7] Code de Commerce, l. 2, tit. 10, s. 3, a. 183.

[8] 1 Johns. R. 181.

I think the word 'abandon' should be used to render it effectual."[1]

It was held in Pennsylvania, that a declaration by the assured, in a letter to the underwriters, that he "meant" to abandon, was an abandonment; the construction put upon the letter being that he meant "thereby" to abandon.[2]

1680. *An abandonment may be implied from the contents of a document communicated by the assured to the underwriters*, but signed by another person, and by the circumstances attending the communication.

The schooner Francis being sold at Carthagena, in South America, on account of sea-damage, in the conclusion of the protest of the master, made before the American consul, the consul said: "And I, the said consul, at the request of the master, declare and make known to the underwriters of the said schooner Francis, that the said master, for himself and in behalf of the owners, doth abandon, cede, and leave to them, all his, the said master's, and their, the said owners' right, title, claim, &c., of and in the said schooner, and that the aforesaid master doth claim on behalf as aforesaid, reimbursement of the same as a total loss." This protest the assured forwarded to the underwriters, saying in his letter to them: "We had seen by an arrival at Charleston from Carthagena that The Francis had been condemned, but were ignorant until now of the cause. By the next steamboat we shall forward you a statement of the loss, with the necessary vouchers." The statement of the loss as a total one, and the vouchers, were accordingly forwarded. Thompson, J., for the court: "It is true no authority is shown from the assured to the master to make abandonment. But this protest was communicated to the underwriters by the assured; it became thereby their act, and constituted a valid abandonment."[3]

1681. *It is requisite to state the grounds of the abandonment.*[4]

[1] 1 Camp. 541.

[2] Bell *v.* Beveridge, 4 Dall. 272; 1 Binn. 52, n.

[3] Patapsco Ins. Co. *v.* Southgate, 5 Peters's Sup. Ct. R. 604.

[4] See cases generally.

"In making an abandonment," says Mr. Justice Woodworth, "the assured must assign the true causes. If he assign an insufficient cause, he is bound by it, and cannot avail himself of a subsequent event without a new abandonment." [1] He was speaking of a case of an abandonment of the ship for sea-damage. The damage had been repaired at the time of the abandonment.

1682. A question has been made, *whether a demand for a total loss is an abandonment.*[2]

A letter to the underwriters containing a statement of the loss, and inclosing an account of the sale of the property, and claiming the balance of the amount insured, after giving credit for the salvage, was held to be a sufficient abandonment.[3]

But Lord Ellenborough was of opinion, that the demand of a total loss did not amount to an abandonment. Where the broker communicated to the insurers on freight that the voyage had been broken up by capture, notwithstanding a recapture, and required them to settle as for a total loss, and to give directions as to the disposition of the salvage, he thought this did not amount to an abandonment. He said: "There is no implied abandonment by a demand of a total loss. If parol abandonments are allowed, I must insist upon their being expressed. An implied parol abandonment is too uncertain. The abandonment must be express and direct; and I think the word 'abandon' should be used to render it effectual." [4]

In respect of a policy "against total loss only," Mr. Justice Sewall said: "If a loss had been proved in this case, total in its own nature, and in the sense of the parties to the contract, a statement of the salvage remaining is all that would be requisite, in

[1] Dickey *v.* New York Ins. Co., 4 Cowen, 222. See also Suydam *v.* Marine Ins. Co., 1 Johns. R. 181; S. C., 2 id. 138; Peirce *v.* Ocean Ins. Co., 18 Pick. 83, at p. 93.

[2] Watson *v.* Ins. Co. of North America, 1 Binn. 47; Calebrath *v.* Gracy, 1 Wash. C. C. R. 219.

[3] Patapsco Ins. Co. *v.* Southgate, 5 Peters's Sup. Ct. R. 604. Mr. Justice Thompson, giving the opinion of the court, said, that a letter making such a statement and claim "leaves no doubt as to the intention and understanding of the parties."

[4] Parmeter *v.* Todhunter, 1 Camp. 541.

my opinion, to the claim of the assured to a total loss; that is, to enable him to recover the sum insured, deducting the amount of salvage. In this opinion, however, my brethren do not concur with me." [1]

It has, however, been expressly held in Louisiana, that a demand for a total loss is an abandonment.[2]

The rule dispensing with any particular form of abandonment amounts substantially to the rule, that it is sufficient for the assured to signify distinctly that he abandons, and he could not signify this more distinctly than by claiming a total loss. I therefore conclude that

The claiming of a total loss is a sufficient expression of an intention to abandon.

As the assured must state what he abandons, and for what cause, the claim of a total loss with those statements can surely leave the underwriters in no doubt of the intention.[3]

Under a policy free from average, where the assured communicated to the underwriters the particulars of the loss of the ship and cargo, without specifically demanding a total loss, or expressly saying that he made an abandonment, Lord Ellenborough considered this not to be an abandonment,[4] though the underwriters expressly denied that the assured had any claim upon them, thereby impliedly admitting that they understood him to make a claim, which could be for no other than a total loss, that being the only loss insured against.[5] But Lord Ellenborough was for restricting the form of abandonment with exceeding rigidness.

1683. *So the payment of a total loss operates as an abandonment;* and accordingly it has been held at nisi prius, that, if a ship paid for in total loss afterwards turns up, it belongs to the underwriters, though there has been no other abandonment than the one thus implied.[6]

[1] Murray *v.* Hatch, 6 Mass. R. 465.

[2] Cassedy *v.* La. State Ins. Co., 6 Martin, 421. See also Patapsco Ins. Co. *v.* Southgate, infra.

[3] See Peirce *v.* Ocean Ins. Co., 18 Pick. 83, per Shaw, C. J. at p. 93.

[4] Martin *v.* Crockatt, 14 East, 465.

[5] Ibid.

[6] Houstman *v.* Thornton, 1 Holt, 242.

1684. *The underwriters must be informed of the grounds of the abandonment,* that they may determine whether to accept.

The provisions of the policy usually make it necessary to state the grounds, since the underwriters agree to pay the loss only after "proof" of it. Accordingly, the assured must make known to the insurers the reasons for which he abandons. He cannot avail himself of any other ground than that alleged by him at the time of abandoning, and if there are any other facts, either known or not known to him at that time, on which an abandonment would be necessary in order to entitle him to recover for a total loss, he must abandon anew before he can recover for such a loss on account of those facts.[1]

Where the assured claimed a total loss on the ground of damage done to the vessel on the Florida Reef, and of her being afterwards surveyed, condemned, and sold "for the good of all concerned," this was held not to be a sufficient abandonment, in form, for damage exceeding fifty per cent. merely, independently of the sale.[2]

The explosion of the boiler of an insured steamer, and loss of divers lives by the accident, being generally known at St. Louis, where the insurance was made, an abandonment because the boat "had been nearly destroyed by the late disaster, and was completely beyond repairs," was held in Missouri to be sufficient.[3]

Under a policy on "cargo and catchings" of a whaling ship, the assured said in a letter to the insurance company: "Having received such information as leaves no doubt of the loss of our ship Orbit, we hereby tender to said company our abandonment of the interest in the cargo of said ship, so far as it has been insured to us by a policy," &c. This was held in Massachusetts to be a sufficient abandonment in form, though it made no express mention of the loss of the cargo, which was, however, distinctly implied.[4]

[1] Suydam *v.* Marine Ins. Co., 1 Johns. R. 181; 2 id. 138; Dorr *v.* New England Mar. Ins. Co., 4 Mass. R. 221; Ralston *v.* Union Ins. Co., 4 Binn. 400, 386; Peirce *v.* Ocean Ins. Co., 18 Pick. R. 83.

[2] Peirce *v.* Ocean Ins. Co., 18 Pick. R. 83.

[3] Citizens Ins. Co. *v.* Glasgow, 9 Missouri R. 406.

[4] Macy *v.* Whaling Ins. Co., 9 Mete. 354.

1685. *A deed of cession of the property has been held not to be an essential part of an abandonment.*

Where the agent of the assured had abandoned, by a letter to the underwriters, and afterwards executed a deed in behalf of his principal, transferring to them all the assured's interest in the goods, the validity of the abandonment was brought into question, partly on account of an alleged informality of the deed. Mr. Chief Justice Marshall, giving the opinion of the court, said: "The informality of the deed of cession is thought unimportant, because, if the abandonment was unexceptionable, the property vested immediately in the underwriters, and the deed was not essential to the rights of either party. Had it been demanded, and refused, that might have altered the law of the case." [1]

Mr. Justice Washington, however, was of opinion, that where the insurers accepted the abandonment, but at the same time required a deed of cession and transfer, the assured might recover for the loss without making such a deed.[2]

But this opinion was given upon the ground that the abandonment gave the insurers all the rights and advantages of ownership of the property; for it can hardly be doubted, that where the property should be so situated, in consequence of the peril by which the loss was occasioned, that the insurers could not, without a written transfer or authority from the assured, establish their claim to the salvage, a court would consider the making of such transfer, or giving of such authority, a condition upon which the right to recover the amount insured should depend. It has been said, that the assured shall be charged in a total loss with as much of the property as might have been saved, but for his fault or negligence. Upon the same principle, if the assured, by not vesting the insurers with the necessary powers, or giving a requisite title, prevents them from recovering the salvage, what they so lose ought to be deducted from the amount which he would otherwise recover.

But the necessity and importance of any written transfer, or

[1] Chesapeake Ins. Co. *v.* Stark, 6 Cranch, 268.

[2] Hurtin *v.* Phœnix Ins. Co., 1 Wash. C. C. R. 400.

authority, would evidently depend upon the nature of the interest abandoned, and the particular circumstances of the case. The laws of most countries, for instance, make some forms of transfer requisite, in order to entitle a vessel to certain privileges; and if, in case of abandonment for detention, the assured should refuse to transfer the vessel to the underwriters by a legal bill of sale, he would, by this refusal, so far deprive them of the right of salvage; and, in such case, he certainly ought, either not to be entitled to recover for a total loss, on the ground that he had waived his abandonment, or the amount by which the value of the vessel to the underwriters was diminished by this refusal should be deducted, in adjusting the loss, in the same manner as if a part or the whole of the salvage had been retained by the assured, and gone to his use.

1686. *A prospective and continuing abandonment may be made.* Thus, where it was agreed that the assured should not have the right to abandon until sixty days after notice of his intention so to do, and he made an absolute abandonment on receiving intelligence of the loss, and continued afterwards to claim a total loss; this was held by the Supreme Court of the United States to be clearly an abandonment, taking effect after the time limited.[1]

1687. *If different subjects*, as ship, freight, and cargo, *are insured in the same policy*, whether open or valid, *an abandonment may be made of either subject separately*, though it must be of the whole of such subject, except where some provision of the policy on cargo authorizes a separate abandonment of a part of the goods insured in the same policy. Mr. Marshall says, that if different subjects, as ship and cargo, are insured at distinct valuations, either may be abandoned separately;[2] but that if two or more subjects, as ship and cargo, are insured together, without any designation of the amount on each, one cannot be abandoned separately;[3] though it does not appear why an abandonment of

[1] Columbian Ins. Co. *v.* Catlett, 12 Wheat. 383; and see Lovering *v.* Mercantile Ins. Co., 12 Pick. 348.

[2] Insurance, 2d ed., page 600, for which he cites Valin, tit. Insurance, a. 47, tom. 2, p. 102, and Pothier, Ins. n. 132, and Emerigon, tom. 2, p. 215.

[3] Ibid., for which Emerigon, tom. 2,

either cannot be made separately in this case, for the amount insured on each must be proved in an adjustment of a partial loss, and it can as well be so in a total loss.[1]

1688. *An abandonment* made for a sufficient cause *operates as an assignment* of the interest, *although it wants formality* in some respects, *if the underwriters waive any objection on this account.*[2]

Mr. Justice Washington was of opinion, that the underwriters, by calling for the papers to prove the loss, where a total loss was demanded, dispensed with any more formal abandonment.[3]

Where the assured claimed a total loss, in a conversation between him and the underwriter, which implied that an abandonment had been made, and a new policy was effected on the same risk, with an agreement that the claim of the assured under the former policy should not be thereby prejudiced, this was held to be sufficient proof of an abandonment.[4]

So where the assured claimed a total loss, and the underwriters made payments upon his claim, they were considered as thereby dispensing with any more formal abandonment.[5]

An acceptance of an abandonment will, no doubt, have the effect of waiving any objection to the abandonment, on account of any insufficiency in form.

SECTION XIV. ACCEPTANCE OF ABANDONMENT.

1689. *Although an acceptance may supply any merely formal insufficiency in the abandonment, an acceptance is not in any other respect, necessary to its validity* and effect; being made in due form, and for sufficient cause, it transfers the subject, and perfects

p. 215, c. 17, s. 8, is cited; but the passage referred to does not seem specifically to support the proposition. Article 37 of the Ordinance of 1681, is apparently to that effect.

[1] See supra, No. 1661.

[2] Watson *v.* Ins. Co. of North America, 1 Binn. 47.

[3] Calbreath *v.* Gracy, 1 Wash. C. C. R. 219.

[4] M'Kintire *v.* Bowne, 1 Johns. R. 229.

[5] M'Lellan *v.* Maine Fire & Mar. Ins. Co., 12 Mass. R. 246.

the assured's right to recover for a total loss, although it is not accepted by the insurers.

1690. *An acceptance, to be binding* upon the insurers, *must be made by persons authorized* for this purpose.

Where it was provided, by the act incorporating a company, that "no losses should be paid without the approbation of at least four of the directors, with the president and his assistants, or a majority of them;" it was held that an agreement by only the "president and assistants," without the four directors, to pay a total loss, was not such an acceptance as bound the company.[1]

1691. *The insurer need not expressly accept, or decline to accept, an abandonment.*

As his accepting is not necessary to its validity, an immediate acceptance is not of great importance to the assured. Since a general, uncertain, and loose kind of evidence must, from the nature of the case, be admitted to be sufficient preliminary proof of a loss, the underwriter is not always able to form a satisfactory opinion, on the proof at first produced, whether the loss is total. Accordingly, he is not construed by his silence, merely, to accept the abandonment. He "is not bound," says Mr. Justice Story, "to signify his acceptance. If he says nothing, and does nothing, the proper conclusion is, that he does not mean to accept."[2]

In a few instances, however, the silence of the insurer has been construed to be an acceptance of the abandonment. Mr. C. J. Dallas, of the English Court of C. P., speaking of a case in which the underwriter had not, during three months after an abandonment, expressly accepted or refused to accept it, nor consented to the appointment of an agent to look after the property, said: "If the law were to compel the assured to give the earliest notice of abandonment, and at the same time to allow the underwriters to lie by and afterwards refuse to accept it, there would be no mutuality of obligation between them. Here the notice was given in December, and the insurers, after having done nothing during nearly three months, interpose," with notice that they did not ac-

[1] Beatty *v.* Marine Ins. Co., 2 Johns. R. 109.

[2] Peele *v.* Merchants' Ins. Co., 3 Mason's R. 27.

cept the abandonment, and should not authorize a sale of the property. "Where there are circumstances to show an acquiescence, it is not allowable for the underwriters, after such an acquiescence, to come forward and interfere. I think there was such an acquiescence here." Park, J.: "Here is enough to satisfy the court that there was an acquiescence." Richardson, J., concurred.[1]

But the doctrine above laid down by Mr. Justice Story, that if the insurer lies by, and neither does nor says any thing, it shall not be construed into an acceptance, or acquiescence in the abandonment, seems to be generally implied very distinctly in the cases on this subject. When the assured demands payment of the loss, it is necessarily understood whether the underwriter accepts the abandonment, and, in ordinary cases, this is as soon as a knowledge of the fact is of importance to the assured. An abandonment is, however, in the greater number of instances, accepted or rejected within a short time. But any rule on this subject would evidently be of no effect, since, if the silence of the underwriter were construed into an acceptance, he would in all cases expressly decline to accept.

1692. *There is no established mode of accepting, any more than of making, an abandonment.*

Whether the insurer accepts or not, is a matter of construction of his words and conduct. Any act done for the purpose of making the most of the property, to whomsoever it may prove to belong, ought not to be construed against the party who thus consults the common interest.

Accordingly, where an agent of the insurers on freight "superintended and directed the unloading of the ship, and employed persons for that purpose," this was not construed to be an acceptance of the abandonment.[2]

Where the assured stated to the underwriters upon sugars the damage the sugars had sustained by the stranding of the ship, and they, in answer, desired "that the assured would do the best they

[1] Hudson *v.* Harrison, 3 B. & B. 97; S. C., 6 Moore, 288. See also Smith *v.* Robertson, 2 Dow, 474.

[2] Griswold *v.* New York Ins. Co., 1 Johns. R. 205; 3 id. 321.

could with the damaged property," Lord Kenyon held that this was not an abandonment and acceptance. "It was the interest of the underwriters to make the partial loss as light as possible, and it was the duty of the assured to do so; and this was the meaning and import of the letter." [1]

1693. The *acts of the insurers may be a proof of their acceptance*, though they declare at the same time that they do not intend to accept.

"Whenever the underwriter," says Mr. Justice Story, "does any act in consequence of an abandonment, which could be justified only under a right derived from it, that act is, of itself, decisive evidence of an acceptance. If he should proceed to sell the vessel, with an express protest against the acceptance, and a declaration that he did it for the benefit of the owner, his act would conclusively bind him." And he held that the floating and repairing of the stranded ship by the underwriters, though it was done with the intention of surrendering it to the assured, was a constructive acceptance of an abandonment.[2]

So the Supreme Court of Massachusetts, though they held that the underwriters had, in the same state of facts, a right to keep possession of the ship for a reasonable time to repair it, yet held that their keeping of it an unreasonable time for this purpose was a constructive acceptance of the abandonment.[3]

It has been held in Kentucky, that if the underwriters take possession of a vessel after an abandonment, and proceed to repair, without giving notice of their object, it is an acceptance.[4]

1694. *Where the assured* does acts that unexplained would defeat his abandonment, still, if both he *and the underwriters treat a transaction as not having defeated the abandonment, it will not have that effect.*

Where, after news of the condemnation of the ship in a foreign prize court, and the purchase of her by the master at the sale on

[1] Thelluson *v.* Fletcher, 1 Esp. 73.

[2] Peele *v.* Merchants' Ins. Co., 3 Mason's R. 27.

[3] Peele *v.* Suffolk Ins. Co., 7 Pick. R. 254.

[4] Cincinnati Ins. Co. *v.* Bakewell, 4 B. Monroe's (Ky.) R. 541.

condemnation, the assured wrote to the underwriters, demanding payment of a total loss in pursuance of a previous abandonment, and they asked for the protest of the master, made previously to the sale, and other documents that might show whether they were liable at all, not whether for a partial or total loss, not offering to take the vessel off the hands of the assured, or objecting that they were only liable for the amount paid for the ship at such sale, it was held that, if the purchase of itself and without being controlled would have defeated the abandonment, these communications between the parties prevented its having that effect.[1]

1695. *A payment under a demand for a total loss is not conclusive proof of an abandonment and acceptance.*

The assured, hearing of the seizure of the goods insured, at a foreign port, before receiving documents to prove the loss, claimed from the underwriters the payment of the amount of their subscriptions, but made no formal abandonment. The underwriters paid fifty per cent. of the amount subscribed, and an indorsement was made upon the policy, "adjusted a return for loss of fifty per cent. on account." This was held by Lord Ellenborough and his associates not to amount to an abandonment and acceptance.[2]

But it is to be observed that the payment was made in this case, without a particular knowledge of the nature and extent of the loss.

1696. *Buying the ship is not an acceptance.*

A stranded ship being sold by the master, who was part-owner, without necessity, and purchased by the underwriters from the party to whom it had been sold, no express abandonment having been made, and no express acceptance of any supposed abandonment having been declared, it was held in Massachusetts, by Shaw, C. J., and his associates, that such purchase of the ship by the underwriters was not an admission of their liability for a total loss.[3]

1697. *An acceptance is an implied admission of a right to abandon, and of a total loss.*[4]

[1] Maryland and Phœnix Ins. Co. *v.* Bathurst, 5 Gill & Johns. 159.

[2] Tunno *v.* Edwards, 12 East, 488.

[3] Badger *v.* Ocean Ins. Co., 23 Pick. R. 347.

[4] Cincinnati Ins. Co. *v.* Bakewell, 4 B. Monroe's (Ky.) R. 541.

SECTION XV. REVOCATION OF ABANDONMENT. WAIVER OF RIGHT TO ABANDON.

1698. *An abandonment, once made, is irrevocable without the consent of the underwriters. A revocation must be by the agreement of the parties.*

"If the assured," says Mr. Chief Justice Reeve, "wishes to waive his abandonment, there must be the consent of the insurer. An abandonment is irrevocable without his consent."[1] But where the insurers allege and insist upon a revocation of the abandonment by the assured, they are not usually required to show that they assented at the time of the alleged revocation; though the assured might perhaps show that they dissented, and thereby defeated his intention of revoking the abandonment.

1699. *Where the assured*, having bid off the ship at a sale by the master on account of sea-damage, subsequently *sells the ship on his own account, it is a waiver of* any right he may have acquired by making *an abandonment*.[2]

It was held that the right of abandonment was waived in case of the assured's giving notice to the underwriters of his intention to sell the insured vessel, which was at the time under detention by an embargo, and buying it himself and afterwards despatching it on a voyage on his own account, no question being made in the case as to the right to abandon.[3]

1700. In case of abandonment for sufficient cause, and refusal by the underwriters to accept, *a sale of the subject by the assured, merely to prevent an absolute loss of it*, for the benefit of whom it may concern, *is not a waiver* of the abandonment. In such case the court said the assured was by the necessity of the case made the agent of whom it might concern.[4]

[1] King *v.* Middletown Ins. Co., 1 Conn. R. 184.

[2] Abbott *v.* Sebor, 3 Johns. Cas. 39; Saidler *v.* Church, 2 Caines's R. 244.

[3] Ogden *v.* Firemens' Ins. Co., 10 Johns. R. 177; S. C. in Error, 12 id. 25. The court remarked, that, if the assured persevered in his claim for a total loss, he must surrender to the insurers the benefit of his purchase, that is, he must treat the purchase as being of no effect.

[4] Walden *v.* Phœnix Ins. Co., 5 Johns. R. 310. See also Livingston

An abandonment being made under a policy on a stranded ship to two thirds of its value, the underwriters offered to make advances of their proportion of the expense to get off the ship, and declined to accept the abandonment. The assured sold the ship as she lay. This was held not to be a revocation of his abandonment.[1]

1701. As a general rule, *if the assured or his agent repairs and refits the ship, this is a waiver of the right to abandon.*[2]

This rule is frequently expressed in the phrase, that, if the assured "elects" to repair, he waives his right to abandon. But it has been justly remarked by Mr. Chancellor Walworth, in the Court of Errors of New York, that the term "election" between abandonment and making repairs is hardly applicable. The fact on which the character of the loss and rights of the parties turn is, that, by repairing, the loss ceases to be a total one.[3] Making an abandonment and proceeding to repair, at the same time, involves an inconsistency, since by abandonment the assured declares the ship to belong to the underwriter, and by repairing any further than merely to preserve the ship from destruction, he treats it as his own.

1702. *The doctrine, that taking care of the property and making the most of it, by sale or otherwise, is not a forfeiture of the right to abandon it* to the underwriter, *is applicable to a policy on the cargo* no less than to one on the ship.[4] Thus investing specie in cotton, as the best remittance, and not as a speculation or new commercial adventure, was held not to defeat an abandonment.[5]

1703. *But if the assured unnecessarily involves the property*

v. Hastie, 3 Johns. Cas. 293; Lawrence *v.* Vanhorne, 1 Caines, 285.

[1] Columbian Ins. Co. *v.* Ashby and Stribling, 4 Peters's Sup. Ct. R. 139.

[2] Dickey *v.* New York Ins. Co., 4 Cowen, 222; Benson *v.* Chapman, 6 Mann. & Gr. 792.

[3] Dickey *v.* American Ins. Co., 3 Wend. 658.

[4] Brown *v.* Smith, 1 Dow, 349, where the owner ordered the master to forward to him "the sales of the ship and cargo," the latter having already been sold but not the ship.

[5] Catlett *v.* Pacific Ins. Co., 1 Wend. 561; S. C., 1 Paine, 595.

in new speculations and enterprises, he is considered as receding from his abandonment.

This is usually called "doing acts of ownership," as distinguished from the superintendence intended merely for the preservation of the property. Mr. C. J. Marshall says, if, after abandonment, any particular instructions had been given by the assured, as to contracts concerning the goods; "if any act of ownership had been exerted by him, such conduct might be construed into a relinquishment of an abandonment which had not been accepted."[1]

Under a policy upon commissions, the assured's proceeding upon the voyage and earning commissions has been held, in Pennsylvania, not to be a waiver of the rights acquired by an abandonment made during detention in the course of the voyage. Insurance was made upon a supercargo's commissions, "valued at $7,000, free of average, and without benefit of salvage," on a cargo from Philadelphia to Laguira. The vessel was captured on the 11th of April, and carried into Curaçoa, and there detained until the 25th of July, when a compromise was made with the captors, and about ten per cent. in value of the cargo was left at Curaçoa as security for the fulfilment of the terms of the compromise. An abandonment had been made in Philadelphia, on the 18th of July. The cargo was also abandoned, on account of the capture, to the respective underwriters upon it. The supercargo proceeded upon the voyage, after the release of the vessel, and received, for making sale of the cargo and investing the proceeds, commissions equal in amount to those originally stipulated for, and which had been insured, at the value of $7,000 in the policy. As average and salvage were excepted by the contract, the questions arising upon these facts were, whether this was a case which authorized an abandonment and claim for a total loss, on the 18th of July, and if it was such, whether the supercargo, by subsequently proceeding upon the voyage, and receiving commissions equal in amount to those on account of which the insurance was made, had waived the rights, if any, acquired by the abandonment.

[1] Chesapeake Ins. Co. *v.* Stark, 6 Cranch, 268, at p. 272.

It was held that this was not a wagering policy; and as a consequence, that these facts constituted a total loss; and that the supercargo's proceeding, and earning commissions, was not a revocation of the abandonment.[1]

SECTION XVI. WHETHER AN ABANDONMENT MAY BE DEFEATED BY SUBSEQUENT EVENTS.

1704. It has been a question much considered, both in England and the United States, *whether an abandonment seasonably made, for sufficient cause, fixes the rights and liabilities of the parties;* or whether the right of the assured to recover for a total loss may be devested by subsequent events?

In respect to this question, Lord Mansfield said, *the action of the assured "must be founded upon the nature of his damnification,* as it really is, *at the time the action is brought.* It is repugnant, upon a contract of indemnity, to recover as for a total loss, when the final event has decided that the damnification in truth is an average, or perhaps no loss at all."[2] This has become the established rule in English jurisprudence.[3]

An abandonment is not defeated in England by the subsequent

[1] Parker *v.* Towers, 2 Browne's R. (Penn.) App. 80. After a constructive total loss under a policy "on the freight bill" of a steamer, the parties agreed to transfer the risk to another boat. This was held in Missouri to be a waiver of any claim for a total loss on the freight of the first boat. Field *v.* Citizens' Ins. Co., 11 Missouri R. 50, Napton, J., dissenting.

[2] Hamilton *v.* Mendes, 2 Burr. 1198. Lord Mansfield reserved his opinion whether a total loss could become a partial one between the time of action being brought and the verdict.

[3] M'Arthy *v.* Abel, 5 East, 388; Brotherston *v.* Barber, 5 M. & S. 418; Cologan *v.* London Ass. Co., id. 447; Naylor *v.* Taylor, 5 B. & C. 718; Hudson *v.* Harrison, 3 B. & B. 105; S. C., 6 Moore, 288; Bainbridge *v.* Neilson, 10 East, 329; Patterson *v.* Ritchie, 4 M. & S. 393; Holdworth *v.* Wise, 7 B. & C. 794; 2 Arnould's Mar. Ins. 994. The doctrine that the rights and liabilities of the parties are conclusively fixed by an abandonment for adequate cause, is intimated in Bainbridge *v.* Neilson, 1 Camp. 237, by Lord Ellenborough; and an opinion to that effect is expressed by Lord Eldon in the House of Lords, Smith *v.* Robertson, 2 Dow's R. 474.

restoration of a captured ship under circumstances rendering it worthless.[1]

1705. *In the United States "an abandonment once rightfully made is conclusive, and the rights following from it are not devested by any subsequent events, which change the situation of the property,"* unless it is revoked by some act of the assured in case of refusal of the underwriters to accept it, or waived by the agreement of both parties in case of its having been accepted.[2]

Mr. C. J. Tilghman justly remarks, that the keeping of the right in suspense until action brought would be of no advantage to the insurers, since the assured would then bring his action forthwith.[3]

Where a policy provided that a loss should be paid in sixty days after proof and adjustment thereof, and the ship, being abandoned during a detention by capture, was restored within the sixty days after abandonment, Mr. Chief Justice Parsons said: "The abandonment was made when the loss was total, and a right to recover for a total loss was vested in the assured, and this right cannot be affected by the credit given to the insurers, in the payment of the loss."[4]

1706. The prevailing doctrine is, that *the underwriter cannot, by repairing an abandoned ship, defeat an otherwise valid abandonment.*[5]

[1] M'Ivers *v.* Henderson, 4 M. & S. 576.

[2] Peele *v.* Merchants' Ins. Co., 3 Mason, 27. See also Humphrey *v.* Union Ins. Co., id. 429; Rhinelander *v.* Ins. Co. of Pennsylvania, 4 Cranch, 29; Lee *v.* Boardman, 3 Mass. R. 238; Jumel *v.* Marine Ins. Co., 7 Johns. R. 412; Chesapeake Ins. Co. *v.* Stark, 6 Cranch, 268; Bordes *v.* Hallett, 1 Caines, 444; Cincinnati Ins. Co. *v.* Bakewell, 4 B. Monroe's (Ky.) R. 541. On this question see also 2 Valin, 143, tit. Insurance, art. 60; Emerigon, c. 17; S. C., tom. 2, p. 194; Code de Commerce, l. 2, tit. 10, s. 3, a. 196.

[3] Dutilgh *v.* Gatliff, 4 Cranch, 31, n; S. C., 4 Dall. 446.

[4] Munson *v.* New England Mut. Ins. Co., 4 Mass. R. 88.

[5] See supra, No. 1559.

SECTION XVII. EFFECT AS TO RIGHTS OF PROPERTY, SALVAGE, AND CLAIMS AND LIABILITIES.

1707. *The effect of a valid abandonment is equitably to transfer the property in the subject.*[1]

The payment of a total loss by the insurers, or their liability to pay such a loss in consequence of an abandonment, gives them an equitable right to the property, or what remains of it, so far as it was covered by the policy, including the spes recuperandi,[2] and the rights identified with the insurable interest or depending upon the possession of it.

1708. *An abandonment, considered as an assignment of property, must have reference to the time of the loss,* for only that which is constructively lost can be abandoned, and to know what is lost, reference must necessarily be had to the time of the loss. From that time the insurers are, to most purposes at least, entitled to the advantages and subject to the liabilities of ownership. This is not inconsistent with the principle, that the right of abandonment depends upon the state of the existing facts; which means, as we have seen, that the facts of which the assured is informed, and which he makes known to the underwriters as the ground of his abandonment, must constitute a total loss, and also that the loss must not have ceased to be total in the mean time. The abandonment must be authorized by the existing facts, but as an assignment, it operates retrospectively from the time of the loss.

In France, an abandonment of the ship, considered as a transfer of the property, has been construed to relate to the commencement of the risk.[3] In English jurisprudence it is taken for granted, that an abandonment of any subject, considered as an assignment, relates to the time of the loss.[4]

So in the United States, Parker, C. J., says: "The under-

[1] Gould *v.* Citizens' Ins. Co., 13 Mississippi R. 524, and cases passim.

[2] Rogers *v.* Hosack's Executors, 18 Wend. R. 319.

[3] Emerigon, tom. 2, p. 223, c. 17, s. 9.

[4] Davidson *v.* Case, 8 Price, 542.

taking, on the part of the insurer upon the ship, is, that he will pay for it, if it should be lost by the perils in the policy. Until that event happens, the property remains in the assured; and the freight and earnings belong to him until that time. But after the loss, the insurers, in virtue of the abandonment, become the owners, and are liable for the repairs and expenses, and are entitled to the earnings of the ship." [1]

In case of a stipulation on the part of the assured not to abandon on account of capture, until after a detention for six months, the abandonment, when made after the expiration of that time, "relates back to the time of the capture." [2]

1709. *A right to claim contribution from the other subjects, for jettison of a part of that insured, passes to the underwriters on abandonment.*[3]

And if the contribution has been previously paid, the same is accordingly to be charged to the assured in deduction from the amount insured, in an adjustment of a total loss.

1710. *The benefit of a right of action* accruing to the shipper *on bills of lading*, or on affreightment for the pending voyage, against the owners of the vessel, *passes to the underwriters* by abandonment so far as the goods are covered by the policy.[4]

1711. *All claims against third parties on account of negligence or agency occasioning the damage to the subject or destruction of it by a peril insured against, are assigned to the underwriter by an abandonment,* so far as the subject is covered by the policy: [5]

As a claim against the owners of another vessel for damage by collision with the one insured: [6]

[1] Coolidge *v.* Gloucester Mar. Ins. Co., 15 Mass. R. 341. See also Schieffelin *v.* New York Ins. Co., 9 Johns. R. 21. See also Leavenworth *v.* Delafield, 1 Caines, 573.

[2] Clarkson *v.* Phœnix Ins. Co., 9 Johns. R. 1. See also the Brig Sarah Ann, 2 Sumner's R. 206.

[3] Walker *v.* United States Ins. Co., 11 Serg. & R. 61.

[4] Mellon *v.* Bucks, 5 Martin's La. R. (N. S.) 371. See also Columbian Ins. Co. *v.* Ashby, 4 Peters's Sup. Ct. R. 139, per Thompson, J.

[5] Atlantic Ins. Co. *v.* Storrow, 5 Paige's (N. Y.) Ch. R. 285.

[6] Yeates *v.* Whyte, 4 Bing. N. C. 272.

And a claim against the master for misconduct in occasioning the loss : [1]

And a claim against a railroad corporation on account of an insured building destroyed by fire communicated from another situated near to it, which was set on fire by sparks from an engine-car.[2]

So a compensation by a municipal corporation for the demolition of a building to stop a fire, was decreed by Mr. Chancellor Walworth, of New York, to be credited by the assured as salvage on a total loss of the building by fire.[3]

The claim on another vessel for damage by collision to one insured, is, without doubt, equitably assigned to the underwriters by an abandonment of the insured vessel on account of loss by the damage.

1712. *Rights and interests identified with the insured interest in property go to the underwriters by abandonment*, or *by* the assured's receiving *payment of a total loss, which is equivalent to an abandonment.*

Thus the interest of the mortgagee in mortgaged property consists in the debt for which it is mortgaged ; and if he insures for his own security merely, independently of the mortgager, underwriters are entitled to an assignment of an amount of the debt equal to that paid for the loss, deducting the premium.

This results from the nature of insurance as a contract of indemnity, and not a gaming contract. If the assured could recover the amount of the debt under a policy on the property pledged as collateral security, and also the debt itself, from the debtor, the policy would be equivalent to a ticket in a lottery, for the debtor is, under such a policy, still liable for the debt, which is not discharged by payment of the loss on property mortgaged as collateral security.[4]

[1] Paradise *v.* Sun Mut. Ins. Co., 6 La. Annual R. 3.

[2] Hart *v.* Western Railroad Corporation, 13 Metc. R. 99. This was under a statute, but there seems to be the same liability at common law.. Aldridge *v.* Great Western Railway, 3 Mann. & Gr. 514.

[3] Pentz *v.* Receivers of the Ætna Fire Ins. Co., 9 Paige's Ch. R. 569.

[4] It is held in Robert *v.* Traders' Ins. Co., 17 Wend. 631, that payment

Mr. Justice Story, giving the opinion of the Supreme Court of the United States, says: "The underwriters are entitled to an assignment of the debt, and may recover the same from the mortgager." [1]

It can make no difference whether the property mortgaged is equal in value to the debt or less, nor whether the whole or only a part of the mortgaged property, or the whole or only a part of its value, is insured. So far as the mortgaged property is paid for to the insured creditor, the whole purpose of the pledge is accomplished, to the extent of his interest, and an equivalent amount of the debt should be accounted for as salvage. In respect to such proportion of the debt, the creditor is under no obligation to pursue the debtor to enforce payment, but merely to give the underwriters the use of his name, if necessary, in proceedings instituted by them, at their risk and expense, for recovering the proportion of the debt in which they are interested as salvage.

Accordingly where the assured on a house had a contract for the sale of it, on which payments had been made, something remaining due when the house was burnt down, it was held that he was entitled to recover only indemnity, and if the insurers paid to him the whole value of his remaining interest, he must transfer to them his contract, or put them in his place for deriving the benefit of it by obtaining a conveyance on payment of the remainder of the purchase money.[2]

Under a policy for $300 against fire, effected by a mortgagee in his own name for his own benefit exclusively, upon "his interest"

of the loss in such case is not so of the debt for which the insured property is mortgaged. So it is held by Plunkett, Vice-Chancellor, in Ireland, in respect of the payment of a loss under a policy in favor of a creditor on the life of the debtor made independently of the latter. Humphrey *v.* Arabin, Lloyd & Goold's Cases, Temp. Plunkett, 318. See also King *v.* State Mut. Fire Ins. Co., 7 Cushing's R. 1; S. C., infra. This seems to be too obvious to need being stated, since the debtor is a stranger to the policy in either case.

[1] Carpenter *v.* Washington Ins. Co. of Providence, 16 Peters's Sup. Ct. R. 495; and see Tyler *v.* Ætna Ins. Co., 12 Wend. 507.

[2] Tyler *v.* Ætna Fire Ins. Co., 12 Wend. 507; Ætna Fire Ins. Co. *v.* Tyler, 16 id. 385.

in a building, which, with the land appertaining to the same, had been mortgaged to him, to secure payment of $400, the building being burnt down, the underwriters offered to pay the loss on the assured's assigning to them the debt and mortgage or a proportional part thereof, which he refused to assign. It did not appear that the mortgager was in any way interested in the insurance. In a suit upon the policy, Mr. Chief Justice Shaw, and his associates Dewey, Metcalf, Fletcher and Bigelow, of the Supreme Court of Massachusetts, were decidedly of opinion that the underwriters were liable for a total loss, and that the claim of the assured for such a loss was not subject to the condition that he should, on the payment of the loss, assign to them the whole or a proportional part of the debt and mortgage, as salvage, and that if they had any right to claim salvage their claim could be enforced only by a proceeding in equity.[1]

It is remarked, first, that the mortgager has no interest in the policy. This is doubtless true; the suggestion is, however, made, no doubt, by way of clearly presenting the question under consideration, and not as any ground of decision against the claim of salvage, in respect to which it evidently has no direct bearing.

Secondly, it is said that a recovery by the assured against the underwriters on this collateral security by insurance to the amount of a part or the whole of the debt secured by the mortgage, and then a recovery of the whole debt against the debtor himself without accounting for salvage, would not necessarily be such a double or excessive recovery as to give the insurance the character of a gambling policy, since on the supposition of certain expenses of the creditor and certain contingencies connected with the transaction as a pecuniary one on the part of the creditor, he might, in the result, be merely indemnified. But it may be supposed, that no such expenses are incurred and no such contingencies happen, and with greater probability, since losses in insurance and debts are most usually paid in full without delay or incidental expense. Again, such possible delays and collateral or incidental expenses and contingencies, if admitted to be probable, seem to be wholly

[1] King *v.* The State Mut. Fire Ins. Co., 7 Cushing's R. 1.

foreign and res inter alios, in respect to the underwriters, and are not taken into consideration in estimating the insurable interest, and determining on over and double insurance and indemnity in other cases, unless the policy contains express stipulations for taking the same into account.

It is, thirdly, suggested that a recovery by the assured of an excess over indemnity, is not inequitable as between the assured and underwriters where such recovery is according to the plain and necessary import of the contract. But this is true of any wager; the question, however, seems to be, not the equitableness of recovery of a wager or an over or double insurance made without fraud, but whether the contract must be construed to be a wager or contract of indemnity, and the court expressly assume it to be the latter.

It is remarked, fourthly, that the rules in respect to total loss and salvage in marine insurance are not necessarily applicable to fire insurance. It is true that no formal abandonment is made in fire insurance,[1] but losses short of the total destruction of the subject, are usually settled as salvage losses,[2] and, therefore, so far as the right to an allowance of salvage under a fire policy is concerned, the inference is entirely in favor of the doctrine of salvage.

The only question seems to be, whether there is salvage; there certainly can be no doubt, considering the contract as one of indemnity, that if any of the interest to which the insurance is applicable subsists, the underwriters are entitled to the benefit of it in diminution of the loss adjusted as a partial loss, or as salvage on payment of a total loss, which, being a payment for the whole value of the insurable interest so far as it is insured, surely entitles the assured to what remains of it where the policy is not a gaming contract. There is neither principle nor precedent in favor of the assured's right to recover against the underwriter as for the absolute destruction of the subject, his interest in which is insured, while a valuable part or the valuable remnants of it, remain in his hands. This seems to be too obvious to be insisted upon, or questioned.

[1] See supra, No. 1508, et seq. [2] See supra, No. 1509, 1511.

A policy in favor of any party upon any subject whatsoever, is an insurance upon his own interest in it, or that of another whom he represents; it is this alone upon which he can sustain a loss, and it is the loss of this alone for which he can recover. The insurable interest of a mortgagee is the debt due from the mortgager. If he does not lose this, he loses nothing. When the underwriters have paid him for the loss of the insured mortgaged subject, they have paid him for so much of the interest which they insured, and seem to be entitled, by the fundamental principle of the contract, to the assignment to them, of the thing for the loss of which they have indemnified him, namely, to an amount of the debt equal or proportional to the loss paid. This adjustment of the loss will operate in favor of the underwriters if the ordinary rate of premium for insurance of a like risk in favor of an absolute owner is paid, and the mortgager is solvent or the remaining mortgaged property is sufficient to satisfy the debt, but this does not render the contract a gaming contract. The better doctrine seems accordingly to be that

Under a policy in favor of a mortgagee independently of the mortgager, the underwriters are entitled to an allowance of the remnants of the insured interest, so far as the policy is applicable to it.

1713. *Where a compromise* of a claim under a policy upon a cargo, in case of capture, *is made for* an amount *less than a total loss, the salvage and spes recuperandi belong to the assured.*

Under a policy on goods on board of a ship destined to Buenos Ayres, the ship was captured by the Brazilians and condemned as prize for an alleged breach of blockade, and an abandonment made under the policy, which the underwriters refused to accept. After some negotiation the claim was compromised at thirty-five per cent., and the policy cancelled. Some years afterwards, in pursuance of a convention between Great Britain and the Brazilian government, indemnity was made for the capture. It was held that the underwriters were not entitled to any part of the indemnity.[1]

[1] Brooks *v.* M'Donnell, 1 Y. & C. 502. See also New York Ins. Co. *v.* Roulet, 24 Wend. R. 505; Goldsmid *v.* Gillies, 4 Taunt. 803; and Tunno *v.* Edwards, 12 East, 488.

1714. *If the salvage, or any part of it, has been received by the assured,* or applied to his use, *the value* of what has been so received or applied *is deducted in adjusting the* amount to be recovered in a total *loss.*

Consequently, if the salvage has been lost, or its amount diminished, by an act of the assured, for which the insurer is not answerable, or by any event or circumstance which is not at the risk of the insurer, the amount so lost, or by which the salvage is thus diminished, is to be deducted in adjusting the amount to be recovered for the loss.

1715. The question has already been considered, whether the insurer is at the risk of the loss or diminution of the salvage on freight or profits, in consequence of the abandonment of the ship or goods.[1]

Whatever doctrine may be adopted in this respect, the principle upon which it is founded does not seem to authorize a construction by which the insurers of one interest, or any part of the subject, shall be liable for any loss in consequence of another insurance upon a different interest or upon the same subject, any further than such a loss is a direct and necessary consequence of such other insurance made in the common form. Estrangin says, that any convention between the owner and freighter cannot affect the rights of the insurer under an abandonment.[2]

The rights of an underwriter cannot be affected by any contract made by the assured with another underwriter or any other person, except so far as the assured is supposed to reserve the right of making such other contract, and the underwriter to subscribe the policy under an implied condition that the assured may avail himself of such right.

Upon this principle, the amount of salvage to which one underwriter may be entitled upon an abandonment ought not to be diminished in consequence of any particular agreement between the assured and other underwriters on the same subject.

A different doctrine was declared by the Supreme Court of the United States. Seven open policies being made on goods an

[1] Supra, No. 1650.

[2] Note to Pothier's Insurance, n. 36.

eighth was then made in which they were valued above the invoice price, at which they were, of course, insured in the prior seven. Upon abandonment under all of the policies, the salvage for the seven open policies would be, in the ordinary mode of adjustment, the same proportion to each that the policy was of the whole invoice value; which left a less proportion for the eighth than that of the amount insured by that policy was of the whole amount at which the goods were valued. The court said: "In no case would this consideration create a difficulty as between the parties to a policy. Among the underwriters alone, in the distribution of the thing abandoned, would it be necessary to determine on the correct rule to be applied in such a case." [1]

This decision is palpably wrong, since such a rule operates inequitably and wrongfully upon the underwriters in the last policy, or in all the policies, according to the rule of the apportionment that should be applied.

A different rule was applied in a Massachusetts case, by Mr. C. J. Parker and his associates, under abandonments on policies similarly made upon a ship in which there was a similar deficiency of salvage, in which it was decided that the assured could recover only as for a partial loss on the last policy, on account of the deficiency of the salvage for that policy.[2]

But this rule is entirely inconvenient, and in some cases difficult, if not impracticable, and there is no need of resort to it, since the adjustment of a total loss is easily made, by charging the assured with the deficiency of the salvage. This rule has in effect been adopted.[3]

1716. *If,* in case of abandonment, *the salvage has been lost, or is encumbered with liens, or its amount is diminished, otherwise than in consequence of the perils* insured against, or by the acts of persons for whose conduct the insurers are answerable, *the assured* ought either to lose his right of abandonment, or — which seems in most cases to be the more convenient and equitable

[1] Pleasants *v.* Maryland Ins. Co., 8 Cranch, 55.

[2] Higginson *v.* Dall, 13 Mass. R. 96.

[3] See Williams *v.* Smith, 2 Caines's R. 13.

rule — he *ought to be charged*, in the adjustment of a total loss, *with the amount* by which the salvage has been diminished.

Insurance was made upon a vessel, which had been bottomried previously to the time of her being purchased by the assured, but he had no notice of the bottomry. A constructive total loss occurred, and the assured made an abandonment. The vessel had, however, been seized, and sold to satisfy the bottomry bond. Mr. Justice Thompson, in giving the opinion of the court, said: "In ordinary cases, immediately on abandonment the subject would become the property of the underwriter. If, then, the underwriter has been deprived of this property in consequence of an encumbrance for which he is not answerable, the assured must put him in the same situation he would have been in had no such lien existed, that is, in the present case, by deducting the value of the vessel, at the time of abandonment, from the amount of the insurance." [1]

This case supports the doctrine, that the insurers are not liable to suffer by encumbrances not arising out of the risks insured against. But the mode of adjusting the loss adopted in this case admits of some question. The assured effected a policy, upon the supposition that he owned the whole of the vessel; but it turned out that he owned only a part of it. His interest was the excess of the value of the ship over the amount due upon the bottomry bond at the commencement of the risk. There appears to be no reason why the loss should not have been adjusted precisely as if a previous policy had been made to the amount due upon the bottomry bond, with the usual stipulation as to prior insurance. An adjustment upon this principle would, in most cases, evidently give a result very different from that of applying the rule adopted in the above case.

It has been remarked that the nondisclosure of any fact whereby the salvage is diminished, as the fact of a mortgage prior to the policy, defeats the policy,[2] but it is surely sufficient that the assured is chargeable with the amount of the deficiency of the

[1] Williams *v.* Smith, 2 Caines's R. 13.

[2] Smith *v.* Columbia Ins. Co., 17 Penn. (5 Harris's) R. 253.

salvage by way of deduction from the amount payable for the loss.

1717. *Where the salvage is encumbered with a lien, arising out of the perils insured against, the insurers take it subject to such charge.*

In case of recapture or the recovery of property abandoned at sea or wrecked, the salvors are entitled to a compensation or reward, also called "salvage," and they have a lien upon the property saved, and may keep possession of it until they are paid.[1] Regulations are frequently made fixing the amount of that compensation or salvage at one eighth, fourth, half, &c., of the value saved,[2] or prescribing the mode of proceeding for settling what shall be allowed in each particular case.[3]

In ordinary cases of shipwreck, or the abandonment of property at sea, the persons who save any part of the property are entitled to a reasonable compensation, according to the time employed, the danger incurred, and the service rendered. The amount to be allowed to the salvors, in such cases, is determined by a court of admiralty, which allows a proportion of the value saved, according to the circumstances and the conduct of the salvors.

In case of recapture by a public ship, the law of Great Britain allows one eighth, and by a private armed vessel, one sixth, to the recaptors.[4]

The laws of the United States allow salvage in like manner, in the case of recapture of property belonging to citizens of the United States; except in case of the recapture of an armed vessel, where one half is allowed; and in case of recapture, before condemnation, of a ship, or of goods, belonging to the subjects of a friendly nation, the same compensation is allowed to the recaptors which would be allowed to recaptors vice versâ, in the country to which the owners belong, for the recapture of property belonging to citizens of the United States.[5]

[1] Hartford *v.* Jones, 1 Lord Raymond, 343; 2 Salk. 654.

[2] Leg. Rhod. s. 2, a. 45, 46, 47.

[3] 12 Ann, Stat. 2, c. 18, cited Park, 216; Marsh. 548; 26 Geo. II. c. 19, s. 5, 6; 48 Geo. III. c. 130, s. 21.

[4] 43 Geo. III. c. 160.

[5] Act 1799, c. 130, s. 7; Act 1800, c. 14.

The claim for salvage, as between citizens of the United States and those of other countries, has, in some instances, been regulated by treaty.[1]

1718. *Whether, on an abandonment of the cargo, it comes into the hands of the underwriters subject to the freight accruing during the pending risks, and becoming due subsequently to the loss?*

In answer to this inquiry Lord Mansfield says: "The underwriters have nothing to do with freight."[2] But he gives no reason. The case was upon a policy on goods from Nevis to Bristol, captured by the French, condemned by the Prize Court at Marlaix, and the ship and goods sold under the decree; and the proceeds were decreed to be restored by the Court of Appeals, and paid over to the agent of the ship-owner, of the assured on cargo, and of his underwriters; and he paid freight pro ratâ itineris to the ship-owner. The question was whether the amount so paid was to be deducted in accounting for salvage to the underwriters. Lord Mansfield and his associates held that freight pro ratâ was due, and in giving the opinion of the court he said the owner of the cargo might either take the part of the cargo saved, or abandon; but in neither case could he throw the freight upon the underwriters, "because they had nothing to do with it." This was a mere reiteration of the negative to our inquiry, without giving any reason, though the phraseology purports to be the expression of an inference.

The same question came before the Supreme Court of the United States in a very similar case. A cargo being insured from Bourdeaux to New York, the ship and cargo, both belonging to the assured, were captured and condemned by the British Admiralty Court at Halifax, and an abandonment made of the cargo and a total loss paid. The sentence of condemnation was reversed on appeal, and the proceeds of the cargo restored and paid over to the underwriters as salvage. The assured, as owner of the

[1] Convention of 1782, with the Netherlands; Treaty of 1783, with Sweden, art. 17, 18; Treaty of 1799, with Prussia, art. 21.

[2] Baillie *v.* Moudigliani, Marsh. Ins., 2d ed. 728.

ship, thereupon demanded from the underwriters freight pro ratâ. Mr. Justice Story, giving the opinion of the court, repeated the words of Lord Mansfield cited above, that, as between the shipper of goods and his underwriter, "the latter is in no case responsible for the payment of freight, whether there be an abandonment or not."[1]

The circumstance of the ship and cargo both belonging to the assured, or only the cargo, is immaterial in respect to the present question.[2] The rule as to the deduction of the freight from the salvage will be decided in like manner in either case.

The same question came before the Supreme Court of the United States in a subsequent case, and was decided in the same way. The insurance being upon a cargo and proceeds from Alexandria to St. Thomas, and two other West India islands, and back to the United States, a part of the outward cargo was sold at St. Thomas, and subsequently the voyage was broken up by the ship being wrecked at Cape Haytien, while a greater part of the outward cargo remained on board, consisting of flour, which was saved in a damaged state, and sold for the benefit of whom it might concern; and an abandonment was made of the cargo to the underwriters. Both ship and cargo belonged to the assured, and the question was, whether, in accounting for the salvage, he

[1] Caze *v.* Baltimore Ins. Co., 7 Cranch's R. 358. The court also held that no freight was due; contrary, as Mr. Justice Story remarks, to the opinion of Lord Mansfield and his associates, in Baillie *v.* Moudigliani, cited supra. The cargo in each case had been so lost by the capture, that it could not be carried forward; but in Baillie *v.* Moudigliani, the ship had been sold also, and so both parties to the contract of affreightment might be understood to assent to its termination at the intermediate port, and to freight pro ratâ having been earned to that port. It does not appear whether the assured, as owner of the ship, could entitle himself to freight, in Caze *v.* Baltimore Ins. Co., by his readiness to bring on the cargo from Halifax to New York, if it had been restored in specie instead of its proceeds. But as the loss of the freight was absolutely total by the capture and sale of the cargo, there was no pretence for demanding freight pro ratâ.

[2] Columbian Ins. Co. *v.* Catlett, 12 Wheat. R. 383.

could deduct pro ratâ freight, or, in other words, whether in case of abandonment for a total loss, with salvage, the underwriters must take the salvage subject to a lien for freight. In giving the opinion of the court, Mr. Justice Story said: "In point of fact, no freight was or could be payable in this case, for the plain reason that the assured was owner of the ship, and there could, therefore, be no lien upon the cargo or its proceeds for the same. But in point of law the case is not supposed to be varied by this circumstance; for if the freight would be a proper charge on the salvage, if a third person were owner of the ship, in the hands of the assured, there is no reason why it should not be allowed when the assured is owner. The owner of the ship has a lien upon the cargo for all the freight which becomes due to him." And the opinion of the court was, that the underwriters on the cargo had nothing to do with the freight, and if they were obliged to satisfy it to the ship-owner in order to obtain the salvage of the cargo, they were entitled to a credit for it in adjusting the loss, "or to recover it in any other manner." Mr. J. Johnson dissented, on the ground that, at the time to which the abandonment referred, namely, "the moment of the loss," no freight had been earned.[1]

Notwithstanding the weight of authority to the contrary, I cannot but think that the dissent of Mr. Justice Johnson was well founded, and there is the less occasion for hesitating to agree with him, since, as already remarked, no ground is stated in support of the above decisions, in which Lord Mansfield is followed in merely reiterating the proposition, that the underwriters have nothing to do with freight. And why not? The goods become his by abandonment. They are transported as his if he claims the salvage, as all the cases suppose him to do. The goods are transported as his, and arrive at the port of destination as his, and the freight is not due upon the assured's goods, but upon the underwriter's, and he is the only party who derives the advantage of the higher market at the port of destination, if the goods arrive there, as they may do. Who then has so properly something to do with freight, to the effect of being liable for it? He is the only party bene-

[1] Columbian Ins. Co. *v.* Catlett, 12 Wheat. 383..

fited by the transportation of the goods. He should, therefore, pay for it, if he claims the salvage. This is the ground of Mr. Benecke's opinion, that the freight should be deducted from the salvage. Suppose a constructive total loss to take place at an early stage of a long voyage, for which an abandonment is made. According to the above decisions, the assured must pay the expense of enhancing the value of the salvage by the transportation of the cargo to a better market.

In case of damaged goods sold at an intermediate port, the pro ratâ or entire freight is deducted from the proceeds in the adjustment of a salvage loss, where the sale is made to avoid the total destruction of the goods, for the reason, as Mr. Stevens[1] and Mr. Benecke[2] say, that it is for the benefit of the underwriter that they should be sold. The same reason holds in respect to a total loss and abandonment generally.[3]

Where the contract for freight reaches back to a transportation for a risk prior to that covered by the policy on the cargo, as under a contract of affreightment or a charter-party for divers passages, and insurance for only one or more subsequent to the first, though the whole freight may be pending at the time of a constructive total loss under such a policy, and the cargo may be subject to a lien for such aggregate freight, yet the assured will no doubt be bound to exonerate the underwriter from the proportion accruing on account of such prior transportation, of which the underwriter cannot be presumed to have notice; but in respect to the freight for the passage covered by the policy, he cannot be presumed not to have notice that some contract exists, and he may reasonably be presumed to have notice that it is made in the usual way, and at the usual rate. It seems to be an entirely reasonable implied agreement, that the underwriter is to take the salvage, in case of abandonment, subject to such an agreement, especially since he is the party to be benefited.

For these reasons the better doctrine seems to be, that,

[1] On Average, 5th ed. p. 81.

[2] Prin. Indem., London ed. 1824, p. 448.

[3] And see Union Ins. Co. *v.* Russell, Anthon's Cases, 128.

On abandonment of the cargo, the salvage comes into the hands of the underwriter subject to the charge of freight for the voyage that is covered by the policy.[1]

1719. The effect of the abandonment of the ship on the pending freight is, as we shall see more particularly in a subsequent section,[2] different in England and the United States. The whole freight becoming due to the insured ship, subsequently to the loss for which the ship is abandoned, goes to the underwriters to whom it is abandoned, according to the English jurisprudence. In the jurisprudence of the United States, if the ship proceeds on the voyage after recapture or escape from other constructive total loss, the freight is apportioned, and the amount accruing on account of the part of the voyage performed prior to the constructive total loss goes to the assured or his underwriters on freight in his stead, and the subsequent portion belongs to the underwriters to whom the ship is abandoned.

When the ship does not proceed after the disaster for which an abandonment is made, and there is a total loss of the ship and freight by shipwreck or otherwise, with salvage of the ship or freight, or of both, and the seamen have a lien upon the salvage of either ship or freight, or upon both of those interests, an inquiry arises which party is chargeable for the wages; whether it is the assured, the insurers on the ship, or those on the freight.

The seamen are entitled to wages down to the time of the loss, not exceeding the amount saved, and have a lien therefor on the ship and freight, and also on the salvage of each.

This lien is preferred to all others.[3]

It is held to reach back to wages for passages prior to that pending at the time of a bottomry of the ship, and is preferred to such bottomry.[4]

The wages are due, and the lien on the ship and its remnants

[1] Vide supra, No. 1461, p. 217.

[2] Section 19.

[3] Abbott on Shipp., 5th London ed. 484, where are cited The Favorite, 2 Chr. Rob. 232; French Ord. 1681, l. 5, tit. 14, a. 16; Code de Commerce, a. 192.

[4] The Louisa Bertha, per Dr. Lushington, 1 Eng. Law, Eq. & Ad. R. (Press of Little, Brown & Co.) 665.

subsists, notwithstanding a failure to earn freight, making an exception to the general rule that freight is the mother of wages, and that the latter is dependent on the former being earned. The jurisprudence, after some diversity of opinion whether the allowance to seamen after a shipwreck, for prior services, was to be considered to be in the nature of salvage, or to be allowed as wages eo nomine to the extent of the salvage on ship and freight, seems to have settled down in the latter doctrine, since the elaborate, and, as usual, lucid opinion of Lord Stowell on the subject;[1] similar decisions having been made in the United States, both previously and subsequently.[2] Mr. Justice Story had, in an early case, been of opinion, that the allowance, if any, to seamen, in case of no freight being earned, must be in the nature of salvage;[3] and the doctrine of that case is adopted by Chancellor Kent in his Commentaries.[4]

Mr. Justice Story adopts the same doctrine in recognizing a seaman's lien on the indemnity paid by a foreign government for the capture of a ship and cargo, where the indemnity was made some twenty-seven years after the capture.[5]

It is to be observed, that in case of shipwreck or other disaster,

[1] In the case of The Neptune, 1 Hagg. Ad. R. 227, which, Lord Tenterden says, "is peculiarly worthy the attention of the reader." Abbott on Shipp., 5th ed. 452. The same opinion is followed by Dr. Lushington, in The Maria Jane, 1 Eng. Law, Eq. & Ad. R. (Press of Little, Brown & Co.) 658.

[2] Frothingham *v.* Prince, 3 Mass. R. 563; S. C., Dane's Abridgment, c. 57, a. 1, s. 3, p. 462; Coffin *v.* Storer, 5 Mass. R. 252; Lewis *v.* The Elizabeth and Jane, Ware's R. 41; The Dawn, Davies's R. Dist. Ct. of U. S. Maine, 121; Pitman *v.* Hooper, 3 Sumner, 50; Hobart *v.* Drogan, 10 Peters's Sup. Ct. R. 108, at p. 122; 2 Peters's Ad. R. 186, n.; Giles *v.* The Cynthia, id. 203; Weeks *v.* The Catharine Maria, id. 424; Taylor *v.* The Cato, 1 id. 48; Clayton *v.* The Harmony, id. 70; and see The Two Catharines, 2 Mason's R. 319.

[3] The Saratoga, 2 Gallison's R. 164. See explanation of Mr. Justice Story, in his edition of Abbott on Shipping, 4th American ed., 1829, p. 452, n.

[4] Vol. III. pp. 195, 196, 2d ed. See also The Two Catharines, 2 Mason's R. 319, in which the same doctrine is maintained by Mr. Justice Story, though the case admitted of being one of salvage by the seamen.

[5] Pitman *v.* Hooper, 3 Sumner's R. 50.

whereby the earning of freight by the ship is wholly prevented, wages cannot be claimed over the amount of the salvage of the ship.[1]

Such being the established doctrine respecting wages and the lien therefor, we must, in order to determine on which party this charge ultimately falls, or to which it must be apportioned, inquire what parties are benefited by the services of the seamen, or would have been so had any benefit accrued; and this is evidently the party who is, or would have been entitled to the freight pending at the time of the loss of the ship by its total destruction by wreck or otherwise, or of its constructive total loss and consequent abandonment. If the cargo is forwarded in the same ship after abandonment, this is a salvage on freight to the amount pro ratâ down to the time of the loss; if the cargo is forwarded by another ship at less than the original freight for the whole voyage, this is a salvage on freight to the amount of the excess of the agreed freight for the whole voyage over that paid to the new vessel.

The result then is, that

1. *The assured on the ship must exonerate the underwriters to whom it is abandoned from all lien on the salvage for seamen's wages:*

2. *The underwriters on freight must take the salvage subject to the deduction of the lien of the seamen for wages for services on the voyage insured upon:*

3. *Any lien of the seamen for wages for services prior to the voyage insured upon must be discharged by the party who contracted with them.*

The first of the above propositions is opposed to an early decision in Massachusetts.[2] The salvage of the ship had come into the hands of the underwriters by abandonment. It was held that the assured should recover against the underwriters, out of the salvage of the ship which had come into their hands, the amount of wages that had accrued, and which he had paid, on account of the services of the seamen from the commencement of the risk until the

[1] Per Parsons, C. J., Coffin *v.* Storer, 5 Mass. R. 251.

[2] Frothingham *v.* Prince, 3 Mass. R. 563, A. D. 1801.

shipwreck. The ship-owner had effected insurance only on his ship; he was, therefore, his own insurer on freight, and the adjustment should be the same as if the freight had been insured by another set of underwriters. The case was one of absolute total loss of the freight and cargo by shipwreck on Cape Cod. Had the freight been insured, the assured would have been entitled to recover for a total loss of this subject without salvage; and surely it cannot be supposed that he might retain this amount, and leave the underwriters on the ship to pay the wages of the seamen out of the proceeds of the salvage of the ship. As he was his own insurer on freight, the adjustment must be the same between him and the underwriters on the ship, as if he had been insured also on freight.

An obvious, and it seems to me conclusive reason for this construction, is, that this lien is not a consequence of the peril insured against, and the underwriter is liable only for charges and losses which are the consequences of those perils. This construction, which seems to result from established doctrines, is supported by the practice in Boston.[1]

Seamen are not absolutely precluded from salvage, the distinction between such a claim and that for wages being that the latter are for services rendered in pursuance of their previous contract, in performance of their duty in the relation in which they stand to the ship, whereas their title to the allowance of salvage is for their voluntary extraordinary services.[2]

1720. After *the insurers* become owners of the ship, *in consequence of abandonment*, they *are*, like any other owners, *liable*

[1] I am not informed of the practice in other ports. I understand from Mr. John S. Tyler, an eminent despacheur of averages, in Boston, that it is well established by the practice in that port.

[2] This distinction is suggested between the claim of seamen for salvage, and that of other parties, by Lord Stowell, in the case of The Neptune, 1 Hagg. Ad. R. 239; and recognized by Dr. Lushington in The Maria Jane, 1 Eng. Law, Eq. & Ad. R. (Press of Little, Brown & Co.) 658; and acted upon by Mr. Justice Story, in case of the rescue of a captured ship by a part of the crew. Williams *v.* Suffolk Ins. Co., 3 Sumner's R. 270; S. C., 13 Peters's Sup. Ct. R. 415.

for mariners' wages, but they are entitled to the ship free from any lien for wages earned before the time to which the abandonment relates.

1721. *The underwriters must take the abandoned property subject to the charges for saving it from the perils insured against.*[1]

1722. Although a valid abandonment gives the underwriters the advantages, and subjects them to the liabilities, of ownership of the property, yet *an abandonment of the same subject to different underwriters does not make them joint owners, and jointly liable as copartners.*

A ship being abandoned to twenty-three different underwriters, it was held that they were not jointly liable, as co-partners, for repairs done upon the ship.[2]

1723. *A mere payment of a loss, whether partial or total, gives the insurers an equitable title to what may be afterwards recovered from other parties on account of the loss.*

The effect of the payment of a loss is equivalent, in this respect, to that of an abandonment.

Thus, if the risk of barratry, or any other misconduct of third persons, is insured against, and a loss is paid on this account; and subsequently the assured recovers the damage from the master or other persons whose misconduct was the cause of the loss, there can be no doubt that the insurers would be equitably entitled to the damages so recovered, in the proportion in which they had made indemnity for the loss.

The same principle is applicable to cases of capture and arrest. A cargo being insured on a voyage from New York to Leghorn, the vessel was captured, in the course of the voyage, by a French privateer, and carried into Porto Ferrajo. The ship and cargo were decreed to be restored, from which decree the captors appealed. The property was, however, delivered to the consignees, on their giving bonds, to the amount of the appraised value, to answer to the final decree. The property insured was appraised at a value exceeding that at which it had been insured; and, as

[1] Frothingham *v.* Prince, 3 Mass. R. 563.

[2] United Ins. Co. *v.* Scott, 1 Johns. R. 106.

it was finally condemned in the Council of State, and the condemnation approved by the Emperor, the consignees were compelled to pay their bonds. The goods, however, were sold at Leghorn, at a value exceeding the amount at which they had been appraised.

The assured made no abandonment, as he wished to avail himself of the state of the markets at Leghorn, but demanded from the underwriters, as a partial loss, at least the whole amount at which the property was valued in the policy, if not the whole sum paid, on account of it, upon the bonds given by the consignees. A verdict was given in favor of the assured, "for the whole sum mentioned in the policy," which the court approved. In giving the opinion of the Supreme Court in New York, Mr. C. J. Kent said: "If France should at any future period agree to and actually make compensation for the capture and condemnation, the government of the United States, to which the compensation would, in the first instance, be payable, would become the trustee to the party having the equitable title to reimbursement, and this would clearly be the insurers, if they should pay the amount of the bond." [1]

This was the case of an adjustment as of a partial loss. If it had been under an abandonment, the question would not have arisen.

The rule of adjustment of the partial loss adopted in the verdict approved by the court in the case above cited, and also in principle in another case in the same court,[2] by subjecting the underwriter to a liability for the amount of a bond exceeding that at which the cargo was insured, seems to be erroneous. The amount due in a partial loss is, by this rule, made to depend upon the state of the markets; the underwriter receives a premium according to the invoice value, or the valuation, but pays losses in reference to some other value. This leads to the inconsistency of

[1] Gracie *v.* New York Ins. Co., 8 Johns. R. 237. Respecting the right of underwriters upon the interest of a mortgagee to an assignment of the debt secured by the mortgage, see supra, No. 1510, 1511, 1712.

[2] Suydam *v.* Marine Ins. Co., 2 Johns. R. 138, stated supra, No. 1480.

paying more than the property is worth for saving it; since, as between the parties, it is worth the amount at which it is insured.

1724. *Any indemnity made by a foreign government for the capture or other loss of the insured property, by a peril insured against, goes to the underwriters, or is received by the assured as trustee for them, in proportion as the subject is covered by the policy.*[1]

Some British ships having been captured by the Spaniards, the British government ordered reprisals, by making capture of Spanish ships, and distributed the proceeds of the property so captured among those who had lost their property by Spanish capture. The insurers, who had paid for losses by Spanish captures, claimed the proceeds of the ships and cargoes taken by way of reprisal. Lord Hardwicke said: "The person originally sustaining the loss was the owner; but, after satisfaction made to him, the insurer. No doubt but from that time, as to the goods themselves, if restored in specie, or compensation made for them, the assured stood as trustee for the insurer in proportion to what he paid."[2]

1725. *Insurers on freight are entitled*, as salvage in total loss, *to the benefit of other freight earned by the vessel on the same voyage, instead of that which is insured.*

Mr. Chief Justice Gibbs, speaking of a loss of the freight insured, in consequence of a loss of the cargo, said: "If the ship had brought home another cargo, that would have been a salvage on the original freight."[3]

In a case before the English King's Bench, the charterer of a vessel agreed to pay dead freight, if the Russian government should not permit the vessel to load. This was equivalent to an insurance against that risk. The Russian government did not permit the vessel to load, but the captain procured a cargo at Stockholm. It was decided that the charterer should pay the freight stipulated in the charter-party, after deducting that earned from Stockholm.[4]

[1] See Gracie *v.* New York Ins. Co., 8 Johns. R. 183; supra, No. 1480.

[2] Randal *v.* Cockran, 1 Ves. 98.

[3] Green *v.* Royal Exch. Ass. Co., 6 Taunt. R. 68; S. C., 1 Marsh. R. 447.

[4] Puller *v.* Staniforth, 11 East, 232.

But a different decision was given in another case, the court saying that the earning of other freight was the owner's affair, with which the charterer had nothing to do.[1]

The two cases only differ in respect to considering the stipulation to be in the nature of an insurance; since, if it is considered to be of this character, there can be no doubt that the new freight is salvage.

1726. It has already been stated,[2] that the underwriter is not liable, in the adjustment of a salvage loss, for the excess of the freight due over the proceeds of the damaged goods sold at an intermediate port. Though the underwriter is liable for the value at which the goods are insured, in case of their value being absolutely lost by the perils insured against, he is not liable, in addition thereto, for the loss by payment of full or pro ratâ freight, this being a remote, indirect, incidental consequence of the perils insured against, unless this risk is expressly included in the policy.

So it has been stated above as the better doctrine,[3] that the underwriter on the ship is entitled to the salvage free from liens by bottomry for other expenses than those occasioned to the ship by the perils insured against,[4] and free from any lien for seamen's wages.

A question somewhat analogous arises,

Whether and how far the underwriters are liable on abandonment for expense of salvage exceeding the amount of salvage?

There is no doubt that underwriters may be liable for an amount of loss exceeding that insured by the policy,[5] for the assured is expressly authorized by the common form of the policy to labor and travel for the safety of the property insured, and some forms expressly stipulate to pay,[6] and all policies cover such expenses,

[1] Bell *v.* Puller, 12 East, 496, n. See 12 East, 494, an attempt to show these two cases to be consistent.

[2] Supra, No. 1461.

[3] Supra, No. 1716.

[4] Supra, No. 1719.

[5] Vide infra, s. 20.

[6] Forms at Antwerp, Rouen, and Bourdeaux, Emerigon, c. 17, s. 7, ss. 5. Emerigon says this is an engagement made blindfold, of which the consequences are indefinite. The French Ordinance of 1681 limits the liability of the underwriters to the amount of salvage received by them. Title, Insurance, a. 45. Valin, tom. 2, p. 93,

either under this provision, or as being the direct consequence of the perils insured against. The underwriters are on these grounds liable for the expense in attempting unsuccessfully to save property from the perils insured against, if properly incurred by the assured himself or his agents, or by others, in such manner and under such circumstances as to be a consideration for his liability to reimburse the same. Beyond this, the assured certainly cannot, by abandonment, render the underwriter liable for any expenses in saving or managing the subject, if the latter immediately on notice of abandonment disclaims and renounces all interest in the salvage. That is to say, the assured cannot by an abandonment, or in any other way, force upon the underwriter the ownership of the subject of the insurance, or the salvage, against his immediate disclaimer. The underwriter is bound by the policy to indemnify the assured, down to the time of the abandonment, against all losses on the subject by the perils insured against, and all expenses and liabilities then incurred, or subsequently, until the assured can give his own instructions at the place where the property is; but as I understand the better doctrine to be, though without any express adjudication on the question,

The assured cannot vest the underwriters with the ownership of the salvage, and subject them to all the subsequent liabilities of ownership, against their immediate disclaimer of such transfer.[1]

It is enough that the assured is indemnified against the expenses and liabilities incurred upon the property in consequence of the loss, in order to preserve the property until he can interpose; there seems to be no reason for investing him with the power of forcing the underwriter into a long series of future adventures and

is of opinion that the underwriters are liable for an excess of expense over the salvage under the ordinary authority to labor, travel, &c., for the preservation of the property. Emerigon, on the contrary, is of opinion, that this clause in the policy is intended to bind the insurers only commensurately with the salvage, in accordance with the provision of the French Ordinance just cited. Emerigon, c. 17, s. 7, ss. 5.

[1] The remark of Parsons, C. J., in Coffin *v.* Storer, 5 Mass. R. 252, at p. 255, is in accordance with the proposition in the text.

enterprises, as owner, against the promptly expressed disclaimer of the latter.

This question is probably not often material, but it may be in peculiar cases of much importance; and I am the more induced to specify this limit to the effect of an abandonment, because in the ordinary phraseology, a valid abandonment is said equitably to invest the underwriters with all the rights, and subject them to all the liabilities, of ownership, so far as they insure the property; and it unquestionably has, in general, this effect.[1]

Jurisprudence has not thrown much light upon the question, how far the underwriters are liable for expense incurred to save the ship or goods beyond the amount of the salvage. An early nisi prius case before Lord Hardwicke, C. J., presented this question, which was not, however, decided. It was a policy upon corn insured without the exception of average, which had not been then introduced.[2] The expense of saving the corn amounted to £80, and its proceeds to £67. Lord Hardwicke ruled, upon the ground of usage, that no credit was to be given to the underwriter for salvage, and that he was liable to pay the full amount of his subscription.[3] It does not appear that the assured claimed the £13, being the excess of the expense over the salvage.

1727. *Whether the underwriter on goods is liable on abandonment for freight, due, and paid by the assured,* on account of the goods, *exceeding their value?*

This question differs from that above considered relative to the expense of salvage. In that case the incurring of the expense was a direct consequence of the perils insured against; whereas the excess of the freight over the value of the damaged goods is a remote, and merely incidental, indirect consequence at most.

[1] Lord Ellenborough is reported to have ruled, that the ship-owner is liable for supplies furnished to the master, on an occasion justifying the advance, to extricate a captured ship, though the owner had abandoned the ship on account of the capture. He disclaimed giving any opinion whether the owner could recover the amount from his underwriters. Mitchell *v.* Glennie, 1 Stark. R. 230.

[2] See Marsh. Ins. 567.

[3] Boyfield *v.* Brown, 2 Str. 1065.

The assured on goods may agree for freight, on condition of their being delivered sound, or make a condition that the freight on delivery shall not exceed the proceeds of the goods; or he may pay freight in advance, or he may ship by his own vessel, so that the question of there being freight at all, and, if so, its amount, and the conditions on which it is to be presumed to be payable, are all matters of inference or supposition. The goods may not be worth the freight, even if they arrive sound at the port of destination. The insurer of the goods is an entire stranger to the contract for freight, until he claims the salvage. Until he makes such a claim, that is, until it appears that the salvage exceeds the freight, the maxim of Lord Mansfield, subsequently repeated by other judges,[1] that the "underwriter on the goods has nothing to do with freight," seems to be applicable. For these reasons I conclude, that

The insurer on goods is not liable for the excess of freight over the value of the goods, unless he has accepted the abandonment; and he is liable for freight only in consequence of his asserting his claim to salvage.[2]

1728. *On abandonment by a mortgagee* or other assured, whose interest in the insured subject is a lien, or on payment of a total loss to such an assured without any abandonment, and without any disclaimer of salvage by the underwriter, where the mortgager or other obligor has no interest in the insurance, *the debt*, or obligation, *or a proportional part thereof*, secured by the mortgage, or other pledge, *is equitably transferred to the underwriters as salvage.*[3]

1729. *Upon payment of a loss on a policy in favor of a creditor upon the life of his debtor*, as security for his debt, where the debtor has no interest in the insurance, *the debt*, or proportional part thereof, *is equitably transferred to the underwriters.*[4]

[1] See supra, p. 405, No. 1718.

[2] Boyfield *v.* Brown, 2 Str. 1065; supra, p. 419, No. 1727, ruling per Lord Hardwicke, approving the verdict of the jury, is in accordance with this proposition.

[3] Carpenter *v.* Washington Ins. Co., 16 Peters's Sup. Ct. R. 495; and see supra, No. 1511, 1512, 1712.

[4] Godsall *v.* Baldero, 9 East, 72; and see supra, s. 3, No. 1515.

1730. *It is the general effect of a valid abandonment, to put the acts of persons, in whose care the subject may be, at the risk of the underwriters.*[1]

SECTION XVIII. EFFECT AS TO CONDUCT OF AGENTS.

1731. *By abandonment, the assured becomes the trustee and agent of the underwriters* for taking care of the ship, cargo, or other subject abandoned, and its proceeds so far as the same remain subject to his control.[2]

1732. *So also, on abandonment, the master or other agent of the assured who has charge of the subject at risk, becomes agent of the underwriters, to the effect that his acts are at their risk and for their benefit, from the time to which the abandonment has reference,* so far as the subject is covered by the insurance.[3]

Mr. Justice Washington ruled, that after the loss, until an abandonment is made, this responsibility of the underwriters is limited to the acts of the master and other agents done in good faith, and in the discharge of their proper duty, and does not extend to fraudulent conduct, nor to acts done beyond and out of the course of their duty and agency:

As an attempt to rescue a captured ship before the abandonment.[4]

In a case in Massachusetts, under a policy in which the risk of barratry was excepted, the conduct of the master was suspected to be fraudulent prior to the abandonment, and proved to have been so subsequently to it, and his fraud was held by Parker, C. J., and his associates to be at the risk of the assured, no express discrimination being made by the court between his prior and subsequent acts in this respect.

The ship was stranded on the 28th of December, in North

[1] See infra, s. 18.

[2] Curcier *v.* Philadelphia Ins. Co., 5 Serg. & Rawle's R. 113; and see cases generally.

[3] Lee *v.* Boardman, 3 Mass. R. 238; Gardiner *v.* Smith, 1 Johns. Cas. 141; Jumel *v.* Marine Ins. Co., 7 Johns. R. 412; and see cases generally.

[4] Dederer *v.* Delaware Ins. Co., 2 Wash. C. C. R. 61.

Carolina, at a place called "The Washwoods," and the cargo advertised at Norfolk, about forty miles off, January 3d, to be sold at the Washwoods on the 11th, and an abandonment was made of the cargo on the 8th of the same month in Boston. The sale being made accordingly, and the proceeds being embezzled by the master, the question was, whether the loss was total and justified the abandonment, the position being assumed by Mr. J. Putnam, in giving the opinion of the court, that, "if there had been a necessity for the sale, the law would have constituted the master the agent of the underwriters."[1]

At subsequent trials of the same case, it did not turn upon one or the other party being at the risk of the master's fraud, but it seems to be assumed that, if the sale had been justifiable and necessary, the conduct of the master after the disaster would have been at the risk of the underwriters. And the doctrine runs through the jurisprudence on this question generally, that the abandonment has its entire effect in reference to the enhancement or mitigation of the loss by the conduct and management of agents, retrospectively from the date of the loss on account of which the abandonment is made, caused by fraudulent or honest conduct, as well as judicious or injudicious management.[2]

The risk has been held to be that of the underwriters,

In case of the master's neglect to appeal after condemnation on capture:[3]

And in case of the proceeds of the abandoned property coming into the hands of the agent of the assured in Matanzas, the question being as to his solvency:[4]

[1] Bryant *v.* Commonwealth Ins. Co., 6 Pick. R. 131. This same case came before the court five years afterwards, on a motion to set aside the third verdict of the jury for the plaintiffs, which was set aside on the ground that the sale was not necessary, and that the verdict was against both law and evidence. 13 Pick. R. 543.

[2] Columbian Ins. Co. *v.* Ashby, 4 Peters's Sup. Ct. R. 139; Mitchell *v.* Edie, 1 T. R. 608; Hudson *v.* Harrison, 3 Brod. & Bing, 97; Per Thompson, J., in United Ins. Co. *v.* Scott, 1 Johns. R. 106, at p. 110.

[3] Gardere *v.* Columbian Ins. Co., 7 Johns. R. 514.

[4] Miller *v.* De Peyster, 2 Caines's Cas. 301.

And in case of sale of a vessel by the master at New Orleans, which had been damaged to more than half of its value and abandoned.[1]

The risk of the conduct of the master, and of his management of the property abandoned, is imposed upon the underwriters by abandonment only so far as the enhancement or diminution of the loss, and the liabilities of owners, as such, are concerned.

A cargo and freight being insured by one set of underwriters, and the ship by others, on total loss by capture, an abandonment was made to the different underwriters, and accepted, and the property was assumed by them respectively. Both ship and cargo were released, and the master proceeded to Kingston in Jamaica, the ship's port of original destination, where the cargo came to the hands of the consignees, namely, the master of the vessel and a mercantile house at that place. A part of the proceeds of the cargo was applied by the consignees to the necessary repairs and restoration of the vessel, and the remainder to the expense of a new and different outfit of it as a privateer. The abandonees of the cargo demanded of those of the ship a reimbursement of the amounts so applied. It was adjudged that they were liable for the amount necessarily expended in repairing the vessel, but not for what had been expended in fitting it out as a privateer.[2] That is, they were liable to the same extent as owners generally are, excepting that the different underwriters, to whom the ship was abandoned, were liable severally, and not jointly.

1733. *The acts of the master will be nothing the less at the risk of the underwriters*, so far as the salvage is thereby affected, *though the policy stipulates against abandonment within six months after the disaster.*

It was so held in New York, in case of a compromise by the master with the captors within the six months, by his relinquishing both ship and cargo to them for about a quarter of their value.[3]

[1] Center *v.* American Ins. Co., 7 Cowen, 564.

[2] United Ins. Co. *v.* Scott, 1 Johns. R. 106.

[3] Clarkson *v.* Phœnix Ins. Co., 9 Johns. R. 1.

1734. *The underwriters are entitled to the benefit of the acts of the assured or the master, and of others acting as his agents or in his behalf.*

1735. The foregoing propositions relate to an agent appointed by the assured, or authorized by the emergency, to take care of the property, and save it, and forward it to its destination to a foreign consignee, or merely deliver it to the assured. But *in the case of an agent appointed by the assured as consignee and commercial factor, with authority to trade and dispose of the property, his acts* done in such capacity *will not be at the risk of the insurers, any more than would be those of the assured himself,* in like circumstances.

A policy provided that the insured subject might assume the Spanish character, and it was documented as that of a Spaniard, who was the captain. The vessel having been captured, and thereupon duly abandoned, was subsequently restored, when the Spanish captain went off with it, and gave no account of it. It was held in Massachusetts, by Parker, C. J., and his associates, that the underwriters were not answerable for this loss.[1] In such case the underwriter evidently ought to be liable for the damage and expense caused by the capture and proceedings thereupon, even though the fraudulent captain may have paid such expense himself. But the subject of the policy had come to the hands of the party whom the assured himself had authorized to hold it, not in capacity of master merely, but as owner. The case is similar to an insurance on goods sold deliverable to the vendee in a foreign port, [to whom the goods are delivered after capture, abandonment, and restoration; but who fails to account for them. In such case, if the loss is adjusted as total, the value of the property in the hands of the consignee, ostensible owner, or vendee, is properly so much salvage. The language of the court in New York is in accordance with the above distinction, as to the capacity in which the agent acts, and the authority under which he acts; for they say, in case of total loss, "the disposition of the goods saved, as made by the consignee, while he acts bonâ fide,

[1] Smith *v.* Touro, 14 Mass. R. 112.

is at the risk and for the benefit of the insurer;"[1] implying that his fraudulent acts are still at the risk of the assured, since he is the party whom the assured has subrogated in his place for the very purpose of disposing of the property, a delivery to whom, or possession by whom, for that purpose, is a delivery to or possession by the assured as trustee for the underwriters.

1736. *The responsibility of the master or other agent in charge of the insured subject, to the assured and insurers, does not cease on its condemnation in a foreign prize court. They have the right to claim and adopt his purchase of the property at a sale under the order of such a court, though he professedly purchases on his own account. The underwriters have the same right to claim the benefit of a purchase made by the assured.*

Kent, C. J., gave an elaborate opinion on this subject in New York. It was a case of the condemnation and sale of a cargo at Malaga, which was purchased by a house there at the request of the master, "for the benefit of whom it might concern." An abandonment had been made and a total loss paid in New York. The cargo was resold at a profit, which was claimed by the assured on the ground that the condemnation and sale of the property had terminated their responsibility to the underwriters. But the court said: "If after capture and condemnation the owner recovers his captured ship, the insurer can be in no other condition than if she had been recovered or taken before condemnation." Though the title to the property is thus changed, yet, if the assured is purchaser, "and still claims a total loss from the insurer, he must tender him the benefit of the purchase." Livingston, J., dissented, and Thompson, J., gave no opinion.[2]

[1] Gardiner *v.* Smith, 1 Johns. Cas. 141.

[2] United Ins. Co. *v.* Robinson, 2 Caines, 280; S. C. in Error, 1 Johns. R. 592. Mr. Chief Justice Kent cited Ord. Louis XIV. tit. Insurance, a. 66, 67; Code de Commerce, l. 2, tit. 10, s. 3, a. 206; 2 Valin, 59, 60; 1 Emerigon, 464, c. 12, s. 21; 2 Burr. 699. See also Jumel *v.* Marine Ins. Co., 7 Johns. R. 412.

SECTION XIX. EFFECT OF THE ABANDONMENT OF THE SHIP AS TO FREIGHT.

1737. *Under the French Code and jurisprudence an abandonment of the ship gives to the underwriters the benefit of the freight pending at the time of the loss.*

This rule arises probably from the prohibition of insurance of the freight of the vessel as well as of the profits on cargo.[1]

This subject has been much discussed in France. Valin[2] was of opinion, that the freight earned during the risk should go, as incident to the abandonment of the ship, to compensate for the diminution of its value subsequently to the commencement of the risk.

Emerigon[3] is of opinion, that an abandonment of the ship should carry also the right to freight earned by the delivery of goods at an intermediate port previously to the loss. It was, however, provided by an ordinance, that only the freight pending and to be earned at the time of the loss, should go to the underwriters on the abandonment of the ship.[4]

1738. *In the jurisprudence of England and that of the United States*, the effect of an abandonment of the ship in respect to the freight is very different, as we shall see; but they coincide in respect to *freight earned prior to the loss*, which *does not go by abandonment to the underwriters on the ship.*

The transfer by abandonment is analogous to that by mortgage, where the mortgager is entitled to the freight earned before the mortgagee is in possession.[5]

1739. So *if the* original *ship* becomes innavigable, and *is abandoned* to the underwriters, *and the cargo is forwarded* to the port

[1] Boulay Paty, Cours de Droit Com., tom. 3, p. 481, ed. 1822, tit. Des Ass. s. 13. At the time of compiling the new code, the question of permitting the insurance of freight and profits was very much discussed; the former prohibitions were, however, continued.

[2] Tome II. p. 115, Des Ass., art. 47.

[3] Tome II. p. 222, c. 17, s. 9.

[4] Boulay Paty, Cours de Droit Com., tom. 4, p. 393.

[5] Chinnery *v.* Blackburn, 1 H. Bl. 117, n.

of destination *by another* at less than the freight originally agreed on for the whole voyage, *whereby freight pro ratâ is saved* for the part of the voyage performed by the original ship, *such pro ratâ freight does not go as salvage with the ship*, either in England or the United States, but belongs to the ship-owner, or goes as salvage to the underwriters on freight.

A ship, upon a voyage from Newfoundland to Lisbon, was captured, whereby the voyage was broken up, though the ship was recaptured and brought to England. The ship was abandoned to the underwriters, but a freight pro ratâ being due for the part of the voyage performed before the capture, this freight was considered to be due to the owners, and no question was made as to its belonging to the underwriters, to whom the ship had been abandoned.[1]

1740. *In* the jurisprudence of *England, the abandonment of the ship includes the pending freight in case the ship proceeds in* the prosecution of *the voyage after the loss*, of whatever kind, for which the abandonment is made.

In English jurisprudence, an inference of the effect of an abandonment of the ship as to freight is made from that of other transfers.

The owner of a ship, having on the 17th of August entered into a charter-party to carry a quantity of tar from Stockholm to Plymouth, on the 26th of the same month, and before the ship sailed on the voyage, executed a regular bill of assignment of the ship to Henry, the master, and about five months after the ship had sailed, the voyage being still pending, he assigned the bill of lading to one of his creditors, Hamilton, as security for a debt. The vessel having performed the voyage, the question arose, whether the freight was equitably due to Henry, to whom the ship had been assigned, or to Hamilton, to whom the charter-party had been assigned. Heath, J.: "Hamilton could not be in a better situation than the original owner was at the time of assigning the charter-party, and HE could not, after the assignment of the ship, prevent Henry from receiving the debt." Lawrence, J.: "The

[1] Luke *v.* Lyde, 2 Burr. 882. See remark of Le Blanc, J., 4 East, 44.

right to the freight subsequently accruingmust b elong to the assignee of the ship, as incident thereto." [1]

While a ship was on a voyage from Portsmouth to Port Mahon, the owner transferred her on the 14th of September, and she arrived at Port Mahon on the 24th of October following. The owner became bankrupt, and a question arose whether the freight due at Port Mahon belonged to the person to whom the vessel was transferred, or to the assignees under the bankruptcy of the original owner. Lord Ellenborough, C. J.: "We cannot say that the covenant [of charter-party] is transferred to the assignees of the ship, by the assignment of the property in the ship, in the same manner as certain covenants are said to run with land." And the freight was accordingly held to belong to the assignees under the bankruptcy.[2] This case accordingly seems to distinguish the freight accruing on a charter-party from the ship as a transferable subject.

The effect of an abandonment of the ship as to the pending freight, was frequently presented and elaborately argued by counsel in England, in the cases arising out of the Russian embargo of 1800.[3] But this question was not definitely decided, until it subsequently came before the King's Bench and Exchequer Chamber, in a case of capture on a voyage from Rio Janeiro to Liverpool, on abandonments of the ship and freight to the underwriters on each respectively, accepted by each, and a total loss paid on both interests. The ship and cargo were recaptured and brought into London, and freight thus earned, and ship and cargo restored, on payment of salvage to the recaptors. The question thereupon arose as to the right to the net freight so accruing. The Court of King's Bench adjudged it to the insurers of the ship. Bayley, J., dissenting, and being of opinion that it should go to the insurers on freight.[4]

[1] Morrison *v.* Parsons, 2 Taunt. 407.

[2] Splidt *v.* Bowles, 10 East, 279.

[3] Thompson *v.* Rowcroft, 4 East, 34; Leatham *v.* Terry, 3 B. & P. 479; M'Arthur *v.* Abel, 5 East, 388; Ker *v.* Osborne, 9 id. 378; Sharp *v.* Gladstone, 7 id. 24.

[4] Case *v.* Davidson, 5 M. & S. 79.

The same case was brought before the Court of Exchequer Chamber, where Dallas, C. J., giving the opinion of the court, said: "The case seems to result in this, as in every other case of transfer; the freight follows the assignment of the ship;" and as an abandonment is merely an assignment that is not modified by any agreement of the parties so as to distinguish it, in this respect, from any other asssignment, "the consequence is, that the underwriters on the ship under an abandonment are entitled to the freight."[1]

But in case of insurance and an abandonment of freight, on account of loss of the original cargo, and no abandonment of the ship, on a voyage from Jamaica to England, the underwriters were held by Lord Ellenborough and his associates to be entitled to salvage on freight earned by shipping another cargo in Cuba for the same destination, "deducting the expense of loading the cargo, and the wages of the crew during the loading."

The same doctrine has been adopted by a majority of a court in Scotland. Insurance being made on a ship in one company, and its freight in another, on a voyage from Quebec to England, a total loss occurred on the ship during the voyage, and on her being brought into Liverpool with her cargo on board, the assured abandoned and recovered against the underwriters for a total loss of the ship. The whole freight of the cargo of timber had been paid over to the assured. It was adjudged, that, in settling the total loss of the ship, the assured was bound to account for and credit to the underwriters the freight. It was held in Scotland, by Hope, C. J., and Lord Cockburn, J., Lord Moncrieff, J., dissenting, that the assured was entitled, thereupon, to recover for a total loss of freight against the underwriters on that interest.[3]

But in case of insurance on freight in England, and an abandonment of that interest, where the ship is not insured, or being

[1] Davidson *v.* Case, 2 B. & B. 379; S. C., 8 Price, 542; S. C., 5 Moore, 116.

[2] Barclay *v.* Sterling, 5 M. & S. 6. Mr. Arnould, Marine Ins., Vol. II. p. 1152, speaking of the American rule on this subject, says "it is more free from objection than the English."

[3] Turner *v.* Scottish Mar. Ins. Co., February, 1851, Assurance Magazine, (London,) April, 1852, p. 285.

insured is not abandoned to other underwriters, the underwriters on freight have been there held to be entitled to salvage, by taking another cargo instead of the one lost.[1]

The English jurisprudence accordingly has, in a still greater degree, the abnormal operation already noticed in the American;[2] namely, that the contract of the assured with the underwriter on freight may be materially affected by the fact of his being insured, or not being so, on the ship.

1741. The irregularity is essentially remedied *in the United States*, where *an apportionment is made of the freight pending at the time of a constructive total loss of that subject, by assigning the proportion belonging to the part of the voyage prior to the loss*, and then or eventually becoming due, *as salvage to the underwriter on that interest, and the proportion belonging to the part of the voyage subsequently performed by the ship, to the owner, or his underwriters on the ship*, to whom it is abandoned. And there does not appear to be any practical difficulty in making apportionment, this being nothing more than an estimate of pro ratâ freight, which estimate has been frequently made, from the time of Lord Mansfield's decision in Luke *v.* Lyde[3] to the present. In that case, which was one of capture and recapture, the freight was apportioned between the underwriters on the ship and the ship-owners.

The question occurred in New York, under an abandonment of a ship insured from Bangor, in Wales, to New York; and abandoned on account of sea-damage, the abandonment being accepted and a total loss paid. The ship, after being refitted at Ribadeo, in Spain, into which port she had put of necessity, performed the voyage, and earned freight. The question was, whether the whole freight should go to the underwriters to whom the ship had been abandoned, or only a proportional part. In the Supreme Court, Mr. Justice Kent (afterwards Chief Justice and Chancellor) was of opinion, that "the growing freight must pass with the ship for want of a precise rule of apportionment;" and Benson, J., agreed

[1] Barclay *v.* Stirling, 5 M. & S. 6.

[2] Supra, No. 1648, p. 350; and No. 1657, p. 357. [3] 2 Burr. 828.

with him. But the other three judges were in favor of an apportionment, and such accordingly was the decision,[1] which was affirmed by the Court of Errors.[2]

A case that soon after occurred in the same State, in which the ship and freight were abandoned to the respective underwriters on each, on account of a capture which took place after eight ninths of the voyage insured had been performed, afforded a striking illustration of the equitableness of the former decision; and the court accordingly adjudged eight ninths of the freight eventually earned to the insurers on that interest, and one ninth to the insurers on the ship.[3]

This doctrine has been fully established by the subsequent jurisprudence in New York,[4] and by Mr. Justice Washington, in the Circuit Court of the United States,[5] and in Maryland,[6] and in South Carolina.[7]

The same doctrine prevails in Massachusetts. Under an abandonment of a ship that put into England in distress on a voyage from Holland to the United States, Mr. Justice Putnam, giving the opinion of the Supreme Court, said, as the property in the ship remains in the assured until the time of the loss, "her earnings belong to him till that time if he stands his own insurer for the freight, otherwise to the insurer on the freight."[8]

Such is the doctrine fully established in the United States; and admitting that there is no difficulty in making an apportionment of freight, as there certainly is not any, the reasons in favor of it are very strong. There seems to be no cogent reason why the under-

[1] United Ins. Co. *v.* Lenox, 1 Johns. Cas. 377; S. C., 3 Caines's R. 251.

[2] S. C., 2 Johns. Cas. 443.

[3] Leavenworth *v.* Delafield, 1 Caines's R. 573.

[4] Davy *v.* Hallett, 3 Caines's R. 16; Marine Ins. Co. *v.* United Ins. Co., 9 Johns. R. 190; Center *v.* American Ins. Co., 7 Cowen, 564. See also the remarks of C. J. Kent, in Livingston *v.* Columbian Ins. Co., 3 Johns. R. 49.

[5] Simonds *v.* Union Ins. Co., 1 Wash. C. C. R. 443; and see Peters *v.* Phœnix Ins. Co., 3 Serg. & Rawle's R. 25.

[6] Kennedy *v.* Baltimore Ins. Co., 3 Harris & Johns. 367.

[7] Teasdale *v.* Charleston Ins. Co., 2 Brevard's (S. Car.) R. 190.

[8] Coolidge *v.* Gloucester Mar. Ins. Co., 15 Mass. R. 341.

writer, to whom the ship is abandoned, should be entitled to the advantages accruing from what it had previously done towards earning freight. It is only required of the assured to abandon the ship free of encumbrance. The underwriter is not entitled, in consequence of the abandonment, to an assignment of the charter-party. If the assured transships the goods, and completes the earning of freight, by another ship, the insurer to whom the original ship is abandoned has no right to object. The terms of the charter-party may prevent this; but, as the charter-party is a contract between other parties, the underwriters are not entitled to the benefit of its stipulations. There seems to be no satisfactory reason for allowing the whole freight to the underwriters, unless that alleged by Valin is to be admitted, who considers the freight earned, or what has been done towards the earning of freight, to be a compensation for the diminution of the value of the ship by wear and tear and consumption of provisions; which principle is not applicable in England or the United States, where freight is a distinct insurable interest, contrary to the law in France, where insurance of freight is prohibited.

SECTION XX. ADJUSTMENT. — AMOUNT RECOVERABLE.

1741 a. *The amount for which an incorporated insurance company can be liable on a risk, is sometimes limited by the charter, and the policies of those and other underwriters usually contain stipulations respecting the amount of the liability of the company,* as such, *and* also *of its members* or the subscribers to its stock or funds.

The amount for which an incorporated insurance company is liable is usually limited by its charter to the amount of its capital and effects, and the liability of a voluntary association for insuring, and of its members, may be so limited by the stipulations of the policy.[1] Under a policy for a greater amount than an incorporated insurance company is authorized by its charter to insure on a risk,

[1] Hallett *v.* Dowdall, 9 Eng. Law & Eq. R. (Press of Little, Brown & Co.) 347; S. C., 21 Eng. Law J. R. (N. S.) Q. B. and Exch. 98.

the company is liable to the amount so authorized and not further.[1]

The liability of underwriters may be limited by valuation, as where freight being by the freight-list $26,000, is insured and valued at $20,000, the result is the same as valuing a dollar of the freight-list at twenty twenty-sevenths of the dollar of the policy.[2]

1742. *The assured may recover, under a marine policy, the value at which the subject is insured, and also the amount of expenditures in addition to a total loss.*[3]

This liability is stipulated for by the provision that the assured may labor, travel, and sue for the safeguard and recovery of the insured property, to the expenses of which the insurers agree to contribute,[4] or are liable to do so in virtue of the license without any more specific undertaking therefor:

As in case of expenses to recover captured property, in addition to a total loss of the property in the event of its not being recovered.[5]

In case of detention by an embargo in the port of Copenhagen, and an abandonment of the cargo, the underwriters upon it were held to be liable for a contribution in general average for the expense of landing and storing the cargo, and for the wages and provisions of the crew, in addition to a total loss of the amount insured by the policy.[6]

Expenses by contribution for jettison and other general average expenses, are similar in this respect to those for recovering captured property; and the latter are, indeed, usually adjusted by

[1] Williams *v.* New England Mut. Fire Ins. Co., 31 Maine (1 Redd.) R. 219.

[2] Capen and Bangs *v.* Boylston Ins. Co.; supra, No. 1191.

[3] Potter *v.* Washington Ins. Co. of Providence, 4 Mason's R. 298.

[4] See supra, Vol. I. p. 30, No. 42.

[5] Jumel *v.* Marine Ins. Co., 7 Johns. R. 412, at p. 424; Watson *v.* Marine Ins. Co., id. 57; Lawrence *v.* Van Horne, 1 Caines's R. 276; and see Bordes *v.* Hallett, id. 444; M'Bride *v.* Marine Ins. Co., 7 Johns. R. 431. See also Potter *v.* Washington Ins. Co. of Providence, 4 Mason's R. 298; Le Cheminant *v.* Pearson, and Le Cheminant *v.* Allnutt, 4 Taunt. 367.

[6] Barker *v.* Phœnix Ins. Co., 8 Johns. R. 307.

contribution. In each case the expenditure is to save the property from total loss, an object in which the underwriters only are interested, if the property is fully insured according to its market value; and interested in common with the assured, if it is partly covered at such value.

In case of expenses being incurred on account of the ship, freight, and cargo, or any two of those interests, the underwriters upon each are liable for the same proportionally.[1]

1743. *How far are the underwriters liable for a total loss in addition to a particular average previously paid on the ship, cargo, or freight?* After the loss of a part of the subject in particular average and payment by the underwriters for replacing it, are they liable again in all cases for the loss of the whole subject, including such part, or is the amount of the part so paid for to be struck out of the amount subsequently at risk under the policy, unless there is some provision in the policy, or some new agreement to the contrary?

It has been intimated by Lord Ellenborough, in an obiter dictum,[2] that such liability extends to particular averages generally, without discrimination. It was in case of an insurance on the ship and cargo, and after damage of three per cent. to the ship and five per cent. to the cargo, by accidental stranding in going out of the harbor of New York, both subjects were lost by seizure for a violation of the American embargo of 1808, which loss was not insured against. The decision, which seems to have been erroneous,[3] was against a recovery for the partial loss, because it was followed by a total loss, whereby the prior partial loss became a matter of indifference to the assured; but as Lord Ellenborough thereupon remarked, "actual disbursements made for repairs"

[1] Watson *v.* Marine Ins. Co., 7 Johns. R. 57. In this case it was held that the underwriters were liable in the first instance for the whole expense, and might recover a proportional reimbursement from the other interests; but I do not see why they are so. It does not appear why the underwriters on the cargo may not as well be liable in the first instance for the whole expense, as those on the ship. Each set should surely be liable on their own subject only.

[2] Livie *v.* Jansen, 12 East, 648.

[3] See supra, Vol. I. pp. 673, 674, No. 1136.

prior to the total loss would have presented a case for recovery by the assured for such particular average, unless the repairs were more properly to be considered as covered by the authority to sue, labor, &c., for the safeguard and recovery of the property. Such an opinion, then, being merely an obiter one, and being, besides, put upon the ground of the authority to sue, labor, &c., may be considered as of no weight whatever in reference to our present inquiry.

That case seems to have been relied upon in some degree by Sir James Mansfield, C. J., in giving his decision, and that of his associates, Heath, Lawrence, Chambre, and Gibbs, Justices, in the English Common Pleas, in case of a prior particular average for the repairs of a ship at the island of Jersey, followed by a total loss by seizure in Norway, in the course of the voyage. The Chief Justice, in giving the judgment, remarked: "As to the double loss, this policy of insurance is a very strange instrument, as we all know and feel;" and added, that he had, in practice, known cases in the King's Bench where such expenses had been recovered as an average loss, without any distinction whether it was from damage repaired, or within the words to sue, labor, &c.; and the judgment was for the amount of the two losses.[1] Sir James Mansfield, by his remark, that "the policy is a strange instrument," seems to have considered it to be a circumstance quite unfavorable to its character, that it admitted of the doctrine he was adopting under it; but if there is any ground of objection, it is to the doctrine rather than the instrument, which contains no provision requiring such a construction. The best basis upon which to put the rule, if it have any good basis, is the one which he may have referred to, namely, usage in adjusting losses, though his phraseology does not obviously have reference to such a usage.

It has been held also in another case, in the English Common

[1] Le Cheminant *v.* Pearson, and the same Plaintiff *v.* Allnutt, 4 Taunt. R. 367. This old commonplace complaint against the defects of marine policies is less frequent than it was formerly, and seems never to have had a very good foundation. Vide supra, Vol. I. p. 5, No. 6.

Pleas, that insurers were liable for a partial loss for recoppering, and subsequent total loss.[1]

The underwriters on the ship are, as has been before stated, liable for cumulative losses by particular averages, or by those and a total loss, to an amount exceeding the amount insured by the policy. Their liability for such excess apparently extends equally to insurances on the ship, cargo, and freight, though it is in practice more frequently applied to the ship, and, by the nature of the subject and the kind of measures most frequently requisite to guard against future loss to that and the other subjects, the authority to labor, &c. for its safety is more extensively applicable to the ship, for it very rarely happens that any expense is to be incurred upon the cargo in consequence of the perils insured against, which is similar in character to repairs of the ship, in respect of which latter a very liberal construction doubtless ought to prevail.

In case of insurance on the ship, the amount at risk is undoubtedly the same after repairs as before, but the question is, so far as the repairs are concerned, At whose risk, that of the assured, or that of the underwriters, is the new investment by repairs? By every policy a certain limited amount is insured. By one construction of the contract, the underwriter is liable to the loss of that amount in particular averages successively, or in those and a total loss, again and again during the period of the risk. By the other construction, though the underwriter is liable for the destruction of the entire value of the subject as estimated in the policy, and also the expense incurred to prevent it or any part of it, he is liable to make but one indemnity for the VALUE of the subject.

The ordinary expressions in policies, the construction of which is in question, are, that the underwriters "cause A to be insured," or "insure and cause A. to be insured," or "insure A." a certain sum, on a certain subject, for a certain voyage or period. The phraseology does not, therefore, expressly specify whether the undertaking is to assume and continue the risk to the specified amount during the whole period or voyage, or to assume the risk

[1] Stewart *v.* Steele, 5 Scott's N. R. 927.

of loss to the specified amount. The latter construction seems to be the more obvious of the two, but not so decidedly as absolutely to preclude the former.

An insurance is analogous to an agreement of indemnity, on which, by the prevailing construction, the liability of the obligor is limited to the amount specified, if a sum is specified. Thus, where the obligor in a bond agreed under a penalty of $3,000 to indemnify the obligee against the debts of a certain firm, it was held by Savage, C. J., and Sutherland and Woodworth, Justices of the Supreme Court of New York, that the obligor was discharged on payment of that amount, though it proved to be less than the liabilities of the obligee.[1] An insurance is an agreement of indemnity against certain perils, and causing a person to be insured for a certain sum seems to be a more obvious limitation of the liability to that amount, than a bond in a certain penalty against a description of liabilities, which turn out to exceed it, is a limitation to the amount of the penalty.

The liability of insurers in a single loss is, without question, limited to the amount insured, and the expense of suing, &c., and the payment of the whole amount for a single loss discharges them from further liability, though there may have been no abandonment, which suggests a doubt of their being subject to a greater liability in successive losses, especially as the assured is not required to make an abandonment in any case.

It is held in Louisiana that underwriters are not liable under a fire policy to a loss exceeding the amount insured;[2] and there is greater reason for an enlarged liability under such a policy, since the period of the risk is usually longer.

I cannot, therefore, but think, on consideration of the subject, notwithstanding the import of the general expressions in the cases above referred to, that

[1] Clark *v.* Bush, 3 Cowen's R. 151, and authorities there cited. See also Webb *v.* Dickenson, 11 Wend. R. 62.

[2] Macarty *v.* Commercial Ins. Co., 17 La. R. 366. Some fire policies expressly limit the whole liability to the amount insured, as those of the Merchants' Ins. Co. in Boston.

It is not definitely settled that the underwriters are liable for an amount exceeding that insured, except as expenses to prevent loss, or interest and costs by neglect to make payment.[1]

The objection to liability for loss exceeding the amount insured is of less force in respect to long risks; but the duration merely of the risk does not seem to be of itself sufficient ground for a distinction.

1744. *A total loss, whether of ship, cargo, or freight, is primâ facie that of its gross value or amount.*

In case of loss upon freight, it has been held that the assured is not bound, by a custom, to strike off one third for wages, provisions, and other charges, unless the custom is uniform, and proved, or presumed, to be known to him;[2] that is, *in a total loss of freight, the insurers are liable for the gross amount.*[3] In case of total loss, the underwriters are always liable for the amount of the insurable interest, if covered, and the gross freight is considered to be that amount.[4]

1745. *In almost every case of total loss, the amount which the underwriter is liable to pay either exceeds or falls short of the actual value* of the subject at the time of the loss, since the amount to be paid is the value at which the subject is insured, and this very rarely coincides precisely with the actual value at the time of the loss. Accordingly, if the value of the subject at the commencement of the risk in an open policy, or its valuation in a valued policy, exceeds its actual value at the time of a total loss, or of a loss of an integral part of the subject, the underwriter is liable to pay more than the actual loss to the assured.

1746. *A total loss is that of the amount of the assured's interest, though a part of it is that of an absolute owner, and a part that of trustee*, or pledgee, where the terms of the policy do not exclude proof of one or the other.

[1] I have the less hesitation in doubting the doctrine of Le Cheminant *v.* Pearson, as it is contrary to the opinion of Valin, Com., tom. 2, tit. Du Capitaine, a. 19.

[2] M'Gregor *v.* Ins. Co. of Pennsylvania, 1 Wash. C. C. R. 39.

[3] Stevens *v.* Columbian Ins. Co., 3 Caines's R. 43.

[4] Supra, No. 1238, p. 48.

A policy on cargo and freight was made "for whom it might concern, loss payable to H.," the owner of the vessel and of half of the cargo. H. had agreed to insure for A., who advanced funds for the purchase of the cargo, one half to be on his own account, the whole cargo to be consigned to A., who was to hold H.'s half and also to have the benefit of the policy upon that half and upon the freight, as security for his advances. It was held by Woodbury, J., in the Circuit Court of the United States, on total loss of the ship and arrival of the cargo, that A. was a party to the policy, and interested to the extent of his share of the cargo, and, besides, was interested in the part of the insurance that was applicable to the freight, and the half of the cargo shipped on account of H., to an amount equal to the balance due to him from H. for his advances on H.'s account; and that the loss was to be adjusted accordingly.[1]

1747. *In case of double or over insurance, if the assured has obtained indemnity in full or in part from some of the underwriters, he can recover* either nothing, or *only the deficiency, against the others.*

The underwriters in such case are not further liable to the assured, though they are held to be liable by way of contribution to the insurers who have previously paid the whole, or more than their proportion, of the loss.

1748. *Where the policy provides that the respective underwriters shall be liable for loss only in the proportion of the amount insured by them respectively to the whole amount insured, though some of them voluntarily compromise by paying more than they are legally liable to pay, this does not exonerate the other underwriters,* or reduce the amount of loss for which they are liable.[2]

SECTION XXI. TOTAL LOSS IN FIRE AND LIFE INSURANCE, AND BOTTOMRY.

1749. Under a fire policy the loss is estimated by the expense of repairs, or is the amount at which the property is valued, or, if

[1] Aldrich *v.* Equitable Ins. Co., 1 Woodbury & Minot's R. 272.

[2] Lucas *v.* Jefferson Ins. Co., 6 Cowen, 635.

not valued, that which it is estimated to have been worth before the loss. Accordingly,

Where the subject of a fire policy is so damaged as not to be reparable, the loss is adjusted by deducting from the amount at which it is insured by the policy, its net proceeds, or value in its damaged condition, over and above all the expense of disposing of it.[1]

1750. *The assured in a fire policy being partly indemnified by the municipality* for the destruction of his building, which was demolished to prevent the spreading of a conflagration, *can recover only the excess of the amount insured* by the policy *over that of the indemnity* made by the municipality.[2]

1751. *A reinsurer is not liable for over the amount for which the insurer is legally liable.*[3]

1752. *The amount of a total loss in a policy of reinsurance is not subject to be reduced below the value at which it is stipulated to estimate the property* in the policy of reinsurance, *on the ground of the insolvency of the reassured*, and of his failure to pay the full amount insured by the original policy.[4]

1753. *A total loss in reinsurance*, under a fire policy providing for the estimation of damage according to the cash value of the property, *is the whole amount reinsured*, not exceeding the whole value of the reinsured subject in the policy of reinsurance, and not the proportion which the amount reinsured bears to that originally insured; and evidence of a custom so to limit the amount of the loss is held by Mr. Justice Sandford, of New York, not to be admissible.[5]

[1] Portsmouth Ins. Co. *v.* Brazee, 16 Ohio R. 81. See as to an adjustment of a loss on a fire policy, Smith *v.* Columbian Ins. Co., supra, No. 1484.

[2] Pentz *v.* Receivers of the Ætna Ins. Co., 9 Paige's Ch. R. (N. Y.) 569.

[3] Heckenrath *v.* American Mut. Ins. Co., 1 Barbour's Ch. R. 363.

[4] Hone *v.* Mutual Safety Ins. Co., 1 Sandford's City of New York Sup. Ct. R. 137; Mutual Safety Ins. Co. *v.* Hone, 2 Comstock's R., Court of Appeals, N. Y. 235.

[5] Hone *v.* Mutual Safety Ins. Co., 1 Sandford's City of New York Sup. Ct. R. 137; and this decision was confirmed in the Court of Appeals, Mutual Safety Ins. Co. *v.* Hone, 2 Comstock's R. 235.

1754. *Insurers against fire have no right to rebuild in satisfaction of a loss, unless this is stipulated for in the policy.*[1]

1755. *A life policy is always against a total loss only*, which, as in any other insurance, *is either of the whole amount specified in the policy or the whole amount of the interest of the assured.*

If the policy is in favor of a creditor on the life of his debtor, or in favor of any party having a definite, computable interest in the insured life, the amount of the interest being precisely determinable, a total loss by the death of the insured subject is only the amount of such interest, although it may be less than the amount specified to be insured. Gambling is not legal in this any more than in other insurance, and as it is essential to the validity of the contract that the assured should have some interest of a pecuniary nature, it follows, that, if the interest is definitely computable, the amount recoverable in a total loss cannot exceed that of the interest. Accordingly, in adjusting a total loss, the salvage, that is, the debt outstanding at the decease of the insured subject, and the amount received upon it, or on account of it, after his death, are to be taken into the estimate.[2] If a party insures his own life, or that of another in which his interest is obviously indefinite, — as in case of dependence for support and divers others, — the interest is, in effect, valued at the amount insured. Where the interest is strictly pecuniary, and subject to estimation, though contingent and fluctuating, and not satisfactorily appreciable, as the value of the skill and qualifications of the person whose life is insured in conducting a pending business, an express valuation is altogether expedient.

1755 a. *No formal* act of *abandonment* by the borrower to the lender *in bottomry* or respondentia, *is necessary*, since by the terms of the bond the subject on which the loan is made is conditionally transferred to the lender. In case of total loss with salvage according to the terms of the bond, or of non-payment of the bond, when it has become absolute, the borrower is bound to deliver over to the lender, the subject or its remnants, or to

[1] Wallace *v.* Louisiana Ins. Co., 4 La. R. 289.

[2] See supra, page 250, No. 1514, 1515.

account to him for the proceeds of the sale of either, and the lender has a remedy in admiralty to enforce his lien.[1]

If at the end of the risk the subsisting value of the subject or salvage which comes into the hands of the lender exceeds the amount of the loan and marine interest, he accounts to the borrower for the surplus.[2]

If the goods on which a maritime loan is made are transshipped and arrive at the port of destination, the borrower is liable on his bond, and there is no total loss any more than under a policy of insurance in like case.[3]

The rule respecting the apportionment of the salvage in total loss between the borrower and lender, is the same as in respect to the apportionment of a particular average between them.[4] If the risks taken and the rule for the adjustment of losses is agreed to be the same as under a policy of insurance, as they now seem usually to be,[5] it follows that the amount or proportion of the value of the subject on which the lender takes the risks assumed by him, must be the same as in a policy of insurance for a sum equal to that loaned without including any interest, since under such an agreement the estimate necessarily has reference to the beginning of the risk. The case is different where the lender himself effects an insurance on the subject. For this purpose he has an insurable interest equal to the amount of his loan and marine interest, just as the shipper has such an interest in his goods and the profits expected to be made by the adventure; which latter he may insure as well as the invoice value of his shipment, using an apt description in the

[1] See supra, No. 1562, et seq., as to the validity of an hypothecation by the master.

[2] See French Ordinance of Marine of 1681, liv. 3, tit. 5, Des Contrib. à Grosse, and French Code de Com., art. 327, 330. By the ordinance, where the value of hypothecated goods exceeded the amount of the loan, the lender was preferred to the insurers of the interest of the borrower, to an amount not exceeding the loan; but by the construction put upon the code, Boulay Paty, Droit Com., tom. 3, ed. 1822, p. 231, the salvage is apportioned pro ratâ, estimating the interest of the lender to be the loan without any interest.

[3] Ins. Co. of Pennsylvania *v.* Duval, 8 Serg. & R. 138.

[4] See supra, No. 1484 a.

[5] See supra, No. 1168, 1169.

policy to cover the same. But as between the borrower and lender in bottomry and respondentia, they stand in the same relation to each other in the case supposed, in respect to the risks assumed and the amount and adjustment of losses, as the assured and underwriters in a policy of the form referred to in the bottomry or respondentia bond. And this does not seem to be inconsistent with a stipulation that the lender shall have a lien on the whole amount of the subject as security for the payment of whatever may eventually be due to him on his bond, though he assumes the risk of loss upon only a part of its value.

The lender on bottomry given by the master, if he has not forfeited his privilege by negligence, is preferred to a subsequent vendee who had no notice of the bottomry.[1]

A lender on bottomry cannot claim against captors in a Prize Court.[2]

[1] The Draco, 2 Sumner's R. 157.

[2] The Mary, 9 Cranch's R. 126; The Francis, 3 id. 420.

CHAPTER XVIII.

EXCEPTED LOSSES.—THE MEMORANDUM.

1756. Commercial policies contain *exceptions of losses*, which have already been enumerated,[1] specifying the rate of loss under which the underwriters are not liable, *on particular articles, or on any article whatever.* These exceptions were formerly introduced, and still are in some forms of policy, under a "memorandum" or "N. B.," and hence the list of them is sometimes signified by the term "memorandum;" and the articles are denominated "memorandum articles."[2]

1757. *In English policies certain articles are "free from average, unless general, or the ship be stranded;"* and *certain others, "free from average under five per cent.*, and *all other goods*, the ship, and freight, *under three per cent.*, unless general, or the ship be stranded;" but general averages are to be paid by the underwriters, in the same manner as if the policy had not contained this memorandum.

[1] Chap. 1, s. 5.

[2] The memorandum stipulating that certain articles shall be free from particular average, and others not subject to particular average under a certain rate per cent., unless the ship be stranded, was introduced into the London policies in May, 1749. But the condition as to stranding was struck out of the policies of the London Assurance Company about five years afterwards, 7 T. R. 210, and the Royal Exchange Assurance Company soon followed their example. Stevens on Average, Part IV. art. 1. It was omitted, it seems, in consequence of a decision of Mr. Chief Justice Ryder on its construction. 3 Burr. 1550. The Royal Exchange Assurance Company has since modified the memorandum so as to read, "free from average on corn, &c., unless general or otherwise specially agreed;" and the London Assurance Company has also reinserted the clause as to stranding. 2 Arnould, Mar. Ins. 852, n.

The running, or, as they are called, "open" policies at Buffalo, on canal transportation, instead of limiting partial loss on particular articles, stipulate against payment of any loss under a hundred dollars on any one boat load.

Some American policies also make stranding one of the conditions of a particular average being payable.[1]

1758. This gives rise to the questions, *What is stranding?* and to what extent does it defeat the exception?

In one case the jury found that "stranding meant where the vessel took the ground and bilged, so as to be incapable of proceeding on her voyage;"[2] in another, where the vessel was driven aground in the Thames, and remained aground an hour, it was considered not to be a "stranding" within the memorandum.[3] But in other cases it has been held otherwise. Where a vessel struck upon a rock and remained fixed for fifteen or twenty minutes, and then was floated, it was held to be a stranding within the meaning of the policy.[4] And it was held to be a stranding also where the ship was driven upon a bank, and remained there for some time, and was then floated.[5] Where the vessel ran upon piles, and rested until they were cut away, it was considered to be a stranding.[6] But in case of a vessel's touching upon a rock, and resting only a minute and a half, it was held not to be a stranding.[7] Where the vessel, being fastened by a rope to the pier of the dock, took the ground, it was considered to be a stranding within the meaning of the policy.[8] And Lord Kenyon was of opinion, that a voluntary stranding of the vessel bonâ fide, was a stranding within the meaning of the memorandum.[9]

The question has been much discussed, whether a stranding comes within the memorandum where vessels usually take the ground at low tide in the ordinary course of the navigation; and the doctrine adopted on this subject is, that where there is nothing extraordinary in the stranding, it is not such within the memorandum.

Under a policy on staves, potashes, and flaxseed, on board of

[1] See c. 1, s. 5; also Lake *v.* Columbian Ins. Co., 13 Ohio R. 48.

[2] 7 T. R. 208.

[3] Baring *v.* Henkle, Marsh. Ins. 240.

[4] Baker *v.* Towry, 1 Starkie, 436.

[5] Harman *v.* Vaux, 3 Camp. 429.

[6] Dobson *v.* Bolton, Park, 177.

[7] M'Dougle *v.* Royal Exch. Ass. Co., 4 M. & S. 503; 1 Stark. 130; 4 Camp. 283.

[8] Thompson *v.* Whitmore, 3 Taunt. 227.

[9] Bowring *v.* Elmslie, 7 Term R. 216, n.

the ship Alexander, from the United States to Liverpool, the ship sailed on the voyage, in January, 1814, and arrived at Liverpool, and was laid aground in the river Mersey, on a bank on the north side of the pier of the dock-basin; at flood tide she floated again, and was taken up to the pier of the basin and there fastened by a rope to the shore, with the intention that she should take the ground when the tide fell. She did accordingly take the ground astern at the falling of the tide, and on the water leaving her, she fell over on her side with such violence, that she bilged and broke many of her timbers, and lay upon her beam ends. When the tide rose, she righted, with ten feet of water in her hold, by which the potashes and flaxseed were very much damaged. Lord Ellenborough and the other judges of the King's Bench held this to be a stranding within the memorandum, because the ship had been "upon the strand;"[1] but ships, especially those of small size, are not unfrequently so in the ordinary course of the navigation in some ports. The more satisfactory reason for holding this to be a stranding within the memorandum is, that the stranding was extraordinary in the manner or effect, as laid down in the subsequent cases.

A ship and cargo of fish were insured from Newfoundland to Cork, including all risk in craft to and from the vessel. In going up Cork harbor, on the 1st of January, 1819, the vessel took the ground, and remained aground eight hours, until the tide rose. The next day she took the ground again, and remained aground eleven hours before she was again floated. On the third, she was moored at the quay, where she was to discharge, having been the whole time under the charge of a pilot. On the ebb of the tide, she took the ground there, and made a lurch, and lay on her broadside two whole tides, by which the vessel and cargo were much injured. The taking the ground in this manner was no more than was usual in going into Cork harbor. Dallas, C. J., and the other judges of the English Common Pleas decided that this case was not a stranding within the memorandum, being only what was usual in the ordinary course of the navigation. Richard-

[1] Carruthers *v.* Sidebotham, 4 M. & S. 77.

son, J., distinguished this case from Carruthers *v.* Sidebotham,[1] by the circumstance, that in the latter case the vessel was moored out of the usual course and against the express orders of the captain.[2]

In case of a policy upon wheat, warranted free from average, unless the ship should be stranded, from Wisbeach to Wakefield, along a course of improved navigation, when the ship had arrived at Beal Lock, it became necessary, for the purpose of repairing the navigation, that the water should be drawn off. The master moored the vessel in what he thought the most secure place alongside of four others, but when the water was drawn off she grounded on some piles, which were not known to be there, whereby the cargo received damage. It was held by Abbott, C. J. (afterwards Lord Tenterden,) and Holroyd and Best, Justices, to be a stranding within the meaning of the memorandum, because it was out of the usual course, and not to be expected.[3]

Cotton goods were insured from Liverpool to Gibraltar, by a policy containing the same exception. The ship put away for Holyhead on account of tempestuous weather. On entering Holyhead Bay she was observed to strike, but her progress was not perceptibly checked. She had been but a short time moored where the water was then about fourteen feet deep, but at low tide about two feet, her draft being about eight or nine feet, when it was discovered that she had sprung a leak. The cable was slipped, and by working both pumps she was kept afloat until she could be warped into shallower water, when she took the ground at a place seven or eight yards distant from the quay, and about a quarter of a mile from that where she had been moored. She lay for about half an hour, and then, being floated by the tide, was hauled near to the quay. When the tide left her, she was pumped dry, and discharged and repaired. The leak was caused by her striking the fluke of an anchor. At the entrance of the harbor vessels may float at all tides, but when the harbor is crowded, as it was when this vessel came in, some vessels are necessarily

[1] 4 M. & S. 77; supra, p. 444.

[2] Hearne *v.* Edmunds, 1 B. & B. 388.

[3] Rayner *v.* Godmond, 5 B. & A. 225.

brought so high up as to be quite dry at low water. The cargo was again put on board, and she proceeded to Gibraltar, where the cottons were found to be damaged. This was also held by the Court of King's Bench to be a stranding within the memorandum, because it was out of the ordinary course.[1]

Goods being insured free of average, the ship was compelled to put into the harbor of Peel, in the Isle of Man, where, being sharp built, she was lashed to the pier by ropes to prevent her falling over when the tide went out. The fastenings, being insufficient, broke, and she fell over when the tide left her, and the goods were, in consequence, damaged. The harbor of Peel being a tide harbor, all vessels lying in it take the ground at ebb tide. Had she been fastened with ropes of proper strength no damage would have happened, and the ropes by which she was fastened were objected to as being insufficient by the pilot of the port, but the mate of the ship insisted that they were sufficient. On the question whether this was a "stranding" within the construction of the memorandum, it was adjudged by Bayley, Holroyd, and Littledale, Justices, that the vessel's being moored, resting on the ground, was not such a stranding, this being in the ordinary course; but when she had fallen over by the parting of the rope, it was such a stranding, this being extraordinary.[2]

Insurance was effected on thirty-nine butts of Zante currants from London to Hull, under this exception. The ship arrived at Hull at high water, and was moored at the quay. The harbor of Hull is a tide harbor, and at the end of the quay near to it was a bank of stones, rubbish, and mud. When the tide was in, she was hauled near the quay to discharge, and when it was going out she was hauled off to be moored by ropes; but, in consequence of the stretching of the ropes, occasioned by a strong wind, her foreshoe was brought upon the bank of stones and rubbish. No concussion was felt by those on board. In consequence of grounding, she strained, and her seams were opened and admitted water, whereby the currants were damaged. As the tide rose, the seams

[1] Barrow *v.* Bell, 4 B. & C. 736; 7 D. & R. 244.

[2] Bishop *v.* Pentland, 7 B. & C. 219; S. C., 1 M. & R. 49.

closed, and it did not appear that the ship had sustained any injury. Lord Tenterden and a majority of his associates held this to be a stranding within the memorandum, on the ground that it was out of the common course.[1]

Where a vessel entered the harbor of Dunkirk, in which vessels ordinarily take the ground at low water, and was moored as directed by the harbor-master, and there took the ground at low tide, it was held by the English Court of Common Pleas not to be a stranding within the memorandum,[2] in conformity to the principle laid down in the other cases already cited.

A vessel insured on a voyage from Nantez to Dublin, put into Palais on the French coast on account of stress of weather, where the master, during a gale, to avoid going ashore cut his cable, and afterwards put into the port of Sanzon, which is a tide harbor, and, it being at the time low water, the vessel took the ground. It was detained there by the weather and the state of the tides for two months, and during that time took the ground at every tide. On leaving the port the vessel proved to be leaky, and the cargo, consisting of barley and flour, insured free from average unless general or the vessel should be stranded, was damaged. This was held by Lord Campbell, C. J., and his associates, Coleridge, Wightman and Crompton, to be a stranding within the memorandum.[3]

1759. *Under a policy on goods, including risk of craft, free from average, unless general, "or the ship be stranded," it was held, that the insurers were not liable for damage to goods by the stranding of a lighter*, in conveying the goods from the ship to the shore; that is to say, it was not considered to be a stranding within the meaning of the policy.[4]

1760. *Bilging*, as well as stranding, *is introduced into some* American *policies, as* a circumstance *defeating the memorandum*

[1] Wells *v.* Hopwood, 3 B. & Ad. 20.

[2] Kingsford *v.* Marshall, 8 Bing. 458; 1 Moore & Scott, 657.

[3] Corcoran *v.* Gurney, 16 Eng. Law & Eq. R. (Press of Little, Brown & Co.) 461; S. C., 2 Eng. Law J. R. (N. S.) 257; Eng. Jurist, 1157.

[4] Hoffman *v.* Marshall, 2 Bing. N. C. 383.

in respect to losses occasioned thereby, which gives rise to the question, What is "bilging?"

Under a policy exempting the underwriters from "partial loss on hides, grain, &c., and other goods esteemed perishable," except "the damage happen by stranding or bilging," the ship, loaded with a cargo coming under the exception, was thrown on her beam-ends, whereby the seams were opened and water admitted, by which the cargo was damaged; but no plank or timber was broken. It was held in Massachusetts, that this was not a "bilging."[1]

1761. Upon the question, *whether the stranding defeats the exception in regard only to losses occasioned thereby*, or to other losses as well as those, the English reports supply some elaborate cases.[2] In some of the earlier of these cases, it was considered that stranding defeated the exception only in respect to the losses occasioned thereby, or, at least, to those only which could not be distinctly traced to some other cause. But, in a subsequent case, it was held by Lord Kenyon, C. J., and Ashhurst, Grose, and Lawrence, Justices, that the provision was in the nature of a condition, on the happening of which the whole memorandum was defeated, and the underwriters thereby became liable for losses on the memorandum articles, in the same manner as for losses on any others.[3]

It is not distinctly decided, that if a vessel is stranded in one part of the voyage, and in a subsequent part of the voyage, without any connection whatever with the stranding, a loss takes place on a memorandum article, the insurer is liable for such loss; but the opinion of the judges seems to be, that in such case the insurers are liable. *The doctrine adopted in England appears to be, that, after a stranding, the construction of the policy is the same, in respect to all losses on goods on board at the time of the stranding,*

[1] Ellery *v.* Merchants' Ins. Co., 3 Pick. 46. This decision is in conformity to Falconer's definition, who defines bilging to be a fracture in the ship's bilge.

[2] Wilson *v.* Smith, 3 Burr. 1550; Cantillon *v.* London Ass. Co., id. 1553; Nesbitt *v.* Lushington, 4 T. R. 783.

[3] Burnett *v.* Kensington, 7 T. R. 210; S. C., 1 Esp. 416.

whether happening before or after the stranding, as if it had not contained this exception.[1]

The decisions upon this point are of the less importance, since the London and Royal Exchange insurance companies long since struck the provision as to stranding out of their policies;[2] and *in the United States, the forms of policies in common use in New York, and the ports to the south of that place, contain no provision on the subject of stranding. By the common forms* of policies used *in Boston, and* many of the *other ports to the north of New York, the insurers are liable for particular average on the memorandum articles, in case of stranding; but the policy expressly limits their liability to the losses occasioned by the stranding.* The policies of private underwriters in London retain this provision in its old form.

1762. A stranding does not let in a claim for a loss that took place previously, on goods that had been landed before the stranding.[3]

1763. *In Great Britain and the United States the insurers are, in the common form of the policy,* generally, and I believe without exception, *liable for general averages, of however small amount.*

1764. There have been divers decisions on the *construction of particular terms used in the memorandum, such as "corn," "salt," "roots," "furs," &c.*

Under the exception of all particular averages, it has been held in England that malt,[4] pease, and beans come within the description of corn,[5] but that rice does not;[6] and that saltpetre is not included in the term "salt."[7] In New York it has been held that the exception of all particular average on "roots" does not

[1] See 2 Arnould's Mar. Ins. 858.

[2] 7 T. R. 210; Stevens on Average, Part IV. art. 1, p. 208.

[3] Roux *v.* Salvador, 1 Bing. N. C. 526; 3 id. 266. Case of damaged hides sold at Rio Janeiro.

[4] Moody *v.* Surridge, 2 Esp. 633.

[5] Mason *v.* Skurray, Marsh. Ins. 226.

[6] Scott *v.* Bourdillion, 5 B. & P. 213.

[7] Journu *v.* Bourdieu, Park, 174; Marsh. Ins. 224, n. On the decision that saltpetre was not included in salt, the London Assurance Company inserted the article saltpetre in the memorandum in its policies. Hughes, Ins. 142, London ed. 1828; Benecke, London ed. 1824, p. 466, n.; Benecke & Stevens by Phil. 418, n.

discharge the insurers from a loss on "sarsaparilla," though a root; it not being considered a perishable article, to which the reason of the exception makes it applicable.[1] It had been before held, that "deer-skins" were comprehended under the exception of "skins," although it was urged that they did not come within the reason of the exception.[2]

It was held by the same court, that the specification of one species of an article excluded the other species of the same article from the exception of "articles perishable in their own nature." Thus "dry" fish being specified as an article free of particular average, excluded other kinds, as "pickled" fish, from the exception.[3]

In a policy made in New York "free from average on skins, hides, and other articles perishable in their own nature," the subject of insurance was described to be "furs." In the invoice exhibited at the time of effecting the insurance, the articles were described to be skins of the bear, raccoon, opossum, deer, fine-fisher, cross-fox, martin, wild-cat, wolf, wolverine, panther, cub. The voyage was from New York to Hamburg. The ship was stranded near Cuxhaven, but the furs were saved and transported by land to Hamburg, where, owing to sea-damage, they were sold for less than half of what would have been their value had they not been damaged. One question was, whether the whole, or what portion, of the shipment would come under the description of "furs." Whether they came under this description or not would, in the opinion of Mr. Justice Edwards, make no difference as to the application of the memorandum, and he instructed the jury that "fur-skins were an article perishable in their own nature, within the meaning of the memorandum." But the jury gave a verdict in favor of the assured for a total loss, which was in effect saying, that the articles insured did not come under the memorandum. The court refused to set aside the verdict. In giving their opinion

[1] Coit *v.* Commercial Ins. Co., 7 Johns. R. 385.

[2] Bakewell *v.* United Ins. Co., 2 Johns. Cas. 246.

[3] Barker *v.* Ludlow, 2 Johns. Cas. 289.

upon the motion for a new trial, the court said: "There can be no doubt that 'skins' and 'hides,' taken in their largest sense, include every article in the invoice. The assured offered evidence, that, by the understanding of trade in the city of New York, these articles are not considered to be within the terms 'skins' and 'hides;' skins being those where the skin constitutes the chief value, and 'furs' where the value is constituted by the fur. The term 'hides' has been laid out of view, as a term confessedly inapplicable to fur-skins. The enumeration in the invoice is of various classes of animals hunted in our Northern forests, chiefly on account of their fur. The term 'fur' seems to have acquired a sense among men engaged in this commerce, contradistinguished from, and excluding the application of, the general term 'skins.'"[1]

1765. The exception of particular average on "all articles perishable in their own nature," has not been often applied in jurisprudence. Mr. Justice Matthews, giving the opinion of the court, in Louisiana, said, that to hold that this clause "is wholly nugatory would be in direct opposition to a general rule of interpretation, which requires that every clause in a contract is entitled to its full effect, unless such interpretation lead to absurd results. To allow an inquiry in all cases, as to the nature of articles not enumerated, would certainly have a tendency to add to the difficulties which ordinarily occur in suits on contracts of insurance; but the apprehension of that evil will not authorize courts of justice peremptorily to debar such an inquiry."[2] To go out of the enumeration in the policy, however, and introduce additional articles into the exception under this general clause, requires a plain case.

Potatoes have been held to be a memorandum article free from particular average under this general description.[3]

1766. *Under an insurance "free from average except general," or "against total loss only," the distinction of total loss*

[1] Astor *v.* Union Ins. Co., 7 Cowen, 202.

[2] Neilson *v.* Louisiana Ins. Co., 5 Martin, N. S. 289.

[3] Robinson *v.* Commonwealth Ins. Co., 3 Sumner's R. 221; Williams *v.* Cole, 16 Maine (4 Shepley's) R. 207.

from particular average or partial loss is the same as in an insurance upon an article not subject to such clause, where the voyage is broken up in respect to such article, by capture, wreck of the ship, or any other cause than damage to the article, or the destruction of a part of it.

A cargo of fish, says Mr. Chief Justice Parsons, "may as well be abandoned for a loss of the voyage, as a cargo of any other description."[1] "If," says Mr. Justice Washington, "the question turns upon the totality of the loss, unconnected with the deterioration of the cargo in value or a reduction in quantity, there is no difference in the memorandum and other articles."[2] The same construction is adopted by Mr. Justice Storrs, in an elaborate opinion given by him in a case depending in the Supreme Court of Errors in Connecticut.[3]

1767. *An insurance against total loss only, or with the exception of particular average,* the two forms being equivalent,[4]

[1] 6 Mass. R. 119. See also Amory *v.* Jones, 6 Mass. R. 318.

[2] Morean *v.* United States Ins. Co., 1 Wheat. 219. See also Le Roy *v.* Governeur, 1 Johns. Cas. 226; and Maggrath *v.* Church, 1 Caines's Cas. 196; Murray *v.* Hatch, 6 Mass. R. 465, in which case, under a policy against total loss only, the question was respecting total loss by damage to the ship; the decision was against a total loss, but no stress was put upon the exception of average as distinguishing the case, in respect of a total loss, from one under a policy without the exception. It is so assumed in many other cases. See Manning *v.* Newnham, Marsh. Ins. 585; S. C., Park, 260; S. C., 3 Doug. 130; Anderson *v.* Wallis, 2 M. & S. 240; Dyson *v.* Rowcroft, 3 B. & P. 474; Glennie *v.* London Ass. Co., 2 M. & S. 371; Wilson *v.* Royal Exch. Ass. Co., 2 Camp. 623; Parry *v.* Aberdein, 9 B. & C. 411; Treadwell *v.* Union Ins. Co., 6 Cowen, 270.

Insurance being made upon sugar and tobacco free of average at and from Heligoland to London, the ship was wrecked at Heligoland, but the sugar and tobacco were saved in a very damaged state. This was held not to be a total loss. Thompson *v.* Royal Exch. Ass. Co., 16 East, 214. The only ground for the claim of total loss in this case was the loss of the voyage by the wreck of the ship. But as it is not said whether another ship was to be had, or, if so, whether the articles could have been shipped in a condition to have arrived as vendible tobacco and sugar, it does not appear what point was decided in the case.

[3] Poole *v.* Protection Ins. Co., 14 Conn. R. 33.

[4] Brooks *v.* Louisiana Ins. Co., 4 Martin, N. S. 640, 681; S. C., 5 id.

excludes a constructive total loss on account of damage to the article, so long as it remains in specie, and can be transported in the same ship, or another can be had to transport it, *to the port of destination, so as to be there of value, as being the sort of article which it was at the time of being shipped. Otherwise it is a total loss.*[1]

Divers cases go the length of maintaining, that where a remainder of the substance of the article arrives at the port of destination, though the article may have been so destroyed by the perils insured against as to be of no value for the uses of such an article as it was shipped for, still it is only an average loss under this exception; but the better doctrine, and one strongly supported by Lord Abinger and his associates of the English Exchequer Chamber, seems to be as above stated.[2]

The adjudged cases on this subject present so much discrepancy, as to leave it to the discretion of judges to adopt the doctrine that may seem most consistent with general principles.

Where pease were so much damaged, that on arrival they were not worth more than about one quarter of the amount of the freight, it was held not to be a total loss, and it was stated by witnesses to be the general understanding among insurers, that though the goods, on arrival, were found to be of no value, it was still a particular average, and so the insurers were not liable.[3]

Lord Mansfield was of the same opinion, in regard to a cargo of fish which was absolutely spoiled, which yet arrived, and still existed in specie, so that it might be properly called "fish."[4]

530; Murray *v.* Hatch, 6 Mass. R. 465.

[1] Williams *v.* Kennebec Mut. Ins. Co., 31 Maine R. 455.

[2] Vide supra, c. 17, s. 6, and Roux *v.* Salvador, 3 Bing. N. C. 266, before the Exchequer Chamber on appeal from the Common Pleas. In that case Lord Abinger, C. B., examines the preceding cases with keen discrimination, and gives a lucid exposition of the law as stated in the text He says expressly, that "the memorandum does not vary the rules upon which a loss shall be partial or total."

[3] Mason *v.* Skurray, Marsh. Ins. 226; Park, 191.

[4] Cocking *v.* Fraser, Marsh. Ins. 227; Park, 181; 4 Doug. 215. The rule seems to be the same in France; Pothier on Cont. Mar., n. 59, Cushing's Translation; Emerigon, tom. 2, p. 184.

Lord Kenyon said it had been uniformly held, that in order to render the insurers liable under this exception, on account of the degree of damage merely, "the cargo must be wholly and entirely destroyed."[1]

In New York the jury were told, in regard to a loss upon corn that was so much damaged as to have become putrid, that if it was so damaged by the perils insured against as to be "of no value as nutriment for man," the insurers were liable for a total loss; but this opinion was overruled by the court, who decided that, "so long as the corn physically existed, there could not be a total loss" on account of the damage merely; although it was "good for nothing, the insurers were not liable."[2]

A similar opinion was expressed by Mr. Justice Story, who said a loss of ninety-nine per cent. of the value would not constitute a total loss.[3]

It was held in Louisiana not to be a total loss by damage, so long as the article remains in specie so as to bear the same name.[4]

Wheat being insured from Waterford to Liverpool, the vessel, in going down the river from Waterford, struck upon a rock, which occasioned it to fill, and it was run aground to prevent its sinking. The hull of the ship was entirely submerged at high water. The wheat was taken out at different times, and in the course of about four weeks it was landed, and two thirds of it was kiln-dried at Waterford. Some part of the remainder was sold for a mere trifle, and the rest was thrown away, as of no value. Lord Ellenborough and his associates adjudged it to be a particular average.[5] This seems to be a more stringent construction of the memorandum in respect to the assured, than the one adopted in subsequent cases referred to below.

It is stated by Mr. Justice Maule that if it is not "practicable"

[1] M'Andrews *v.* Vaughan, Park, 114; Marsh. Ins. 232.

[2] Neilson *v.* Columbian Ins. Co., 3 Caines, 108.

[3] Robinson *v.* Commonwealth Ins. Co., 3 Sumner's R. 221.

[4] Skinner *v.* Western Fire & Mar. Ins. Co., 19 La. R. 273.

[5] Anderson *v.* Royal Exch. Ass. Co., 7 East, 38.

to carry on a damaged article insured free from average, the loss is total;[1] or if it is "impossible," as the same judge says in another case, and he considers the carrying goods forward to be impracticable and impossible, as a matter of business, where the expense would exceed the value of the article on arriving at the port of destination.

Accordingly, in case of wheat insured free from average unless general or the ship should be stranded, from Odessa to Liverpool, the ship, after being stranded near to Constantinople, and got off and repaired, was again purposely stranded to avoid sinking near to Cork and got off, it was held by Jarvis, C. J., and his associates, Cresswell, Williams, and Talfourd, Justices, of the English Common Pleas, that if the expense of discharging the damaged wheat and drying it, and the excess of freight, for forwarding it to Liverpool over the original freight, and expense of admiralty proceedings, would exceed its value on arriving at Liverpool, it was not "practicable" or "possible," as a matter of business, to forward it, and so was a total loss as distinguished from a particular average.[2]

In case of shipwreck, on a voyage from Trieste to Liverpool, the remnants of a quantity of raisins, figs, and currants, insured free from average, and damaged by sea-water, were sold, the first for something over, the two latter for much less than, the freight of each respectively, and also altogether for less than the whole freight. The cargo was so damaged that it could not have been carried on, and arrived at Liverpool of any value. Lord Tenterden, C. J., speaking of all these articles, said: "This is not a mere loss of the voyage, but in reality a loss of the thing insured."[3] The ship was libelled for salvage, and not restored to possession of the master until about five months after the disaster, and no other could

[1] Moss *v.* Smith, 19 Eng. Law J. R. (N. S.) Com. Pl. 226; cited in Rosetto *v.* Gurney, by Jervis, C. J., 7 Law & Eq. R. (Press of Little, Brown & Co.) 461, at p. 466; from 20 Eng. Law J. R. (N. S.) Com. Pl. 257; and 15 Eng. Jur. 1157.

[2] Rosetto *v.* Gurney, 7 Eng. Law & Eq. R. (Press of Little, Brown & Co.) 461; S. C., 20 Eng. Law J. R. (N. S.) 257; Eng. Jur. 1157.

[3] Parry *v.* Aberdein, 9 B. & C. 411.

have been had. The grounds of the decision are not specifically discriminated by the court in this case, but it presents at least two, each of which seems to have been sufficient; namely, one that the property was destroyed in value; the other, that it could not have arrived at the port of destination in a condition to be vendible, as being of the descriptions of articles which had been shipped.

So where sugars insured under this exception were so damaged that they could not be forwarded, and arrive at the port of destination in a condition to be vendible as sugars, the abandonment was held to be valid.[1]

But in case of insurance on fifty-four hogsheads of sugar, so washed out that not over one hogshead remained, no hogshead, however, being entirely empty, the loss was held not to be a total one under this exception.[2] This remnant of one fifty-fourth part, divided into as many portions, seems to have been so inconsiderable, that it might well have come under the maxim, "de minimis."

In an elaborate opinion upon a case pending in the Supreme Court of Errors in Connecticut, Mr. J. Storrs considers a case very similar to that just stated to be a total loss under this exception. The insurance was on two hundred and eighty hides from Mobile to New York, eighty-nine of which were saved from the wreck of the ship at the Bahama Islands, after submersion seven or eight days, in a state of incipient putrefaction, and wholly unfit to be forwarded to the port of destination, yielding net proceeds over salvage and port charges, $\$39\frac{84}{100}$. Their value at the time of shipment is not stated, but seems to have been $\$400$ or more. Mr. J. Storrs considered this to be a total destruction of the article.[3]

The Supreme Court of Maine held the loss to be total on potatoes which were so damaged as to be a mere nuisance.[4]

[1] Gernon *v.* Royal Exch. Ass. Co., 1 Holt's R. 49; S. C., 2 Marsh. R. 88; S. C., 6 Taunt. R. 383.

[2] Hedberg *v.* Pearson, 1 Holt, 349; S. C., 2 Marsh. 432, and 7 Taunt. 154. See also Glennie *v.* London Ass. Co., 2 M. & S. 371.

[3] Poole *v.* Protection Ins. Co., 14 Conn. R. 33. There was another ground for holding the loss total. On this point the doctrine coincides precisely with Roux *v.* Salvador.

[4] Cole *v.* Bangor Ins. Co., 16 Maine (4 Shepley's) R. 207.

The discrepancy of the preceding decisions leaves us free to choose the doctrine of either set of them, without the imputation of disregarding the authority of precedents, and the doctrine stated above seems to me to be the better one.[1]

1768. *If any considerable part of a memorandum article arrives at the port of destination in specie and of value, it is held not to be totally lost.*

A cargo consisting of 4,406 bushels of Indian corn, 100 barrels of navy bread, and 20 barrels of corn-meal, was insured from Cape Henry to Lisbon, free from average except general. The vessel was wrecked just below Belem Castle, and outside of the harbor of Lisbon, but by the order of the custom-house officers a part, 1,988 bushels of the Indian corn, was saved and carried up to Lisbon, after being dried, where it was sold by the consignee for about one quarter of the price of sound corn; leaving something over the expense of saving and drying it. The supercargo, supposing the expense of saving any part of the cargo would be equal to or exceed its value, considered the wreck as a total destruction of the cargo, and was opposed to taking any measures to save any part of it. Mr. Justice Washington said: "The question is, whether the loss was total, and this can never happen where the cargo, or a part of it, has been sent on by the assured, and reaches the original port of destination."[2]

In a case of a vessel's putting into an intermediate port, where a part of the corn was found to be putrid in consequence of sea-damage, and the remainder was not worth carrying on, it was held in New York to be only an average,[3] but this case may well be doubted.[4]

1769. It is a doctrine favored by some authorities, and more strongly supported by principle, that *a destruction in value of an*

[1] Some of the above cases seem to put a total loss of a memorandum article very much upon the same footing as the exoneration of the shipper from the payment of freight, on account of the destruction of the article. The two cases, though quite analogous to each other, do not seem to depend upon a common principle.

[2] Morean *v.* United States Ins. Co., 3 Wash. C. C. R. 256.

[3] Saltus *v.* Ocean Ins. Co., 14 Johns. R. 138.

[4] See infra, No. 1769.

article is a total loss of it under the exception of average, divers of the preceding cases to the contrary notwithstanding.

In the decisions against total loss, where the value of what was saved of the property did not exceed, by any appreciable amount, the expense of saving and the freight, the construction of the exception seems to have been severe upon the assured. If, substantially, nothing accrues to the assured from the attempt to save the property, he surely ought not to suffer the loss of his indemnity by reason of such an unsuccessful attempt, whether made by himself, or by others, with or without his concurrence. An article in a condition to cost as much to turn it to account as it will fetch, is, in a commercial sense, totally destroyed, and it is the commercial sense that ought to be adopted. The deterioration in value is precisely what the assured seeks indemnity for, and the loss of the whole value is to him, to all intents and purposes, a total loss of the thing; and there are not wanting cases in which it is treated as such.[1]

The phraseology used by Mr. Justice Story, in giving the opinion of the Supreme Court of the United States, implies a leaning to this doctrine. He says: "Nothing short of a total extinction, either physical or in value," will be a total loss of the memorandum articles. "And perhaps even as to extinction in value, where the commodity specifically remains, it might be deemed not quite settled whether it would authorize abandonment."[2]

1770. *Whether, if a memorandum article is so damaged by the perils insured against that it would not be worth freight at the port of destination, it is a total loss?*

In a case before the English Court of Exchequer, Alderson, Parke, and Platt, Barons, were deliberately of opinion, that, if corn is so damaged that it cannot be carried on to the port of destination and arrive of value equal to the freight, and is accordingly sold at an intermediate port, it is a total loss under a policy containing the exception of partial loss.[3]

[1] See Treadwell *v.* Union Ins. Co., 6 Cowen, 270.

[2] Marcardier *v.* Chesapeake Ins. Co., 8 Cranch, 39; and see Aranzamendi *v.* Louisiana Ins. Co., 2 La. R. 433; and Parry *v.* Aberdein, 9 B. & C. 411.

[3] Reimer *v.* Ringrose, 20 Law J. R. N. S., Exch. 175; 4 Eng. Law & Eq.

Such a case seems to be a loss of the voyage, which is a total loss of a memorandum article no less than of others, where the loss is absolute and not constructive; and the destruction of the value of an article by the perils of the voyage for which it is insured, to such a degree that it is not equivalent to the freight for that voyage, where it is caused wholly by its deterioration in value, and in no degree by the state of the markets, that is, where the sound would have sold at the port of destination for an amount equal to that of the invoice value and freight, seems to be *as absolute a loss of the article itself, and of the voyage too, as is possible.*

1771. The loss by a *change of a memorandum article in specie is a total loss, and may be recovered for as such.*[1]

It was held in New York, that a chariot, insured free of average, did not specifically remain, after the loss of the box; for if the box should be replaced, Mr. Justice Benson said, "it could not, with propriety, be said that the chariot was repaired; it would be a new chariot."[2]

1772. *Under insurance upon an article free from average, if,* in consequence of damage by the perils insured against, *it becomes a* mere *nuisance, or endangers the safety of the ship or the lives of the crew, or* is subject to such deterioration that it *cannot be carried to the port of destination and arrive as being the article described in the policy, and is* accordingly landed and *sold* at some intermediate port, *or thrown into the sea, this is a total loss.*[3]

1773. *Where an insurance, free from average, is made indiscriminately upon an article, without any provision in the policy, indicating that a loss is to be adjusted on the different bales, or*

R. (Press of Little, Brown & Co.) 388.

[1] Roux *v.* Salvador, 1 Bing. N. C. 526; 3 id. 266; Murray *v.* Hatch, 6 Mass. R. 465; Skinner *v.* Western Fire & Mar. Ins. Co., 19 La. R. 273; and Parry *v.* Aberdein, 7 B. & C. 411; and see supra, No. 1605.

[2] Judah *v.* Randal, 2 Caines's Cas. 324.

[3] Hugg *v.* Augusta Ins. Co., 7 Howard's U. S. Sup. Ct. R. 595; Parry *v.* Aberdein, 9 B. & C. 411; Poole *v.* Protection Ins. Co., 14 Conn. R. 33; Bangor Ins. Co. *v.* Colman, 16 Maine (4 Shepley's) R. 207.

packages, or parcels, separately, the assured cannot recover for a total loss on account of the destruction of a part of the insured shipment of articles of the same description.

A contrary doctrine was adopted in a case of insurance from London to Exeter, on flax, which was packed in twenty-four packages, though it does not appear that the policy contained any intimation of distinct parcels. The ship having been wrecked, a part of the flax floated ashore, and some more was taken from the wreck. All that came to land was out of the packages, and was sold on account of being damaged, the net proceeds being $2\frac{3}{4}$ per cent. of the value at which it was rated in the policy. Lord Ellenborough and his associates adjudged this to be a total loss.[1]

In some other cases in which this question has been presented and decided against the claim for a total loss, judges have, in distinguishing them from the preceding one, thus incidentally recognized the authority of that case; as Gibbs, C. J.,[2] and Abbott, C. J.[3]

That decision seems not to be supported by a subsequent one on a policy upon sugars and tobacco, at and from Heligoland to London, free from average, in which case the vessel was wrecked at Heligoland, and broken up in consequence, and the cargo landed, but "in a very damaged and unprofitable state," as the reporter states; and as the counsel for the assured says, "the sugars were

[1] Davy *v.* Milford, 15 East, 559. Lord Abinger, in Hills *v.* London Ass. Co., 5 Mees. & Wels. 569, says, the policy was "on sugar, where each hogshead was separately insured and valued." He had confounded this case with Hedberg *v.* Pearson, 1 Holt, 349; 2 Marsh. 432; 7 Taunt. 154. Mr. Arnould, 2 Mar. Ins. 1039, suggests that the policy in Davy *v.* Milford may have contained some such clause. This would not, however, help the case, unless some packages were wholly destroyed, so that no part of their contents was saved, which does not appear to have been proved.

[2] In Hedberg *v.* Pearson, supra.

[3] In Cologan *v.* London Ass. Co., 5 M. & S. 447, at p. 456, where, speaking of Davy *v.* Milford, he says: "I should strongly incline to the conclusion that it was a total loss of a part." And Lord Abinger, in Hills *v.* London Ass. Co., infra, and Mr. Arnould, 2 Mar. Ins. 855, 1040, seem to consider the case of Davy *v.* Milford to be of some authority in Westminster Hall.

mostly washed out of the hogsheads, and the tobacco quite spoiled by the sea-water, and worth nothing to the assured, and he never received any thing." Lord Ellenborough, C. J., and his associates, held it to be not a total loss.[1]

So, under the memorandum, in case of a part of a cargo of wheat stowed in bulk being pumped into the sea during a storm, it was held by Lord Abinger and his associates not to be a total loss of the part pumped out.[2]

Whatever may be the doctrine in England, there is no question that in the United States, the assured has no claim under this exception on account of a partial destruction of the value of the article, or the destruction of a part of the article, whether it may have been in bulk, or in separate parcels or packages, unless the policy indicates that a loss is to be adjusted on different parcels or divisions.[3]

So under an insurance on profits free from particular average, a loss of a part, though exceeding fifty per cent. of the goods on which the profits are to arise, is not recoverable.[4]

Under a policy from Messina to Boston, upon a cargo generally, which consisted partly of 1100 boxes of lemons, and a quantity of oranges, the vessel met with a disaster, and twenty-four days afterwards put into Lisbon as a port of necessity, where the lemons were found to be damaged, and 806 boxes of them were repacked as sound, and three quarters of the oranges, having been wetted, were wholly destroyed, and a part of the remaining quarter that had not been so damaged were found to be partially decayed. Story, J., said: "The argument is, that the memorandum is not designed to exclude losses, where there is a total destruction of

[1] Thompson *v.* Royal Exch. Ass. Co., 16 East, 214.

[2] Hills *v.* London Ass. Co., 5 Mees. & Wels. 569.

[3] Biays *v.* Chesapeake Ins. Co., 7 Cranch, 415; Guerlain *v.* Columbian Ins. Co., 7 Johns. R. 527; Gracie *v.* Maryland Ins. Co., 8 Cranch, 84; Louisville Mut. Ins. Co. *v.* Bland, 9 Dana's R. 143. See also 1 Wheat. 219, and remarks of Mr. Justice Story in Humphrey *v.* Union Ins. Co., 3 Mason, 429.

[4] Waln *v.* Thompson, 6 Serg. & R. 115.

any specific separate portion, as a box, a hogshead, or bale of the memorandum articles, and a fortiori when there is a total destruction of the whole of any single memorandum article. What is this but a determination that the loss of the whole, or any portion of the thing insured, capable of distinct enumeration, and separated from the rest, is out of the warranty? Suppose the insurance had been on coffee or corn, what difference is there between the loss of a single kernel and a bag? between the loss of an aggregate mass made up of artificial and separate parcels, or of an aggregate made up of things in their own nature single and separate? The loss of the whole of a bag of coffee or corn does not seem to me to differ in principle from the loss of an equal quantity of coffee or corn in bulk. The true meaning of the memorandum has hitherto been supposed to be, that it shall exempt the underwriters from all partial losses or particular averages of the thing insured."[1]

In a New York case, on a policy upon hides free from average except general, a part of which were lost by perils of the seas, the Supreme Court decided against a claim for the loss of that part, and, on appeal, the judgment was affirmed in the Court of Errors by the votes of eleven Senators against eight. Mr. Chancellor Walworth said: "The object of introducing the memorandum undoubtedly was, to protect the underwriters against injury arising to the articles from inherent decay. But it does not follow that the excepted risk is to be confined to those injuries only. I think it must be considered a settled rule of American law, that the underwriter is not answerable for any partial loss on memorandum articles, except for general average, unless there is a total loss of the whole of the particular species, whether the particular article is shipped in bulk or in separate boxes or packages."[2]

In a Louisiana case on a policy upon a shipment of mules from St. Iago, in Mexico, to the island of Cuba, "against stranding and total loss," the assured claimed for a loss of part of the mules by perils of the sea, the remainder having arrived; and the court were, on the first argument of the case, in favor of the claim, but

[1] Humphrey *v.* Union Ins. Co., 3 Mason, 429.

[2] Wadsworth *v.* Pacific Ins. Co., 4 Wend. 33.

on a rehearing by the same judges with another judge, the judgment was against the claim.[1]

1774. *The exception of loss*, like the other provisions of the policy,[2] *has reference to the amount at risk at the time of the loss*, whether it be more or less than that at risk before or afterwards.

Lord Kenyon acquiesced in this rule applied to the part of the full cargo which had been taken on board when the loss occurred.[3]

So, after a part of the cargo had been landed, the exception of loss under five per cent. was held, in Maryland, to apply to the amount still remaining at risk.[4]

It has been remarked, that a total loss of a memorandum article insured free from partial loss cannot take place after a part of the article so insured has been landed, and the risk upon that part has ceased.[5] But the better doctrine seems plainly to be as above stated.

1775. A question has been made in an analogous case, *where a transshipment is allowed, and a part of the insured goods are transshipped by one vessel, and a part by another, whether the exceptions of loss apply to each transshipment separately.*[6]

This is the more convenient and satisfactory rule, and it would be as applicable to separate transshipments that were justified by circumstances, as to one expressly authorized by the policy.

1776. *The exception of all particular average* does not wholly protect the underwriter from liability, on account of the perishable nature of the article. It *does not purport to exempt the underwriter from total loss by damage to the article, though such total loss may be owing to its character and qualities, in concurrence with the perils insured against.*

Thus in a case on flour insured from Ireland to Newfoundland free from average, where, the ship being delayed by perils of the

[1] Brooks *v.* Louisiana Ins. Co., 4 Martin, N. S. 640, 681, and 5 id. 530.

[2] Supra, No. 1612, 938, 941, 942, 943, 1196, 1265, 1394.

[3] Rohl *v.* Parr, 1 Esp. R. 445.

[4] Maryland Ins. Co. *v.* Bosley, 9 Gill & Johns. 337.

[5] Gracie *v.* Maryland Ins. Co., 8 Cranch's R. 84; and see 1 Wheat. R. 219.

[6] Louisville Fire & Mar. Ins. Co. *v.* Coleman, 9 Dana's R. 147.

seas in the early autumn, so that the voyage could not be prosecuted until the next season, and the assured abandoned, on the ground of the voyage being broken up, Lord Ellenborough said: "If the cargo had been of a perishable nature, this would not have been a case of retardation only, but of destruction of the thing insured;" by which he evidently meant a breaking up of the voyage.[1]

So in an elaborately investigated case under a policy upon hides free from average, that were damaged and had become "greased," so that they could not be carried forward to the port of destination in Europe, and arrive as hides, and were accordingly sold at Rio Janeiro, and bought for the purpose of being tanned there, Lord Abinger and the other judges of the Exchequer Chamber held it to be a total loss notwithstanding the exception.[2]

In this case the voyage was broken up in respect to the hides, owing to a concurrence of the effects of the perils of the seas, the quality of the article, and the distance from the port of destination; and the decision was precisely the same as if the insurance had not been subject to the exception.

Lord Abinger, in giving the opinion of the court in the same case, distinctly says, that, in respect to a total loss, there is no difference between a damaged memorandum, and a damaged non-memorandum article; and there surely ought not to be any, for when a policy excepts particular average, or makes any other exception, the words should be understood in their ordinary meaning, as generally understood and applied in matters of insurance; and it is the departure from this plain and generally received rule which has brought so much discrepancy of decisions into the jurisprudence relative to memorandum articles.

1777. *Suppose the case of an impending total loss of articles insured free of average, and expenses incurred to avert it; are these expenses within the exception*, and to be borne by the

[1] Hunt *v.* Royal Exch. Ass. Co., 5 M. & S. 47.

[2] Roux *v.* Salvador, 3 Bing. N. C. 266, overruling the decision of the Common Pleas, 1 Bing. N. C. 526, 1 Scott, 491.

assured? *or are the underwriters liable for them*, on the ground that they were incurred to prevent a total loss for which they would have been liable?

In the case of hides insured free of average, and sunk near Nieu Diep, the assured claimed reimbursement of the expense of recovering the hides, under the clause authorizing him to sue, labor, and travel for the safety of the property, at the expense of the underwriters. The underwriters were held not to be liable in that case, on the ground that they were not liable for a total loss of a part of the hides insured, this being the only total loss that was impending in that case, as above stated. But Mr. Justice Livingston, in giving the opinion of the Supreme Court of the United States, said: "The parties certainly meant to apply this clause only to the case of those losses or injuries for which the insurers, if they had happened, would have been responsible. The underwriters not being answerable for the principal [impending] loss, cannot be so for the expenses in recovering the property." [1]

This distinctly implies, that, if a total loss of the whole subject insured had been impending, and the expenses had been incurred to avert it, the underwriters would have been liable. But the case is not a positive, direct authority to this point. Mr. Benecke says: "As by the salvage of goods insured free of particular average, from shipwreck, &c., a total loss is prevented, which would have fallen upon the underwriter, it seems obvious that the salvage charges must be borne by the underwriter, although the degree of average sustained by the goods has no influence upon him. In a similar manner, where a cargo of corn, &c., arrives damaged at an intermediate port, the charges not only of warehousing, but also of drying and preserving the corn, must fall upon the underwriter, because thereby prevented becoming a total loss at his charge." [2]

It is evident that the same principle will apply to the exception of loss under three, five, ten, or any other rate per cent. in respect

[1] Biays *v.* Chesapeake Ins. Co., 7 Cranch, 415.

[2] Principle of Indemnity in Insurance, 8th London ed. of 1824, p. 380.

to salvage charges incurred to prevent the loss from exceeding the rate per cent. of the exception. The subject is introduced by Mr. Chancellor Walworth, in giving his opinion in the Court of Errors in New York;[1] but he does not express an opinion upon it.

This question was not discussed in the cases already cited, in which it was presented.[2] The objection to the liability of the underwriter is, that the assured is bound to make reasonable exertions to save the property. This objection does not prevail against expenses of a nature to be contributed for in general average, for which underwriters are usually liable however small they may be, or if they exceed a very low rate per centum. And *expense incurred to prevent a total loss of an article insured free from partial loss seems properly to come under the liberty to "sue, labor, and travel" at the expense of the underwriters*,[3] which the underwriters ought to be liable to reimburse on such articles no less than on others. The expense, for instance, of drying wetted corn,[4] to save it from total loss, where this is the only means of saving it, seems to be of this description, though the loss by the deterioration of the corn is not chargeable to the underwriters.

Under an insurance on wheat damaged by sea-water, Jarvis, C. J., and his associates of the English Common Pleas, held that the expense of drying it is to be included in the estimate of the amount of the loss, in deciding whether it is total or partial;[5] which judgment, as it adjudges the underwriters to be affected by this expense as a ground of fixing upon them a liability for the loss, seems to afford ground of inference that they should be chargeable with it when incurred to prevent such a loss. The question is, however, of so nice and subtile a character, that an opinion either way, or a doubt, seems to be quite excusable, since it may be said on the other side that under the general exception

[1] Wadsworth *v.* Pacific Ins. Co., 4 Wend. 33.

[2] Morean *v.* United States Ins. Co., 3 Wash. C. C. R. 256; Anderson *v.* Royal Exch. Ass. Co., 7 East, 38; and Hills *v.* London Ass. Co., 5 Mees. & Wels. 569.

[3] See Shultz *v.* Ohio Ins. Co., 1 B. Monroe's (Ky.) R. 336.

[4] See Anderson *v.* Royal Exch. Ass. Co., 7 East, 38; Morean *v.* United States Ins. Co., 3 Wash. C. C. R. 256.

[5] Rosetto *v.* Gurney, cited supra, No. 1764.

of particular average, the underwriter is not liable if the assured can, and still less if he or his agents do actually, prevent a total loss. But it will not be pretended that he is obliged, himself, to incur what is substantially a total loss, to which this doctrine would not unfrequently subject him, that he may thereby exonerate his insurers. Perhaps the reasons for one or the other rule may be so balanced in other respects, that the scale can be turned only by a resort to the general canons of interpretation requiring the construction to be most stringent in respect to the party speaking, namely, the underwriter, and in furtherance of the predominating object of the contract, namely, indemnity.

1778. *If the policy does not exempt the underwriters from loss on goods by dampness or change of flavor*, or being spotted, discolored, or mouldy, unless the same is caused by actual contact with water,[1] *they are liable for such loss, with the condition, in respect to a memorandum article, that it exceeds the rate of the exception.* And where an article is damaged by perils of the sea, and consequently occasions damage to other articles, the damage to these latter is a direct, and not merely remote and consequential damage by perils of the sea.

1779. Under the general exception of losses under three, five, or any other rate per cent., not specifying any kind of loss, the question occurs, What damage or loss is to be included in making up the amount of loss? And, first, Can general and particular average losses be added together to make up the rate? *The practice appears to have been, not to add together the general and particular average to make an amount exceeding the excepted rate.* And this practice has been ratified in jurisprudence, so far as it has come under judicial cognizance.[2]

1780. Another question is, *Whether successive losses can be added together, and a claim made, if the aggregate exceeds the rate of the exception?*

[1] See supra, Vol. I. p. 37, No. 56.

[2] See 4 Mass. R. 458; Benecke, London ed. 1824, p. 471; Benecke & Stevens by Phil. 1883, p. 425, n. In Amsterdam and Antwerp the practice is to include both general and particular average. Benecke, ut supra; Lafond's Guide in Insurance, Paris, 1837, p. 98.

In respect to the cargo and freight, the practice in adjustments has always been to estimate the rate of the exception upon the aggregate loss of each passage or period during which the risk continues on the same subject. The exception could not well be otherwise applied to these subjects, since, in respect to the cargo at least, "the damage received at different times cannot be ascertained during the passage, or where it happens, but only when the cargo is discharged;"[1] and because also, in respect to some species of average, as leakage, breakage, and injury from salt water, the injury goes on increasing, from the time of the commencement of the operation of the peril, until the cargo is discharged. This has been alleged as a ground of distinction between the application of the exception in a policy on the ship and one on the cargo.[2]

Mr. Stevens says, this exception in a policy on the ship is in practice applicable to each loss separately, and not to the aggregate loss.[3]

Mr. Justice Story holds, that under the exception of losses less than five per cent. on cargo, if the aggregate losses "during the voyage," though happening at different successive periods, amount to five per cent., the underwriters are liable. And he intimates a strong inclination to the same construction of a policy on the ship. And he says, he cannot "well see how the same words are to receive an entirely different construction as to the different subject-matters of insurance. It is often as difficult to ascertain the damage done at any one time to the ship, as to the cargo. The injury to the ship done by successive gales, is often impracticable to be ascertained at sea, and, especially where there has been great straining, until she has been overhauled in port."[4]

It has been held by Lord Lyndhurst and his associates in the Court of Exchequer in England, in case of insurance on the ship, that under this exception of average under three per cent., if the

[1] Per Putnam, J., Brooks *v.* Oriental Ins. Co., 7 Pick. 259.

[2] 7 Pick. 259, supra.

[3] Average, Part IV. a. 3, 214, London ed. 1822; Benecke & Stevens by Phil. 1833, p. 401.

[4] Donnell *v.* Columbian Ins. Co., 2 Sumner, 366.

aggregate losses amount to three per cent., the underwriters are liable. Lord Lyndhurst, C. B.: "The words are ambiguous, capable of excluding every average which per se is under three per cent., and capable of including every average, however minute, if the aggregate of different averages come up to that amount. Usage might, perhaps, explain the ambiguity, and show which of the two alternatives was intended;" but there was no evidence of usage, and upon the principle that the exception, being introduced by the underwriters, must be taken most strongly against them, they were held to be liable in case of the aggregate average amounting to three per cent.[1]

The weight of authority leads to the conclusion, that

The exception applies to the aggregate of successive losses on the ship, in the same manner as on the cargo.

One strong reason in favor of such a construction is, that a prior loss is very frequently contributory to a subsequent one.

In case of a policy on ship, freight, and cargo, under the exception of "any partial loss unless it amounts to five per cent., exclusive, in each case, of all charges and expenses incurred for the purpose of ascertaining and proving the loss," Mr. Justice Story held, that the words "each case" referred to the different subjects, namely, the ship, freight, and cargo, and not to successive losses on either.[2]

1781. There is a rule prevailing on the continent of Europe, where damage to ships or cargoes happens by collision of vessels without fault on either side, to assess it upon the two ships and their cargoes and freights. Though this is apportioned in the manner of a general average, it is not such in its nature. It has none of the characteristics of a jettison or other voluntary sacrifice.

The law and the prevailing practice are different in Great Britain and the United States, the loss being considered as an inevitable effect of perils of the sea, to be borne by the parties respectively, as it may happen to fall. But where a case of colli-

[1] Blackett *v.* Royal Exch. Ass. Co., 2 Cromp. & Jer. 244.

[2] Donnell *v.* Columbian Ins. Co., 2 Sumner, 366.

sion of an American vessel with some other comes within the jurisdiction of the Continental law, the assessment of the damage is made in conformity to it. And the underwriters on the American vessel, its cargo, or freight, have, as already stated,[1] in some cases, been held liable for such contribution as a loss by perils of the sea.

This gives rise to the question, *Whether the direct damage to the subject insured is to be added to the contribution assessed upon it in the apportionment for collision in a foreign port, to make up the rate per cent. specified in the exception?* Mr. Justice Story, in the case of the ship Paragon, which came in collision with another in the Elbe, held that the contribution is to be included. He remarks, that "the loss by the collision was an entirety, and the whole loss assessed upon, and payable by, the P., was a direct damage or partial loss, occasioned by the collision, and the items are not to be separated."[2]

Such would be the logical inference in applying the Hamburg rule to the case.

1782. In the statement of an average on an article, the loss per cent. is ascertained by a comparison of the amount of the damaged with that of the sound value at the port of destination, and the underwriters are liable for the same proportion of the invoice value, that the value of the damaged article is of the sound value at that port.

Suppose the invoice to consist of divers articles, insured free of average under five per cent., without discrimination of the different articles, and assume the construction of the exception to be of all particular average less than five per cent. of the whole amount of the invoice. And suppose one of the articles to be damaged. *Are the underwriters* liable, if the damage at the port of destination is five per cent. of the sound value of the whole invoice at the port of destination? or are they *liable only in case the amount of the damage on the article damaged, computed in the invoice value of that article separately, is five per cent. of the whole in-*

[1] Supra, No. 1137, 1272, 1416, 1436.

[2] Peters *v.* The Warren Ins. Co., 1 Story's R. 463.

voice value of all the articles? This latter *is undoubtedly the true method of computation*, since the amount of damage contemplated by the policy is that which is computed on the invoice value. This mode of stating the average will give the same result, whether some of the articles arrive at a gaining market and others at a losing market, or all of them arrive at a market equally a gaining or losing one; whereas, the other method of stating it may make the insurers liable if the article damaged comes to a gaining market and the others to a losing market; while they may not be liable if the damaged article comes to a losing market, and the others to a gaining market, though the amount of the average stated on the damaged article by itself, independently of the others, might be precisely the same, whether it comes to a gaining or a losing market. This is a demonstration that the latter of the above methods of stating the average, by ascertaining the loss on the damaged article separately from the others, and then comparing it to the whole invoice value, to ascertain whether it amounts to five per cent. of that value, is the true one.[1]

[1] This will be rendered more plain by an example. Let the invoice consist of coffee and sugar of the invoice value of $500 each. Suppose the coffee comes to a losing market, where its value, being sound, is $400, and the sugar to a gaining market, where its value, being undamaged, is $600. Suppose the coffee to be damaged 10 per cent., that is, $40 at its value in the port of destination, or $50 estimated on its invoice value. Had the invoice consisted of the coffee alone, the underwriters would be liable for $50. By comparing $40 with $400, and then taking that rate of the invoice value of the coffee, namely, $50, and comparing this with the invoice value of the coffee and sugar, namely, $1,000, this will make the rate of loss 5 per cent. But if the $40 be compared with the sound value of the coffee and sugar, $1,000, it is 4 per cent. only, and so comes within the exception. Suppose the sugar to be damaged 10 per cent., $60; this, estimated on the sound value of the whole invoice in the port of destination, is 6 per cent. But if it be estimated on the invoice value of the sugar, it is again $50, and the loss 5 per cent. So that one method makes the loss the same rate and amount, whether the articles come, some to a gaining and others to a losing market, or all to a gaining or all to a losing market; the other method makes the amount and rate of loss depend on the state of the market of the different articles. The former is no doubt the correct method of stating the loss.

1783. *If only one interest is at risk, as the ship, and a loss in the nature of general average is incurred,* as cutting the cable, *which does not amount to the rate of exception applicable to all partial losses, it is customary to pay such a loss;* for although there are no other interests at risk to contribute to this loss, yet inasmuch as it is in the nature of a general average, insurers consider themselves liable for it. Both Mr. Benecke and Mr. Stevens think that such a loss ought to be paid,[1] and the custom in the United States, in many offices at least, if not generally, is to pay a loss of this sort. Mr. Benecke says opinions differ on this subject.[2]

1784. In respect to the exception of average generally, as well as that of losses under three, five, or any other rate per cent., the *question* arises *as to the number or quantity of articles* or subjects *to which the exception is to be applied.* Magens says: "If, in a chest containing one hundred pieces of linen, three are deducted for damages, and as such allowed to the buyer, the loss ought to be recoverable from the insurers, whether that chest was in a policy by itself or among a parcel of an hundred chests." But this would, in effect, defeat the memorandum on all articles shipped in small parcels, pieces, or packages, and it seems that the contrary custom prevailed in his time. He proceeds: "For why should a person who has insured and paid an equal premium for an hundred chests have the same advantage as he that insured but for one? Suppose a merchant has shipped one hundred and one chests of goods numbered one to one hundred and one, of which on arrival, three chests are by sea, or other accident, so spoiled as to be worth nothing; if the damage be calculated as on the whole value of one hundred and one chests, it will not exceed three per cent., and is, by most insurers, thought not to be recoverable by the assured, especially if the insurance be made without expressly declaring in the policy the particular sum insured on each chest." [3]

[1] Part IV. art. 3, p. 214; Benecke & Stevens by Phil. 402.

[2] Principles of Indemnity Insurance, London edition of 1824, p. 473; Benecke & Stevens by Phil. 476.

[3] 1 Magens, 73, Essay on Insurance, s. 61.

He says that he thinks a jury of merchants would, in such case, give a verdict in favor of the assured. But then he looks to one side of the case only, for suppose a case of insurance on one hundred boxes of goods, of which one box is entirely destroyed, and that each box of the other ninety-nine is damaged two and three quarters per cent. Now, by Magen's rule of estimating the damage on each box, the assured can recover but for one box, or for one per cent. on the whole invoice; whereas, if the damage of all the ninety-nine, and the loss of one be estimated on the whole value of the invoice, the assured has a right to recover three and three quarters per cent. In case of such a loss, therefore, it is for the advantage of the assured to estimate the exception on the whole invoice. Unless, therefore, the assured has his election, in case of insurance upon a cargo or invoice generally and promiscuously, and can, as he may choose, adjust the loss in one or the other method, as he may find the one or the other gives him the greater claim, it does not appear that any alteration of the present rule will be in the least advantageous to him. And it would be entirely anomalous to to give the assured any such election, unless he expressly stipulates for it in the policy. *The obvious construction of each exception is to apply it to the whole quantity of the same article; and this is the practice.*

1785. *If different articles are at risk subject to the same exception, as sugar and skins, the exception ought to be applied to each separately;* that is, if the loss on either amounts to five per cent., if that be the rate of the exception, the underwriters are liable.[1]

By this mode of adjustment, the construction is the same as if the policy read, "sugar free of average under five per cent., skins free of average under five per cent.," and so of each article. If such were the form of expression, there would be no question that the exception should be applied to each article separately; and the grammatical construction is precisely the same where the exception reads, "sugar, skins, &c., free of average under five per cent.,"

[1] Stevens on Average, Part IV. a. 3, p. 211; Benecke & Stevens by Phil. 1833, p. 398.

and it does not appear why the practical construction in adjustments should not be the same.

1786. *Where certain articles of a cargo are free from average under certain specified rates, and "all others" under a certain other specified rate, a loss is adjusted on the latter class independently of the former, as if only the latter had been at risk.*

A case occurred in Boston, in 1809, under a policy upon sugar free of average under seven per cent., and upon coffee and pepper, neither of which was enumerated in the memorandum, and both of which were accordingly free of average under the general exception of five per cent. A loss happened upon the coffee exceeding five per cent. of the value of that article and the pepper, but not amounting to five per cent. of the value of the goods at risk under the policy. It was settled, by referees, that the assured was entitled to recover for this loss. The referees said: "By the policy, the cargo is divided into two classes or masses of property, upon one of which the underwriter is exempted from loss under seven per cent.; upon the other, from loss under five per cent. A partial loss that happens to the articles composing one of said classes is to be computed on the value of such class, in the same manner as if the insurance on one class was effected in one policy, and the insurance on the other class in another policy." The award was, that in regard to all the cargo excepting the articles specifically enumerated in the memorandum, a loss, in order to be recoverable, whether it happened upon one or upon any number of them, must amount to five per cent. on the whole value of such non-enumerated articles.

Every article at risk is subject to some exception, which must be estimated upon the value of the article itself, or upon the value of all the articles at risk subject to the same exception, or upon the value of all the goods at risk. The general exception of losses under five per cent. on "all other goods" cannot conveniently be estimated upon the value of the particular kind of articles at risk on which the damage happens, since this raises the difficulty of determining what articles are of the same kind. Suppose the invoice to consist of nails, bar-iron, and iron nail plates; and an average to take place upon the nails. A doubt would occur

whether all these articles are of the same class, and whether the estimate is to be made upon the value of the nails only, or upon that of all three, or of any two of the articles. This difficulty would occur in innumerable instances, and there would be no principle upon which it could be obviated. The estimate of the general exception, therefore, upon the value of the same kind of article at risk, seems to be impracticable and out of the question. This is a sufficient reason for applying the general exception as it was applied by the referees in the case above cited, and as it is universally applied in practice. But there is no such reason for grouping together different specifically enumerated articles, severally made subject to a specific rate of exception, and making them subject to the exception in a mass, as the language of the referees above quoted imports; though I have understood that some despacheurs have been in the habit of so grouping them.

1787. The *form of expression of the general exception, applicable to the ship, freight and all the articles not enumerated in the memorandum, varies in different general forms of policies* in use. In some forms it is expressed to be of losses under "five per cent. upon the whole interest at risk," or "the whole value thereby insured,"[1] or "all other goods," or "all other goods, the ship, and freight,"[2] or it is provided, in general, that no loss shall be paid unless it amounts to five per cent.[3]

The first two of the above forms preclude the construction, that a loss of five per cent. on the non-enumerated articles, not amounting to five per cent. of the value of all the articles at risk, enumerated and not enumerated, is payable. The construction of a policy in those forms is accordingly different from that of one in which the exception is made applicable to "all other articles" than those enumerated.

1788. *It is the practice*, as it was in the time of Magens, *to consider a separate valuation of different articles of a cargo or shipment as giving distinct basis on which to compute the rate of exception in the memorandum.*

[1] Charleston form. [2] English, Boston, and Philadelphia forms.
[3] New York and Baltimore forms.

Thus, in regard to a policy upon a shipment of horses and oxen, with an exception of losses under ten per cent., it was assumed that, if both the horses and oxen were valued together, then the loss, to come within the policy, must be ten per cent. of the whole value; but if the horses were valued separately from the oxen, the exception would be applied to each separately.[1]

1789. *Where the policy provides for the rate and adjustment of loss on the article at risk, "as if it had been" a different article, it has been held that the kind and amount of loss for which the insurer is liable are to be the same as on such other article if it had been exposed in the same manner to the same risk.*

In a respondentia bond, in which the lender always stands as insurer to a greater or less extent, it was agreed that, if other articles than specie should be shipped, "the lender should be only liable to average, and entitled to salvage, as if it had been a specie shipment," and bales of dry goods were shipped, of which a part were totally lost, and the remainder saved in a damaged condition. It was held, in Pennsylvania, that the lender was liable only for the part totally lost, and not for the particular average on those saved, since specie exposed to sea-water in the same manner would not have been subject to any injury.[2]

1790. *Whether the premium is to be included in the value of the article in applying these exceptions?*

It has been said, that under a valued policy the custom in this respect is not uniform, but that the prevailing usage has been to deduct it from the valuation."[3] It does not appear that there is any ground of distinction between a valued and an open policy.

[1] Ocean Ins. Co. *v.* Carrington, 3 Conn. R. 357.

[2] Delaware Ins. Co. *v.* Archer, 3 Rawle, 216. It was contended by the borrower, who was in effect the assured, that, if the shipment had been specie, it would have been stowed at the bottom of the hold, and the whole of it totally lost, as the specie which had been taken abroad actually was; and therefore he was entitled to indemnity for the damage to the goods, as the loss would in that adjustment be less to the lender than it would have been on specie. But the court considered this to be too conjectural a mode of adjustment.

[3] Brooks *v.* Oriental Ins. Co., 7 Pick. 259.

In fact, the general exception of losses under three or five per cent. "on all other articles, the ship, and freight," is frequently applicable to subjects valued and not valued." Every subject has its value by construction or agreement; and for the purposes of the contract of insurance, the premium constitutes a part of its value. If the loss is a part of the thing insured, it makes no difference, as to its coming within the exception, whether the premium is, or is not, included in making the adjustment; for the premium must go into the value of the part lost, as well as the invoice or agreed value of the whole subject of the exception, or be omitted in both.

If the loss is in disbursements, the omission of the premium in estimating the value of the article may have the effect of rendering the underwriters liable for a loss, for which they would not be liable were the premium included. *The more scientific rule is to include the premium* in estimating the value, this being the value of the subject as between the parties to a policy, and therefore the value to which they may be more properly supposed to refer, in stipulating the rate per cent. at which the liability for a loss begins.

1791. *Whether the expenses of surveys, certificates, protests, and of the adjustment of the loss, are to be included* in determining whether a loss comes within any exception. By the ordinance of Hamburg, "the insurer is obliged to pay a particular average, if the same amount to three per cent. after the commission of the despacheur of averages is deducted." [1]

This is adopting the rule, which seems to be the proper one, that *the charges for ascertaining the amount of the loss should fall upon the party who must have sustained the loss, had its amount been ascertained without any expense.*[2]

"If," says Mr. Martin, "an average does not amount to five per cent. without the charges, it is not recoverable. The argument that it is not, appears to me to be fallacious. It is urged that the damage must amount to a certain proportion or aliquot part of the

[1] Title 21, art. 11, 2 Magens, 238.

[2] See Stevens's Essay on Average, Part IV. a. 3, p. 216, n.

principal, before costs are incurred, and that it would be contrary to all rule, if the damages themselves do not amount to the sum required, to permit the costs to be added for that purpose. But the warranty is from an average, and not from sea-damage, and an average has always been made up with the extra charges. They form a part of the indemnification which the assured always receives from the underwriters, and it is in reference to an average thus imposed, that he engages to exempt the underwriter if it do not amount to five per cent." [1]

But suppose the owner of ship, cargo, and freight, not to be insured, he would incur no such expenses; at least it is at his option whether to incur them. They would evidently be useless, unless he intends to make or defend himself against some claim. It seems, then, to be very questionable, whether the expenses incurred in prosecuting the claim should, of themselves, be added to bring it up to the rate of the exception. To put this question at rest, some policies provide that the underwriters shall not be liable for particular average, unless it amounts to three, five, or any other rate per cent. stipulated in the exception, "exclusive of the expenses incurred for the purpose of proving the loss." [2]

Mr. Stevens says he has been informed, that the intention of the memorandum, when first inserted, was, that the five or three per cent. should, in all cases, be deducted from the average, the underwriters paying the balance." [3] But *the practice* in England and the United States *is, to consider the underwriters liable for the whole of the loss where it exceeds the rate at which the exception is fixed*, unless the policy contains a provision that the insurer "will pay only the excess of damage above the rates limited," [4] or some equivalent clause.

1792. An act of Louisiana of 1834 provides for a general exception of loss in policies on steamers, by accidents, except such as are impossible to be avoided, from racing, high steam, running

[1] Compendium of the Practice of Stating Averages, ed. 1823, p. 119.

[2] Form of policy adopted in Boston, 1825.

[3] Stevens's Essay on Average, Part IV. a. 3, p. 213, n.

[4] A Savannah form.

foul, or while the captain and pilot are engaged in gambling or attending to any game of chance." [1]

1793. Under the exception of, or warranty against, any risk, as of illicit trade, &c., in marine policies,[2] and the risks or perils warranted against in fire policies, the underwriters are exonerated from the losses which are the direct consequences of such risks.

1794. The exception, in a life policy, of death by the assured's own hands, is held not to exonerate the underwriters in case of self-destruction by an insane person, though there is some diversity of opinion relative to the degree of insanity requisite to their exoneration.[3]

1795. The liability of the funds of an incorporated insurance company depends upon the provisions of its charter, and *the funds of a company may be thus made liable to certain assureds in preference, which operates as an exception of the losses of other assureds* in respect to such funds.

The act incorporating a mutual fire insurance company, provided that, "if the deposit notes should be insufficient to pay the losses, the sufferers should receive a proportionate dividend, and likewise a sum to be assessed on all the members, not exceeding one dollar on every hundred by them respectively insured, and that no member should be required for any loss to pay at any one time more than one dollar upon every hundred." It was held, that, where the losses amounted to the full amount of the deposit notes and one per cent. assessed for payment of the same, the losers by a subsequent fire, that took place before the deposit notes and assessments had been collected and the proceeds paid over, were not entitled under the charter to share in that fund.[4]

[1] 1 Rob. (La.) R. 216.

[2] Supra, No. 1154, Vol. I. p. 688.

[3] See supra, Vol. I. No. 895.

[4] Coston *v.* Alleghany County Mut. Ins. Co., 1 Penn. R. 323.

CHAPTER XIX.

LIMITATION OF THE LIABILITY OF UNDERWRITERS. SET-OFF. DEDUCTIONS.

SECT. 1. Limit of the liability of underwriters. | SECT. 2. Set-off and deductions in adjustments.

SECTION I. LIMIT OF THE LIABILITY OF UNDERWRITERS.

1795 a. THE liability of underwriters is, in divers ways, subject to be limited within, and reduced below, the amount underwritten, though the loss to the assured may exceed that amount:

As by the charter of the underwriting company.[1]

The amount for which the underwriters are liable, for a single loss, in an indemnity policy as distinguished from a gaming contract, is only commensurate with the value of the insurable interest to which the insurance is applicable, as has already often appeared, and been assumed, and is implied by the very term "indemnity," since a loss is a condition precedent to a claim for indemnity, and a loss can accrue to the assured only so far as he has an interest.

Where the officers of an incorporated company underwrite a greater sum than the company is authorized to insure upon a risk, the liability of the company, as such, will be only up to the authorized amount.[2]

The liability for a loss is limited to the net amount after deducting what the assured has received as salvage, or from third parties, as indemnity for the loss on account of which an abandonment is made.[3]

[1] Hallett *v.* Dowdall, 9 Eng. Law & Eq. R. (Press of Little, Brown & Co.) 347, and other cases cited supra, No. 1475 a, 1741 a. See also Ex parte Greenwood, in re The Sea, Fire and Life Ins. Co., Eng. Jur. 118.

[2] Williams *v.* New England Mut. Fire Ins. Co., 31 Maine (1 Red.) R. 219, cited supra, No. 1741 a.

[3] Pentz *v.* The Receiver of the Ætna Fire Ins. Co., 9 Paige's Ch. R. 569.

The members of an insurance company, whether stock or mutual, may by their charter, deed of settlement, terms of their subscriptions, or by their policies, be individually subject to a personal liability for losses to a limited amount, either directly to the holders of policies for losses, in a proceeding in chancery,[1] or in a proceeding against them in the name of the company for their subscriptions or for an assessment.[2]

Where under a provision in the charter of a mutual fire company, that an insured member should, on the bonâ fide sale of his insured property, be discharged from liability on his deposit premium-note on account of subsequent losses, an associate, having sold his insured property, made a bonâ fide settlement with the company, for his liability on his deposit note, which was thereupon given up to him to be cancelled. It was held by the Court of Appeals in New York that he was thereby discharged from further liability on his note on account of losses, though the same had previously occurred.[3]

The maker is held by the same court to be liable to the indorsee of such a negotiable note, to whom it has been indorsed in payment of a loss, although, if it had still remained in possession of the company, it would have been subject to the deduction of the amount of premiums paid by the maker to the company.[4]

The question as to the right of an underwriter to settle a loss by taking possession of the damaged subject, and repairing it, without the consent of the assured, as a settlement of the loss, instead of paying the damage, has been already considered.[5]

[1] Per Parker, V. C., in Traders' Mutual Association, Ex parte Talbot, 13 Eng. Law & Eq. R. (Press of Little, Brown & Co.) 205; S. C., 16 Eng. Jur. 855; 21 Eng. Law Jour. (N. S.) Chancery, 845.

[2] See Ex parte Burton, per Parker, V. C., 13 Eng. Law & Eq. R. (Press of Little, Brown & Co.) 435; S. C., 16 Eng. Jur. 967; 21 Eng. Law J. R. (N. S.) Chancery, 781. See also Hallett *v.* Dowdall, 9 Eng. Law & Eq. R. (Press of Little, Brown & Co.) 347; S. C., 21 Eng. Law J. R. (N. S.) Q. B. and Exch. Chamber, 98; supra, No. 1475 a, 1741 a.

[3] Hyde *v.* Lynde, 4 Comstock's R. 387.

[4] Deraismes *v.* Merchants' Mut. Ins. Co., 1 Comstock's R. 371.

[5] Supra, No. 1559, et seq.

SECTION II. SET-OFF AND DEDUCTIONS.

1796. In cases of adjustment as a total or salvage loss, the salvage, consisting of the remnants of the subject insured, in the proportion to which it is covered by the policy, and also the claims of the assured for indemnity or damages against third parties who have occasioned the loss, are, as we have seen,[1] to be assigned or accounted for to the underwriter, on the payment of the loss. Accordingly, *where the assured has, by the different rates of valuation in different insurances*, or any act of his own,[2] *disabled himself to transfer the salvage, or claims against third parties*, consequent upon the loss, *a corresponding deduction must be made in the settlement of it:*

As where the assured on goods, by cancelling the bill of lading, had disabled himself to subrogate his underwriters in his stead to claim damage against the owners of the vessel.[3]

So if, by the different valuations of the subject insured in divers policies, the assured has disabled himself to transfer a due proportion of the salvage to any set of underwriters by abandonment, an amount equivalent to the deficiency is to be recouped in the adjustment of a total loss.[4]

1797. *Set-off is frequently stipulated for.*

Under an agreement that "the premium note, if unpaid, and all sums due to the underwriters from the assured when the loss becomes due," should be deducted from it, where the policy was

[1] Supra, No. 1711.

[2] Supra, No. 1715, 1716.

[3] Atlantic Ins. Co. *v.* Storrow, 5 Paige, 285. Accordingly, where the assured, having been paid the loss on his ship occasioned by another ship, prosecutes the owners of such other for the damage, the latter have no right to a deduction of the amount so received from the underwriters. Yates *v.* Whyte, 4 Bing. N. C. 272. Where the owner had assigned the whole freight, and the master unjustifiably sold some goods of a shipper, it was ruled by Lord Ellenborough, that the shipper was not liable to pay the whole freight to the assignee, and then look to the owner or master for the value of his goods so sold, but was entitled to set off such value against the freight. Campbell *v.* Thompson, 1 Stark. R. 490.

[4] See supra, c. 17, s. 17.

in the name of the agent "for whom it might concern," Story, J., held that other "sums" than the premium referred to sums due from the principal, not to those due from the agent.[1]

The capital of a mutual marine insurance company being constituted by the members giving stock notes, on which the premiums paid by each were to be indorsed, so that the promissory note of each member was a security to other assureds for the payment of losses, and was also intended as an undertaking to effect insurances on which the premiums should, in the whole, be equal in amount to his note. A member, A, finding that his premiums would not be equal to his stock note, agreed with the company to bring other parties to effect insurance in his stead. He accordingly procured insurance for B in B's name on the vessel of the latter, and with the consent of the company kept B's premium note himself, instead of handing it over to the company, and, without any specific agreement with the company for the purpose, negotiated it for his own use to some fourth party, without the knowledge of B. The policy contained the common clause for set-off above mentioned. A loss having occurred on the vessel, and being demanded by B, the company insisted on the right to set off the amount of the premium. The matter was submitted to a referee,[2] who awarded that the clause had reference to B's premium note, and not A's stock note, and that the company had no right to set off the premium unless they produced B's note.

Under a similar agreement for set-off and deduction, the policy was assigned, with the consent of the underwriters, "reserving to themselves all the rights expressed in the policy regarding premium notes, debts," &c.; the underwriters held a bottomry bond of the original assured, and other premium notes, some dated after the assignment, and losses had also occurred on the other policies still held by the original assured, before the loss on the assigned policy; the question was what claims against the original assured should be set off against the assignee of the policy. The Supreme

[1] Hurlbert *v.* Pacific Ins. Co., 2 Sumner, 471; and see supra, c. 9, s. 12, No. 903.

[2] The author, in Seabury *v.* City Mut. Mar. & Fire Ins. Co.

Court of Massachusetts decided that the underwriters had a right to set off the premium notes of the principal, as well those made after as those made before the assignment, against losses due to the original assured on the other policies still held by him; and then enough of the bottomry bond, which had in the mean time become absolute, to cancel the losses so due to the original assured, and then to deduct the whole remainder due to them on the bottomry bond from the loss which had occurred on the assigned policy,[1] notwithstanding that they had a right to resort to the vessel itself or to the surety for payment of the bottomry bond.[2]

1798. *Where salvage is diminished by the act of the assured, or of any agent of his, for whose acts he is responsible, the underwriters are entitled to deduct the amount from the loss.*[3]

1799. So if the assured, or his agent, neglects to collect a contribution due at the port of destination, on account of a jettison of a part of the subject insured, the underwriter may deduct the amount so lost from the loss under the policy.[4]

[1] Wiggin *v.* Suffolk Ins. Co., 18 Pick. 145.

[2] The court cites Lupton *v.* Cutter, 8 Pick. 248; Union Bank *v.* Laird, 2 Wheat. 390. If the company assents to an assignment, the clause requiring notice of other insurance thereafter made becomes a condition between the underwriters and the assignee, and, to the amount of the interest of the latter, ceases to be such between them and the original assured, on the same principle that governs the right of set-off. Charleston Ins. and Trust Co. *v.* Neve, 2 M'Mullen's (S. Car.) R. 237.

[3] See supra, No. 1714, 1716.

[4] Lapsley *v.* United States Ins. Co., 4 Binney, 502. The right of set-off between a broker or agent and parties to the policy is treated of subsequently.

CHAPTER XX.

NOTICE AND PRELIMINARY PROOF OF LOSS.

SECT. 1. Marine policies. | SECT. 2. Fire policies.

SECTION I. MARINE POLICIES.

1800. THE English marine policies in the common form do not appear to contain any express provision as to preliminary proof, or the time of payment for a loss. *The American marine policies universally contain a provision, that a loss shall be paid in thirty, or sixty, or ninety days, or some other time, "after proof of the loss."* The time agreed upon in most policies is sixty days.

The evidence of the loss under this provision of the policy is called PRELIMINARY PROOF.

The abandonment, and the furnishing of preliminary proof, are distinct acts.

We have already seen what constitutes an abandonment, and that it is made only in case of total loss; but preliminary proof is requisite in every description of loss.

1801. This clause requires only reasonable information to be given to the underwriters, so that they may be able to form some estimate of their rights before they are obliged to pay. It is construed to require only general evidence[1] as a ground of reasonable presumption of the loss,[2] as distinguished from a specific statement of it.[3]

The production of the register of the ship by the assured, and

[1] Lawrence *v.* Ocean Ins. Co., 11 Johns. R. 241. See also Barker *v.* Phœnix Ins. Co., 8 id. 307; Talcott *v.* Marine Ins. Co., 2 id. 130.

[2] Child *v.* Sun Mut. Ins. Co., 3 Sandford's City of New York Sup. Ct. R. 26.

[3] Fuller *v.* Kennebec Mut. Ins. Co., 31 Maine (1 Redd.) R. 325.

his affidavit that it sailed twenty months before from the Sandwich Islands, and had not been heard from for fifteen months, has been ruled to be sufficient preliminary proof of total loss.[1]

Under a policy on a whaling ship, outfits, and cargo, preliminary proof by "C., agent," that he was part-owner and managing agent, and that the vessel "sailed full," was ruled to be sufficient preliminary proof of interest, and of the cargo at risk.[2]

It is accordingly plain, that documents may be produced as preliminary proof, which would not be admissible as evidence in an action on the policy.[3]

1802. *The ordinary proofs of a loss are the invoice,*[4] *bill of lading,* &c., *to show the interest of the assured; the survey*[5] *of the vessel or cargo, protests, consular certificates, letters of the captain or other correspondents,* &c., *to show that a loss has taken place.*[6]

Some of these documents refer to the vessel or cargo only, others to both of those subjects, and the documents relative to one of them are, in divers cases, requisite as preliminary proof of loss on the other.

Where the captain had been made prisoner, and the assured, being informed of the loss by the pilot, communicated his information to the underwriters, Mr. Chief Justice Parsons said, in giving the opinion of the court: "The evidence of the loss was sufficient. Nothing can be objected but the want of affidavit, which it is not usual to send. The master was a prisoner, and could make no protest, which is the usual evidence."[7]

Letters from the master or other person, giving an account of a loss, have been held to be sufficient preliminary proof:[8]

[1] Child *v.* Sun Mut. Ins. Co., 3 Sandford's City of New York Sup. Ct. R. 26.

[2] Ibid.

[3] See American Ins. Co. *v.* Francia, 9 Penn. R. 390.

[4] Allegre's Adm'r *v.* Maryland Ins. Co., 6 Harris & Johns. 408.

[5] 8 Johns. R. 307; Anthon's Cases, N. P. 16, n.

[6] Robbins *v.* New York Ins. Co., 1 Hall, 325.

[7] Munson *v.* New England Marine Ins. Co., 4 Mass. R. 88. See also Johnston *v.* Columbian Ins. Co., 7 Johns. R. 315.

[8] Craig *v.* United Ins. Co., 6 Johns. R. 226; Barker *v.* Phœnix Ins. Co., 8 id. 307.

As also the protest of the master and mate.[1]

It depends upon the provisions of the policy, and also in some degree, upon the demand made by the insurers, whether the production of any particular documents is necessary. Where it was agreed, that the insurers should not be liable for a loss on a vessel insured, if, upon a regular survey, she should be condemned on account of being unsound or rotten, on a claim being made for a loss, the insurers required the production of a survey which had been made upon the vessel. The assured did not produce the survey. The court said: "We are of opinion, that the assured was bound to produce the survey, or give some account of its non-production. It is possible the survey might have shown that the vessel was unable to prosecute her voyage on account of her being unsound or rotten. It was a material document to the insurers in forming a judgment whether the loss claimed was total." [2]

In a policy on cargo on time, that is a continuing insurance, the same proof of interest on each passage is requisite as if the policy were on that particular passage.[3]

In case of insurance on freight on account of interest arising in consequence of advances for which the assured has a lien on the freight, the production of the agreement to make the advances is intimated to be sufficient preliminary proof of interest.[4]

1803. *The underwriter may impliedly waive objection to the preliminary proof.*[5]

It is wholly waived by the underwriter's saying, on being called upon, that he "would not pay the loss any way." [6]

If the invoice is considered to be a material document according to the usages of the place, and only the protest and bill of lading are shown, and the underwriter, not objecting to this omission, re-

[1] Talcott *v.* Marine Ins. Co., 2 Johns. R. 130.

[2] Haff *v.* Marine Ins. Co., 4 Johns. R. 132. See also S. C., Anthon's Cas. N. P. 14.

[3] Wolcott *v.* Eagle Ins. Co., 4 Pick. 429.

[4] Robbins *v.* New York Ins. Co., 1 Hall, 325.

[5] The rule is the same in respect to fire policies. Infra, No. 1812, 1813.

[6] Francis *v.* Ocean Ins. Co., 6 Cowen's R. 404; Ocean Ins. Co. *v.* Francis, 2 Wend. R. 64.

fuses to pay the loss, this is held to be a waiver of the right to demand the production of other documents.[1]

The assured made an abandonment of the vessel, alleging capture as the cause, which the underwriters refused to accept. It was objected that his abandonment was insufficient on account of his not exhibiting the captain's letter, giving an account of the attempt to rescue the ship. Mr. Justice Washington said: "If the legal ground of abandonment be assigned it is sufficient when the abandonment is refused. Had it been accepted, the underwriter would have been fully apprised of the attempt to rescue, as the letter of abandonment says that the assured is ready to furnish the proofs."[2]

Where the assured produced to the underwriters the heads of the master's protest, and his letters, in proof of barratry, and the question between the parties was, whether the facts stated amounted to barratry; Mr. Justice Thompson, giving the opinion of the court, said: "Under these circumstances, even admitting the documents not to be competent preliminary proof, I should consider the underwriters as having waived the claim to more formal proof."[3]

And the protest of the captain, relating to a loss, being produced, but no proof of interest furnished, the court said: "As the underwriter made no objection to the sufficiency of proof, and placed his refusal to pay on the ground of deviation, he must be deemed to have waived the proof of interest."[4]

Where the underwriters objected to the claim of a loss, on the ground of the unseaworthiness of the ship, it was left to the jury whether this was not an admission or a waiver of preliminary proof.[5]

Where a deficiency of preliminary proof could be obviated if

[1] Allegre's Adm'r *v.* Maryland Ins. Co., 6 Harris & Johns. 408.

[2] Dederer *v.* Delaware Ins. Co., 2 Wash. 61.

[3] M'Intire *v.* Bowne, 1 Johns. R. 229.

[4] Vos *v.* Robinson, 9 Johns. R. 192.

[5] Martin *v.* Fishing Ins. Co., 20 Pick. 389.

objected to at the time of abandonment, the objection is held to be waived, unless it is immediately made.[1]

1804. *The thirty, or sixty days,* or other time of credit for the loss, *are computed from the time of the production of the proof, and not from that of abandonment.*[2]

We have seen[3] that, in order to support an abandonment, the loss must still continue to be total, and the cause of the abandonment must be truly stated; and since the subjects of abandonment under marine policies are usually at a distance, it follows that a valid abandonment can be made only for a cause which continues unremoved from the date of the last intelligence to that of the abandonment. Consequently, the facts existing at the time of the abandonment cannot, in every case, be stated as part of the preliminary proof; the assured can only state a sufficient cause of abandonment by the latest intelligence, and if such cause has not in the mean time been removed, the abandonment is valid.

The facts communicated may be of a kind not to be changed, as in case of shipwreck, and then the loss is payable at the end of the thirty or sixty days stipulated by the policy. But if the loss is one that may have ceased in the mean time, as detention or capture, it is not ascertained that the assured has a right to recover for a total loss until the condition of the subject at the date of the abandonment is known, and evidence of this seems plainly to be a necessary preliminary to recovery for the loss. The more obvious construction seems to be, that the loss is payable immediately on the expiration of the thirty or sixty days, if it is previously known that it continued to be total at the time of the abandonment; or, otherwise, as soon after the expiration of that time as that fact is made known.[4]

[1] Child *v.* Sun Mutual Ins. Co., 3 Sandford's City of New York Sup. Ct. R. 26.

[2] Barker *v.* Phœnix Ins. Co., 8 Johns. R. 307.

[3] Supra, c. 17, s. 10.

[4] It has been intimated, that the loss is payable at the end of the thirty or sixty days, 1 Binn. R. 289; but it should seem it can hardly be so, except as above stated in the text.

SECTION II. FIRE POLICIES.

1805. *The preliminary proof is usually the subject of express stipulation in fire policies.*[1]

These stipulations relate to notice of the loss, the certificate of a magistrate, the selectmen of a town, or a clergyman, and an account of the property burnt; and some policies require an affidavit of the loss.

Though the assured must, in an action upon a policy, prove the nature of his insurable interest, it is not necessary to state it particularly in the preliminary proof in the first instance.[2]

The clause for forfeiture of the claim in a fire policy by false swearing, has reference to the preliminary proofs.[3]

1806. *The notice of loss is distinguishable from the proofs, and is usually required to be given without delay; and the notice and proofs must be given to the underwriters or their representatives in a proper form.*

A verbal notice of the loss is held to be sufficient, no other form being stipulated for, or demanded.[4]

It is remarked by Mr. Justice Sutherland, of the New York Supreme Court, that notice through the post-office properly addressed, is a sufficient compliance with this provision of the policy.[5]

The assured may avail himself of affidavits taken by the underwriters respecting the loss, as a part of his preliminary proof, though the affidavits are taken without notice to him.[6]

Under the clause, that all persons insured by the company and sustaining loss should give notice thereof, it was held that it might be given by the assignee instead of the original assured.[7]

[1] Routledge *v.* Burrell, 1 H. Bl. 254. See supra, Vol. I. No. 63, p. 46, and No. 885, 886, pp. 481, 482.

[2] Gilbert *v.* North American Fire Ins. Co., 23 Wend. R. 43.

[3] Hoffman *v.* Western Mar. & Fire Ins. Co., 1 La. Annual R. 216.

[4] Curry *v.* Commonwealth Ins. Co., 10 Pick. 535. See also 11 Miss. R. 278; 3 Gill's R. 176; 11 Wheat. R. 383.

[5] Innman *v.* Western Fire Ins. Co., 12 Wend. R. 452, at p. 461.

[6] Sexton *v.* Montgomery Ins. Co., 9 Barbour's R. Sup. Ct. of N. Y. 191.

[7] Cornell *v.* Leroy, 9 Wend. R. 163.

A provision in a reinsurance for notice of loss forthwith, and an account of the loss as soon as possible, signed by the assured with their own hands, accompanied with their oath, was held in New York to be complied with by transmitting to the reinsurers the notice, account, and affidavit of the original assured.[1]

1807. *Fire policies generally have a condition, that the assured shall produce certain certificates respecting the loss,* which vary considerably, as will appear from the instances to be given. This, like all express conditions, must be complied with, unless the right to demand the certificate is expressly or impliedly waived by the insurers.

1808. *The certificate produced must answer to the condition.* It was a condition of a fire policy, that the assured should procure a "certificate, under the hand of a magistrate, notary public, or clergyman, most contiguous to the place of the fire," not interested or related to the assured, "that he was acquainted," &c. On a loss happening, the assured applied to the two nearest magistrates, who refused to give the certificate, and he then applied to the next nearest magistrate, who gave the certificate. It was held by the Supreme Court of Maine, that this did not entitle the assured to recover for the loss, and that the procuring of the certificate of the nearest magistrate answering to the description in the policy, was a condition precedent, that must be complied with before the assured could recover.[2]

The court will not go into a nice evidence of distances, in determining which is the nearest magistrate.[3]

The distance of the magistrate may be determined by his place of business.[4]

Under the provision requiring a certificate of a magistrate or notary, "that he is acquainted with the character and circumstances of the assured, and knows or believes that the assured has really and by misfortune, without fraud, sustained loss to the

[1] N. Y. Bowery Fire Ins. Co. *v.* N. Y. Fire Ins. Co., 17 Wend. R. 359.

[2] Leadbetter *v.* Ætna Ins. Co., 1 Shepley, 265.

[3] Turley *v.* North American Ins. Co., 25 Wend. R. 374.

[4] Ibid.

amount therein mentioned;" it was held by the court of Lower Canada to be a condition precedent to the right to recover, that the certificate should state the AMOUNT of the loss.[1]

1809. A stipulation to produce a certificate of the nearest magistrate, "that he is acquainted with the character of the assured," is complied with by a certificate to the character as learned from information and personal knowledge.[2]

1810. *The certificate required* and other documents *must be produced within proper time.*

A delay to give in a particular account of the loss nineteen days, is held in Louisiana not to be unseasonable.[3]

The particular circumstances, as employment of the assured in attempting to stop the fire, and in saving the property, and the frequency of the mails, are to be considered by the jury in determining whether the assured used due diligence to give notice of the loss forthwith.[4]

Under a stipulation for notice forthwith, the assured's being necessarily absent in removing his family on account of a pestilence prevailing at the place of his residence where the subject insured is situated, and where it is insured, has been considered to justify a delay to give in the preliminary proofs.[5]

Where it was provided in a fire policy, that "persons insured, and sustaining loss, were forthwith to give notice to the underwriters, and, as soon as possible thereafter, deliver in a particular account of their loss, signed, &c., and make proof, &c., and procure a certificate under the hand of a magistrate," &c., it was held by the Supreme Court of the United States, that the words "as soon as possible" could not be drawn down to fix the construction of the clause respecting the certificate. "We think," said Mr. Justice Story, giving the opinion of the court, "that the certificate must be procured within a reasonable time after the loss." And

[1] Scott *v.* Phœnix Fire Ass. Co., Stuart, Lower Canada R. 354.

[2] Turley *v.* North American Fire Ins. Co., 25 Wend. R. 374.

[3] Wightman *v.* Western Marine & Fire Ins. Co., 8 Robinson's R. 442.

[4] Edwards *v.* Baltimore Fire Ins. Co., 3 Gill's R. 276.

[5] Phillips *v.* Protection Ins. Co., 14 Missouri R. 220.

in the same case, where, soon after the loss, a certificate was produced to the underwriters, who made no objection to it until the action on the policy came to trial, and a question was made at the trial, whether the silence of the underwriters did not amount to a waiver of all objections to the certificate, and the decision was in favor of the assured upon this question, at the Circuit Court, from which the case was carried up, on writ of error, to the Supreme Court, where the circumstances were held not to amount to such waiver, and directly thereupon, and about five years after the loss, the assured procured a new certificate, it was held that this certificate was, under the circumstances of the case, produced within a reasonable time.[1]

Where a certificate of the character of the assured, and the opinion of the certifying magistrate that the assured had sustained the loss without fraud, was required; on notice and demand of loss on the 20th of February, a question arose about the interest of the assured, which was in discussion until the 28th of June, when the insurers finally declined to pay the loss. Chief Justice Marshall and his associates decided that this discussion was not a waiver on the part of the underwriters of the condition for the production of the magistrate's certificate.[2]

A stipulation for notice forthwith, was held by the Supreme Court not to be complied with by notice on the 2d of April of a fire that happened on the 23d of February.[3]

1811. *Under a fire policy on furniture, merchandise, or stock, some schedule and estimate of the value of the articles burnt are usual, and seem to be necessarily* a part of the *preliminary proof*, and are, in many forms of policy, expressly required.

Some policies require "that persons sustaining loss shall, as soon after as possible, deliver in a particular account of the loss, verified, if required, by their books of account and other proper vouchers."

[1] Columbia Ins. Co. *v.* Lawrence, 10 Peters's Sup. Ct. R. 507.

[2] Columbian Ins. Co. *v.* Lawrence, 2 Peters's Sup. Ct. R. 25.

[3] Innman *v.* Western Fire Ins. Co., 12 Wend. R. 452.

Mr. Justice Story held, that the particular account thus required was that of the articles lost or damaged, and not of the manner or cause of the loss.[1]

Where the assured's books and papers were burnt with his stock of goods, and he accordingly could not make out a schedule of his stock, he made oath that a short time before the fire he examined his books and found his stock to amount to $5,000, which had not been much reduced. This was held by Mr. C. J. Savage, and his associates of the Supreme Court of New York, to be a sufficient compliance with the condition, under the circumstances.[2]

The usual proof of loss of merchandise is by invoices, bills of purchase, books of account, accounts of stock, invoices of purchases and sales, and schedules of articles saved.[3]

If the assured, his books being burnt, estimates his loss on goods in his preliminary proofs from a previous account of stock and subsequent purchases and sales, he should state, not merely the result, but also how he makes his estimates so as to arrive at his results.[4]

A condition that a claim for a loss by fire shall, if required, be sustained by the books of account and other vouchers of the assured, is not an implied condition that he shall keep books.[5] And it is accordingly construed to be a stipulation to produce such books, if any, as he may be in the habit of keeping.

The condition that the assured shall, as soon after the fire as possible, deliver a particular account of the loss, means that he shall use reasonable diligence for the purpose. Accordingly, where the assured did not deliver such an account of a loss that took place in November, before the March following, it was held in Maryland not to be a compliance with the condition.[6]

[1] Catlin *v.* The Springfield Ins. Co., 1 Sumner's R. 434.

[2] Norton *v.* Rensselaer and Saratoga Ins. Co., 7 Cowen, 645; The Chief Justice cites Barker *v.* Phœnix Ins. Co., 8 Johns. R. 307.

[3] See Case *v.* Hartford Fire Ins. Co., 13 Illinois R. 676.

[4] Phillips *v.* Protection Ins. Co., 14 Missouri R. 220.

[5] Wightman *v.* Western Marine & Fire Ins. Co., 8 Rob. (La.) R. 442.

[6] Edwards *v.* Baltimore Fire Ins. Co., 3 Gill's R. 276. Life policies do not usually contain any particular provision respecting the preliminary

1812. *The right* of the underwriters *to require* compliance with the stipulations for *preliminary proofs*, *may*, under a fire as well as a marine policy[1] *be* impliedly *waived*, temporarily or absolutely, by their silence:

1813. Or *by their objecting to the loss on other ground than the deficiency of the proofs.*

Each of the two propositions just stated, is illustrated by divers decisions.

The underwriters, by omitting to point out to the assured a mere formal defect apparent upon the face of the notice or proofs, so that he may supply it, may thereby waive the right to object to it.[2]

Notice of a loss being given under a policy providing for notice "forthwith," a reply by the underwriters that they could not examine the claim "this moment," and the assured "must wait a few days" on account of "the great press of business" which "months would scarcely be sufficient to adjust," is held in Missouri to be a waiver of objection that the notice was not given forthwith.[3]

An examination of the site of the fire by the officers of the insuring company during the thirty days within which notice of the loss is required to be given, and objection thereupon to the claim for the loss on other ground than the insufficiency of the notice, is a waiver of objection to the insufficiency of the notice.[4]

The waiver on account of delay may be only temporary. In case of defect in the proofs, it is held in Maryland that the neglect of the underwriters to point it out, though it may be a sufficient excuse to the assured for not producing it until demanded, is not a waiver by the underwriters of their right subsequently to de-

proof of loss, and the proof required depends upon the practice of each company, and varies in the same company according to the particular case.

[1] See supra, No. 1803.

[2] Edwards *v.* Baltimore Fire Ins. Co., 3 Gill's R. 276; O'Neil *v.* Buffalo Fire Ins. Co., 3 Comstock's R. 123.

[3] Phillips *v.* Protection Ins. Co., 14 Missouri R. 220.

[4] Clark *v.* New England Mut. Fire Ins. Co., 6 Cushing's (Mass.) R. 342.

mand that the defect shall be supplied, provided the assured has not, in the mean time, lost the means of supplying it.[1]

Under a stipulation for "proof of loss," notice being given that a loss has occurred and is claimed, the right, if any, of the underwriters to require a more particular *specification* of the loss, is *waived by* their *neglecting to demand it*.[2]

An objection to the preliminary proofs that the assured had not submitted to examination on oath, is held in Missouri to be a *waiver of other objections* to the proofs.[3]

The underwriters waive objection on account of the omission of the assured to give proof of his insurable interest, by not making the objection at the time of the proof of loss being given, and by alleging other grounds of defence.[4]

Where the policy requires as a part of the preliminary proof a statement as to his ownership of the insured building, and its being free of incumbrance, the right of the underwriters to insist upon such a statement is waived by their objecting to the loss on other grounds.[5]

If a certificate is produced, and the underwriters allege its insufficiency, they are bound to point out the deficiency, and, on the assured's request, to return the certificate to him, to be amended;[6] and their neglect to do so will excuse the neglect of the assured to produce an amended certificate.

Where the policy required the certificate of the *minister* or magistrate nearest to the place, and the assured produced that of one near, but *not nearest*, and the insurers objected to the loss on another ground, it was held in New York to be a waiver of objection to the certificate.[7]

So the right to object that the *certificate* produced by the assured respecting a loss, is *not* that of *the nearest magistrate*, is held in Missouri to be waived by the underwriters' refusal to exa-

[1] Edwards *v.* Baltimore Fire Ins. Co., 3 Gill's R. 276.

[2] Heath *v.* Franklin Ins. Co., 1 Cushing's R. 257.

[3] Phillips *v.* Protection Ins. Co., 14 Missouri R. (by Gardenhire) 220.

[4] Vos *v.* Robinson, 9 Johns. R. 172.

[5] Underhill *v.* Agawam Mut. Fire Ins. Co., 6 Cushing's (Mass.) R. 220.

[6] Turley *v.* North American Fire Ins. Co., 25 Wend. R. 374.

[7] O'Neil *v.* Buffalo Fire Ins. Co., 3 Comstock's R. 123.

mine it, and declaring their intention to resist the assured's claim upon other grounds.[1]

The underwriters' neglecting to object on account of the *omission of* the magistrate to put a *seal to his certificate* produced by the assured as part of his preliminary proof when the same is presented is held in New York to be a waiver of the right to make the objection.[2]

In case of a demand for a loss under an agreement to make a policy against fire, a denial of such an agreement by the insurers is held to be a waiver of preliminary proof of loss within the time stipulated in the form of policy used by the company.[3]

Where the attorney of the assured gave the preliminary proofs to the agent of the underwriters on the day after the fire, being the 17th of January, and shortly after called on the agent and required copies of the proofs, and was put off then and several times subsequently, and finally the agent refused to furnish the copies, and thereupon new preliminary proofs were given in on the 7th of May following, it was adjudged, that the conduct of the agent was a sufficient excuse for the delay, if it would otherwise have been considered unreasonable.[4]

Where the assured produces an account of the loss, the offer of the underwriters to compromise and pay a part of the claim, making no objection to the account as insufficient, was held by the Court of Appeals in New York to be a waiver of objection to the account as being insufficient.[5]

A forfeiture of a condition in a fire policy, by a material defect of preliminary proof of the amount of the loss, is not waived where the underwriters reply that the preliminary proof is wholly unsatisfactory as to the amount of the loss, and also deny their liability for the loss, on account of a material concealment in the assured's representations of the character of the risk, reserving all objections and not waiving any rights.[6]

[1] Phillips *v.* Protection Ins. Co., 14 Missouri R. 220.

[2] M'Masters *v.* Westchester Ins. Co., 25 Wend. R. 374.

[3] Tayloe *v.* Merchants' Ins. Co., 9 Howard's U. S. Sup. Ct. R. 390.

[4] Cornell *v.* Le Roy, 9 Wend. R. 163.

[5] Bodle *v.* Chenango County Mut. Ins. Co., 2 Comstock's R. 53.

[6] Edwards *v.* Baltimore Fire Ins. Co., 3 Gill's R. 276.

CHAPTER XXI.

ADJUSTMENT OF A CLAIM FOR A LOSS.

1814. An adjustment of a loss is, it seems, in London, usually made by indorsing on the policy, "Adjusted this loss at" so much per cent., or other note to this effect, which is signed by the underwriter;[1] or it is written opposite to the underwriter's signature.[2] There does not appear to be any particular form of making an adjustment in the United States.

1815. *An adjustment of a loss made in writing, with the full knowledge of the circumstances*, and intended by the parties to be absolute and final, *is binding*, no less than other settlements of accounts or demands.[3]

To render an adjustment binding, it must be intended to be absolute and final, and not a memorandum of a merely primâ facie provisional understanding subject to revision or revocation at the discretion of either party, as some of the instances presented in jurisprudence seem to have been.

A payment of the amount of the adjustment gives it the character of an absolutely final one, however it may have been before;[4] and the money can be recovered back only on the ground of fraud.

Insurance being in the name of R., for whom it might concern, in a certain sum on freight, and a distinct sum on cargo, in which

[1] Park, 192.

[2] Adams *v.* Saundars, 4 C. & P. 25.

[3] Hogg *v.* Gouldney, coram Lee, C. J., Beawes, 310; Park, 8th ed. 266; Hewitt *v.* Flexney, Beawes, 308; by Lord Mansfield and his associates, in Da Costa *v.* Firth, 4 Burroughs, 1966; Wiebe *v.* Simpson, per Lord Kenyon, Selwyn's N. P. 995; Rodgers *v.* Maylor, per Lord Kenyon, Park, Ins., 8th ed. 267; De Garron *v.* Galbraith, Park, Ins., 8th ed. 267; Christian *v.* Combe, 2 Esp. N. P. 489, per Lord Kenyon, and cases infra; Shepherd *v.* Chewter, 1 Camp. 274, per Lord Ellenborough; and Reyner *v.* Hall, 4 Taunt. 725.

[4] Per Lord Ellenborough, Herbert *v.* Champion, 1 Camp. 134.

the insurers were informed that T. was the party concerned in one third, and W. in two thirds, a claim was made by R. in their behalf for a total loss, and it was agreed between him and the insurers to submit the same to arbitration, "the interest of the party for whom insurance was effected being admitted." A total loss was awarded to R. In an action on the award by R., it was held in Massachusetts to be conclusive upon the insurers as to the interest of T. and W., and that evidence that W.'s interest was not admitted or passed upon was inadmissible.[1]

An acceptance of an abandonment is an adjustment of a loss as total,[2] and a payment made on a claim of a total loss, being held to be equivalent to an acceptance of an abandonment, is in effect an adjustment.[3] Lord Ellenborough adopts this doctrine.[4]

A policy contained a stipulation for a return of two per cent. of the premium on arrival, and this return was demanded by the assured, and made by the underwriter, and a memorandum was made upon the policy to signify that it had been adjusted. After this the assured claimed an average loss. Gibbs, C. J. ruled that this stipulation for a return had reference to the safe termination of the risk, and the acceptance of the return premium by the assured was constructively and in effect an adjustment, whereby he wholly discharged the insurer from all claims under the policy; and so it was found by a special jury.[5]

The assured is not bound by his first claim. Where a statement of a loss was made up by a despacheur, and presented to the underwriters, and they refused to settle in conformity to it, it was held in New York that the assured was not thereby precluded from claiming a greater amount than had been allowed to him in such statement.[6]

After an adjustment and payment of a loss by a part of the underwriters upon a policy, another underwriter subscribed an in-

[1] Richardson *v.* Suffolk Ins. Co., 3 Metc. 573.

[2] Bell *v.* Smith, 2 Johns. R. 98.

[3] M'Lellan *v.* Maine Fire & Marine Ins. Co., 12 Mass. R. 246.

[4] Herbert *v.* Champion, 1 Camp. 134.

[5] May *v.* Christie, 1 Holt, 67.

[6] American Ins. Co. *v.* Griswold, 14 Wend. R. 399.

dorsement on the policy, "Adjusted thirty-three pounds per cent. on account, upon my subscription to this policy, until the account of the proceeds of the goods insured can be made up, when a final loss is to be paid to the same amount as by the other underwriters." This was held by the English Common Pleas to be a conditional adjustment, and it was held that the liability of the insurer upon it depended upon the assured's making up the account.[1]

An adjustment being made in writing, or by award of arbitrators, the assured may bring an action upon it without setting forth the policy particularly, or he may bring an action upon the policy in the same manner as if there had been no adjustment, and give the adjustment in evidence of a loss and of its amount.[2]

Where, immediately after signing the adjustment, doubts arose in the mind of the insurer as to the honesty of the transaction, and he called for other proof, the adjustment was held by Lord Kenyon and his associates not to be binding.[3] This case cannot be consistent with those above cited, without supposing these doubts to have been expressed, and further proof to have been demanded, before the adjustment could be considered as concluded, and while something remained to be done, equivalent to the delivery of a deed after it has been executed; for the doubts or demands of one party, after a transaction is completed, cannot make it the less binding.

On an application to set aside an adjustment, the Court in New York said: "It appears that, previous to the adjustment, all the facts were communicated to the underwriters. The adjustment was made by the underwriters with their eyes open. An adjustment cannot be opened, except on the ground either of fraud, or mistake from facts not known."[4]

Where the assured settled with the underwriters for a partial loss, and gave up the policy to them without notifying to them a claim pending in admiralty against the vessel for salvage, it was

[1] Gammon *v.* Beverly, 1 J. B. Moore, 563; S. C., 8 Taunt. 119.

[2] Rodgers *v.* Maylor, Park, 8th ed. 267; Christian *v.* Combe, 2 Esp. 489.

[3] De Garron *v.* Galbraith, Park, 8th ed. 267. See remarks upon this case, Park, ut supra; Marshall, 635.

[4] Dow *v.* Smith, 1 Caines's R. 32.

held in Louisiana that he could not recover any further loss on account of the salvage which he might be liable for.[1]

Insurance being made on a vessel in favor of F., the master and general owner, and by the same underwriters in another policy in favor of B., a mortgagee, a suit on F.'s policy, in which the underwriters alleged in defence that he had fraudulently caused the vessel to be cast away, terminated in a verdict and judgment for the plaintiff. Thereupon the three parties, the mortgager, mortgagee, and underwriters, made a compromise, for the amount of which the underwriters gave their negotiable promissory note, payable to their own order, and by themselves indorsed, generally; on which note the mortgagee brought an action. The insurers offered new evidence in this action, that, on breaking up the vessel, augur-holes were discovered to have been bored in its bottom, and stopped with plugs, which were taken out, and the vessel thereby fraudulently sunk by the master. This evidence was held by Shaw, C. J., and his associates, in Massachusetts, not to be admissible, being merely cumulative evidence of a ground of defence which had been taken in F.'s suit, there being no suggestion that B. was a party to the fraud, or knew of it at the time of the compromise.[2]

If the insurers repair a damaged vessel, and it is thereupon delivered to the assured and accepted by him, this is held in Massachusetts not to preclude him from recovering against the underwriters for any deficiency of the repairs.[3]

Where one of the two part-owners of a vessel, being authorized to insure for both, effected such insurance on the freight, and, on a loss happening, compromised with the underwriters, and released them from all claims on the policy on their paying him the amount of his own proportion of the loss, it was held in Massachusetts that the other part-owner had an election either to claim, in an action on the case against his copartner, the whole amount of his loss, on the ground that the compromise was not justified, or to

[1] Batre *v.* Louisiana Ins. Co., 13 La. R. 577.

[2] Barlow *v.* Ocean Ins. Co., 4 Metc. R. 270.

[3] Reynolds *v.* Ocean Ins. Co., 22 Pick. R. 191.

acquiesce in the settlement as being a compromise for the interests of the two part-owners, in which latter case he was entitled to recover his proportional part of the amount received.[1]

Where the assured having proposed to abandon a steamer gave over the abandonment on the underwriters agreeing to be answerable for the repairs, it was held in Ohio that they were answerable only for their proportion in an adjustment as of a partial loss.[2]

In case of the underwriters on a life policy agreeing, on loss, to pay to a creditor, to whom the policy was assigned, the amount of his debt, Wigram, English V. C., decreed that the creditor must account for his other collateral security in adjusting the amount to be paid to him.[3]

An award of arbitrators under a submission, and payment of the amount awarded, will be binding in respect to a claim for a loss, as in case of other claims.[4]

1816. *Any adjustment which one party is led to make in consequence of the fraud of another, is not binding upon the party who would not have made the agreement but for the fraud.* This is a general doctrine applicable to all agreements.

The assured having stated to the underwriter that the property had been captured, and omitted to state that a greater part of it had been saved, and from a misapprehension in this respect the insurer having adjusted the loss at ninety-eight per cent., it was adjudged by Lansing, C. J., and Kent and Radcliff, Justices, that the underwriter was not bound by the adjustment.[5]

So, an adjustment upon the production of fictitious bills of lading in proof of the interest of the assured, was ruled by Sir James Mansfield not to be binding upon the underwriter.[6]

In case of a memorandum of an adjustment by the underwriter's

[1] Briggs *v.* Call, 5 Metc. R. 504.

[2] Webb *v.* Protection Ins. Co., 6 Ohio R. 456.

[3] Cook *v.* Black, representing the Britannia Life Ass. Co., 2 Jones's Life Annuities, 1186.

[4] Newburyport Ins. Co. *v.* Oliver, 8 Mass. R. 402.

[5] Faugier *v.* Hallett, 2 Johns. Cas. 233.

[6] Haigh *v.* De la Cour, 3 Camp. R. 319.

indorsing his initials, he afterwards, before paying the loss, learned that there had been a material concealment in effecting the insurance, whereupon he refused to pay it. Lord Ellenborough ruled that he was not conclusively bound by the adjustment, but might avail himself of the defence on the ground of concealment.[1]

1817. *An adjustment*, like other agreements, made *through mutual mistake* and misunderstanding *of the material facts by the parties, is not binding upon either party.*

An adjustment made by a party through a material mistake of the facts, *into which he is led by the other, though without fraud, or which the other might well suppose him to make, and which he was not bound to have corrected at his own risk, is not binding upon such party.*[2]

Insurance being made "free from capture in port," an adjustment was made and the premium returned, on the supposition that the loss had been by capture in port. It afterwards appeared that the loss had been by capture not in port. The underwriter was held to be liable, notwithstanding the adjustment.[3]

Where the underwriters paid the loss on a vessel that was condemned for want of a sea-letter, a ground of condemnation which exonerated the insurers, but of which they had no knowledge at the time of paying the loss, Mr. Chief Justice Mansfield said: "It seems to be clear that an adjustment is not binding, if it in any degree proceeds on a mistake."[4]

Where the facts are known to the parties, either or both of whom prove to be mistaken in judgment or in estimating the result, this will not be a ground for setting aside an adjustment. A policy being made upon indigo, that was sunk at the loading port and sold at auction on account of the damage, the loss was adjusted by agreement at seventy-one per cent. The purchaser of the indigo sent it forward to the same port of destination, and sold

[1] Herbert *v.* Champion, 1 Camp. R. 134.

[2] Bilbie *v.* Lumley, 2 East, 469; Elting *v.* Scott, 2 Johns. R. 157; and see 1 T. R. 712; 4 Dallas's R. 109; 8 Johns. R. 384; 3 Mass. R. 74; 4 id. 341; 9 id. 408; Faugier *v.* Hallett, 2 Johns. Cas. 233; and cases passim.

[3] Reyner *v.* Hall, 4 Taunt. 725.

[4] Steel *v.* Lacy, 3 Taunt. 285.

it there at a price very little less than if it had not been wetted. It was held that this was not a ground for setting aside the adjustment.[1]

1818. *A party is not permitted to allege a mistake of the law as a ground for setting aside an adjustment.* In this respect, adjustments are on the same footing as other agreements.[2]

[1] Hardy *v.* Innes, 6 J. B. Moore, 574.

[2] Bilbie *v.* Lumley, 2 East, 469, in which case the judges expressly dissent from the suggestion of a contrary doctrine by Lord Kenyon, in Rodgers *v.* Maylor, Park, 8th ed. 267. See also Dow *v.* Smith, 1 Caines's R. 32.

CHAPTER XXII.

RETURN OF PREMIUM.

SECT. 1. Where there is no risk.
2. Stipulations for return of premium.
3. Forfeiture of a warranty or condition.
4. Illegality and fraud.
5. What payment is a ground to claim return.
6. Return under an assignment.
7. Abatement of marine interest.

SECTION I. WHERE THERE IS NO RISK.

1819. It is a general rule, subject to some exceptions, that, *if the thing insured has never been brought within the terms of the contract so that the insurer might have been liable for a loss* occasioned by the perils insured against, *the premium must be returned* to the assured, or the premium note cancelled, deducting, however, one half per cent. on the amount insured, or making such other deduction as is stipulated for.[1]

"Where the risk has not been run," says Lord Mansfield, "whether it be owing to the fault, pleasure, or will of the assured, or to any other cause, the premium shall be returned."[2]

As where insurance is on goods for a voyage, and no goods are shipped on account of the party for whom the policy is made.[3]

Accordingly, though the party in whose favor a policy is effected has a ship or goods answering to the description in the policy, at the place whence the risk was to begin, but the risk does not begin, owing to the voyage insured not being commenced,

[1] 1 Emerigon, 62; 1 Magens, 90; 1 Vesey, 319; Bermon *v.* Woodbridge, Doug. 781; Boehm *v.* Bell, 8 T. R. 154; Martin *v.* Sitwell, 1 Show. 156; Siffkin *v.* Allnutt, 1 M. & S. 39; Graves *v.* Marine Ins. Co., 2 Caines's R. 339; Forbes *v.* Church, 3 Johns. Cas. 159; Lawrence *v.* Ocean Ins. Co., 11 Johns. R. 241; Mar. Ins. Co. of Alexandria *v.* Tucker, 3 Cranch, 357.

[2] Tyrie *v.* Fletcher, Cowp. 666.

[3] Waddington *v.* United Ins. Co., 17 Johns. R. 23.

but a different voyage being undertaken,[1] the premium must be returned.

1820. *But if the property has, though for a short time only, been exposed to the risks insured against,* and within the conditions of the policy, *in such manner that the insurers might have been liable for a loss, no return of premium* for insurance of the property so at risk *can be claimed.*[2]

The freight of a ship was insured "from Cuba to ports in St. Domingo, and from thence to ports in the United Kingdom." The ship being let for the voyage by a charter-party, in which the charterer agreed to pay a stipulated amount of freight, and having sailed from the island of Cuba to St. Domingo on the voyage insured, afterwards, and before any cargo was taken on board, deviated. The assured claimed a return of premium. Lord Ellenborough instructed the jury, that, "had the ship been lost while waiting to take in a cargo, the underwriters would have been liable for the whole sum insured. The charter-party created an interest on which the policy had attached, and there had been an inception of the risk."[3] And he ruled, that the assured was not entitled to a return of premium.

1821. *The party for whom the insurance is effected may, at his election, defeat the contract,*[4] by sustaining the loss of the one half of one per cent. or other rate agreed upon in such case. This a party will not do voluntarily, and where the insurance fails to take effect, it is usually through some mistake as to having a subject within the specified risks, or in describing the subject, or making a representation, or in the stipulations.[5]

[1] See c. 11, s. 1, as to the commencement of the risk.

[2] Hendricks *v.* Commercial Ins. Co., 8 Johns. R. 1. See also Loraine *v.* Tomlinson, Doug. 564; Steinbach *v.* Columbian Ins. Co., 2 Caines's R. 132; Taylor *v.* Lowell, 3 Mass. R. 331.

[3] Moses *v.* Pratt, 4 Camp. 297.

[4] Molloy, l. 2, c. 7, s. 12; Marsh. 676; Loccenius, l. 2, c. 5, n. 16; 2 Emerigon, 168; Colby *v.* Hunter, 3 C. & P. 7; M. & M. 81.

[5] The amount of premium reserved varies in the United States, being one half or one quarter of one per cent. upon the amount insured, or ten per cent. of the amount of the premium, which last is the more equitable rule.

So an agreement with a life insurance company by an insured debtor to the company for a loan, to pay the premium on the policy and maintain it as collateral security for the loan, ceases to be binding upon him on the company being dissolved after having assigned its interest in the policy to another company, and he may elect not to pay the premium.[1]

1822. *The premium is returnable in case the insurance fails from misdescription of the subject:*

As by describing a sloop as being a brig:[2]

Or insuring to cover a bottomry interest, without describing it as such.[3]

1823. *A premium for insurance of a subject against a peril already insured against, on the same subject, by the same underwriters, for the same assured, must be returned,* since, as between the parties, there is no such peril remaining at the risk of the assured.

It was so held in Massachusetts, where the underwriters, having already insured against detention, capture, and all the usual risks, agreed by a memorandum indorsed upon the policy, in consideration of an additional premium, to insure against the risk of an existing blockade at Martinico, when there was no such blockade, and, if there had been, the risk of it was already covered by the policy.[4]

1824. *If the assured has no interest in the subject, so that the underwriters are not liable for a loss, the premium is to be returned.*

A British order in council being issued in 1807 to commanders of ships of war and privateers, preliminary to an order for general reprisals, to detain Danish vessels and bring them into port, the officers of an armed ship detained a Danish vessel and effected insurance on the same. In an action for the loss of the ship by

[1] Per Kindersley, V. C., Atkinson *v.* Gilby, 13 Eng. Law & Eq. R. (Press of Little, Brown & Co.) 209; S. C., 21 Eng. Law J. R. (N. S.) Chan. 848.

[2] Emerigon, tom. 1, p. 161.

[3] Robertson *v.* United Ins. Co., 2 Johns. Cas. 250.

[4] Taylor *v.* Sumner, 4 Mass. R. 56

perils of the sea, in which the want of insurable interest was objected, Lord Ellenborough ruled, and the ruling was subsequently confirmed by the full court, that the captors had no insurable interest; and, as there was no fraud or illegality, that the premiun should be returned.[1]

But the mere imperfection of the title of an assured, who has possession under a purchase, claiming to be owner, was ruled by Lord Ellenborough not to be a good ground for demanding a return of premium on account of the title being void, being under an unauthorized sale made by the master in a foreign port.[2]

1825. *If a policy is expressly predicated upon a fact mistaken by the parties, the premium is returnable.*[3]

If the assured supposes himself to have an interest, when in fact he has no interest, he is entitled to a return of the premium.[4]

1826. The risk may have terminated before the policy is made, yet if it be so made that it would have applied to any loss that might have happened during the risk, no return of premium can be demanded.[5] Policies not unfrequently admit of this construction.

1827. *Whether a party making a policy for another under a description of the subject applicable to the interest of such other, can reclaim the premium on the ground of want of authority?*

A policy being effected in New York by A, June 6th, on the vessel D and cargo, "at and from Trinidad de Cuba to New York," for himself and B and C and whomsoever else it might concern, for the purpose of protecting the interest of any of the three parties named, as was verbally stated to the underwriters, it appeared that B, being at Trinidad, had purchased the vessel and

[1] Routh *v.* Thompson, 11 East, 428. See supra, Vol. I. p. 183, No. 323.

[2] M'Culloch *v.* Royal Exch. Ass. Co., 3 Campbell, 406. Lord Ellenborough puts stress upon the return not being demanded until after the voyage had been performed and freight earned, and seems to have ruled mostly, or wholly, upon that ground; but if the underwriters had never been liable for any loss, it does not appear to be at all material to claim the return of the premium while the voyage is pending.

[3] Taylor *v.* Sumner, 4 Mass. R. 56.

[4] Routh *v.* Thompson, 11 East, 428.

[5] Park, 563.

cargo there on his own account exclusively. He was at the time concerned with A in other commercial transactions, and A, having heard, through other persons, of the purchase, supposed it might be on joint account. The vessel was purchased by B on the 2d of April, in contemplation of a voyage to New York, but no preparation was actually made for that voyage, the vessel being in fact loaded with a small cargo, and on the 29th of May despatched for Havana; and on the 31st, insurance was ordered there by an over-land despatch, provided the vessel should not have arrived before the order. It had, however, arrived before the order. Lewis, C. J., and Lansing and Radcliff, Justices, of the Supreme Court of New York, were in favor of a return of premium, on the ground, that as the policy was not ordered or adopted by B, it had not attached, and judgment was given accordingly; Mr. Justice Kent, afterwards Chancellor, dissenting on the grounds, that the policy had attached "at" Trinidad, and that B might have availed himself of it by ratification, had a loss happened at that place, and that A was estopped to allege want of authority.[1]

It is questionable, however, whether B could have taken advantage of the policy, since the voyage to New York had not been undertaken.[2] If the insurance could have been effectually adopted by B, the premium was undoubtedly not returnable, though he should have disclaimed the policy.

The proper answer to our inquiry, therefore, seems to be, that,

If a party voluntarily effects insurance for another, who could avail himself of it to recover for a loss, the premium cannot be reclaimed, though such other disclaims it.

The case seems to be precisely the same, in respect to the return of the premium, as if the party effecting the policy had effected it for himself.[3]

A Massachusetts case is in contradiction to the doctrine just stated. The master and part-owner of a brig belonging to himself and two others, the cargo of which belonged in part to the

[1] Steinback *v.* Rhinelander, 3 Johns. Cas. 269.

[2] See No. 935.

[3] See 1 Duer, Marine Ins. 10, 141, et seq., and Note III. p. 174.

three jointly, and in part to them separately, voluntarily ordered insurance on the cargo for "the owners" of the brig. The insurance was adjudged to have failed in respect of the separate interests of the other two part-owners, on the ground that they had not previously authorized or subsequently ratified it, though their interest was asserted, and a loss claimed in their behalf, in the action brought in the names of the agents by whom the policy had been effected. But it was adjudged that they were entitled to a return of the premiums on their separate parts of the cargo.[1] As it appears on the face of the case, that the insurance company was liable to the contingency of their adopting the insurance on their separate interests in the cargo, and consequently to a loss if they had adopted it, the insurers surely should not have been affected by the two other part-owners repudiating, or neglecting to ratify, the insurance on their separate interests; if under the circumstances of this case, it could, in fact, be considered as having been rejected by them.

1828. *In case of a fire policy made through mistake, the premium may doubtless be reclaimed for want of interest,* no less than under a marine policy.

This results from the doctrine that gaming policies are illegal, and the necessity of proof of interest under such a policy.[2]

1829. *Upon the same principle, which entitles the assured to a return of the whole premium, where he has no interest at risk, he is entitled to a return of a part of the premium, where only a part of the value insured is ever at risk under the policy.*[3]

1830. *Where the policy is on two distinct subjects, and only one is put at risk, the proportional part of the premium for the other is returnable:*

As in case of insurance on the ship and cargo, where no cargo is put at risk.[4]

[1] Foster *v.* United States Ins. Co., 11 Pick. R. 85.

[2] Lynch *v.* Dalzell, 4 Bro. P. C., Tomlin's ed. 431.

[3] Loccenius, l. 2, c. 5, s. 8; Amery *v.* Rodgers, 1 Esp. R. 207; Holmes *v.* United Ins. Co., 2 Johns. Cas. 329; Polloch *v.* Donaldson, 3 Dall. 510; Foster *v.* United States Ins. Co., 11 Pick. R. 85.

[4] Horneyer *v.* Lushington, 15 East, 46.

1831. *A part of the premium may be returnable for short interest, under a policy on profits:*

As where only a part of the goods of which the profit is insured, is put at risk.

It follows, from the English doctrine, that the existence, as well as amount, of interest in profits must be proved, that a return of premium may be claimed as well for want of interest as for short interest.

In the United States, so far as interest in the goods is held to give an interest in profits, it is necessary to prove that no goods, or only a part of the goods on which the profit was insured, were shipped, in order to entitle the assured to a return of premium; whereas, in England,[1] though the goods are all shipped and at risk, if the state of the markets is such as to give no profit, the assured ought to be entitled to a return of premium; and so for a partial return, if the profit is, or would have been, only to a part of the sum insured.

1832. *A policy being for an entire period at one entire premium, no part of the premium is returnable after the policy has attached.*

A ship being insured at an entire premium for twelve months, the risk terminated at the end of two months, and the assured thereupon claimed a return of a part of the premium for the subsequent time; but it was held that he was not entitled to it.[2]

1833. *A proportional return of premium is due for short interest in the different stages or periods specified, if the policy contains a suggestion and measure for an apportionment.*

Under an open policy on the cargo of a vessel until its return to the United States, "as interest should appear," at the rate of fifteen per cent. for six months, the vessel had on board successively, at different times within that period, $5,000, $1,500, and $2,500. It was held that a proportional part of the premium was returnable for short interest, for the successive periods.[3]

If the premium is stipulated for certain distinct successive pe-

[1] Eyre *v.* Glover, 16 East, 218.

[2] Loraine *v.* Tomlinson, Doug. 564.

[3] Pollock *v.* Donaldson, 3 Dall. R. 510.

riods, at a certain sum for each period, it is due only to the end of the latest period entered upon before the termination of the adventure.

Under a policy on the vessel "at and from New York to Monte Video and Buenos Ayres, and at and from thence back to New York," at "one and three quarters per cent. each way, to return one half per cent. if Buenos Ayres was not used," a loss having occurred in an early part of the voyage, by the vessel being fraudulently set on fire and scuttled, and the risk being thus terminated, it was held by the Supreme Court of New York, that the premium from Monte Video was returnable.[1]

A ship being insured for one year at a certain rate per month, warranted two and a half per cent. for six months, and at the same rate per month if it did not arrive until after the end of the year, was captured shortly after the end of six months. It was held that the premium was due only for the months entered upon after the six months before the capture.[2]

And the same rule applies where insurance is for an indefinite period, the premium being payable monthly, quarterly, or at other periods.[3]

1834. *Whether, under insurance for successive stages, passages, or voyages, for a single premium, a proportional part can be reclaimed for passages on which no risk is run?*

A ship insured "from London to Halifax, warranted to depart with convoy from Portsmouth," was too late for the convoy from Portsmouth, upon which the assured applied to the underwriters to take the risk without convoy, for an additional premium, or to return a part of the premium, considering the risk as terminating at Portsmouth. They refused both propositions. The jury found that it was the custom, in such case, to return a part of the premium. Lord Mansfield said: "I have not the least doubt about this question. This is a contract without any consideration as to the voyage from Portsmouth to Halifax, for the assured intended

[1] Waters *v.* Allen, 5 Hill's R. 421.

[2] Lovering *v.* Merchants' Ins. Co., 12 Pick. R. 348.

[3] Emerigon, c. 3, s. 2.

to insure that part of the voyage, as well as the former part, and has not. It has been objected, that, the voyage being begun, the premium cannot be apportioned. But I can see no force in this objection. There are two parts in this contract, and the premium may be divided into two distinct parts, relative, as it were, to two distinct voyages."[1] The other judges concurred in this opinion, and it seems to have been subsequently adopted by the Court of Common Pleas.[2]

In case of a policy on a ship "at and from Jamaica to London, warranted to sail with convoy," where the vessel was too late for the convoy, and so did not comply with the warranty, the jury were of opinion that there ought to be an apportionment of the premium, and the part for the risk "at" Jamaica retained, and that for the risk thence to London returned. Lord Mansfield was of the same opinion.[3]

A similar judgment was given by Lord Mansfield and his associates on a similar voyage, wholly on the ground of usage.[4]

But in another case the same distinguished judge is reported to have said: "It would be endless to go into an inquiry about the value of the risk at Jamaica. Nothing is said from whence it can be inferred that it was meant that there should be two risks, or by which the risk at Jamaica could be distinctly estimated." In this case there was a warranty "to sail on or before the first of August," and a stipulation for the return of a part of the premium for convoy, and the vessel did not comply with the warranty. Mr. Justice Buller said: "In all insurances from Jamaica, the policy runs at and from, and though, in many instances, the voyage has not been commenced, yet there never was an idea of any part of the premium being returned."[5]

[1] Stevenson *v.* Snow, 3 Burr. 1237.

[2] Rothwell *v.* Cooke, 1 B. & P. 172; Marsh. Ins. 658.

[3] Gale *v.* Mackill, Marshall, 659; Park, 589.

[4] Long *v.* Allen, 4 Doug. R. 276; S. C., Marsh. Ins., 3d ed. 660; Park, Ins. 569.

[5] Meyer *v.* Gregson, 3 Doug. 402; Marsh. 658, decided after Stevenson *v.* Snow, but the year before Gale *v.* Mackill, and Long *v.* Allen, supra.

In the intermediate time between the earlier and later of the above cases, one came before Lord Mansfield and his associates, under a policy upon a vessel "at and from London for twelve months from the 19th of August, 1776, warranted free from capture by the Americans," at a premium of nine per cent., which was captured by an American privateer about two months after sailing, and a proportional part of the premium was demanded back. The decision was against the claim, but Lord Mansfield at the same time reasserted the doctrine of the prior decision in favor of an apportionment and return,[1] though the distinction between the cases is not specifically pointed out, and is not apparent.

In 1781, and four years after the latest of the preceding decisions, a case came before the same court on a policy upon a ship and cargo, "at and from Honfleur to the coast of Angola, at and from thence to her port of discharge in St. Domingo, and at and from St. Domingo back to Honfleur," at a premium of eleven per cent. A deviation took place in the voyage from Angola to St. Domingo, and the assured claimed a return of premium for the voyage from St. Domingo to Honfleur. Lord Mansfield said, in giving the opinion of the court: "The question depends upon this, whether the policy contains one entire risk on one voyage, or whether it is to be split into six different risks. There is nowhere any contingency, at any period, out or home, mentioned in the policy, which, happening or not happening, is to put an end to the insurance." And the judgment was against a return.[2]

In New York the court seem to have been of opinion, that, where the risk is at and from a place, and attaches at such place, there can be no return of any part of the premium, though the risk from the place should never be run by the insurers. The court say: "The difficulty of apportioning the risk is insurmountable." The question of usage was not made.[3]

Usage is one distinct ground of apportionment stated in the above cases.[4] This ground was particularly considered in a Mas-

[1] Tyrie *v.* Fletcher, Cowper, 666.

[2] Bermon *v.* Woodbridge, Douglas, 781.

[3] Columbian Ins. Co. *v.* Lynch, 11 Johns. R. 239.

[4] It is also incidentally stated as a

sachusetts case of insurance on a cargo from Boston to Archangel and back, where the outward cargo was safely landed, and, on account of the state of the markets, no homeward cargo was shipped. It was proved to be the usage in Boston to return the premium for the homeward voyage in such a case, that is, where there was no loss; which usage had continued, notwithstanding some prior decisions of the court to the contrary. But the court again decided against the return, on the ground of its being contrary to the legal principles of construction, and that "the usage of no class of the citizens could be maintained in opposition to principles of law."[1]

The same usage still continues in Boston, namely, to return a proportional part of the premium where there is no property shipped for the homeward voyage, provided no loss has taken place, under the policy, on the outward voyage, which is a practicable and reasonable limitation; and the usage ought to be so limited, since, if the underwriters pay a total loss on the outward passage, it is a good reason for retaining the whole premium, and it is convenient, and renders the usage plain, to extend the exception to all cases of loss, partial as well as total, since it lies with the assured to treat a constructive total loss as partial or total.

In respect to the objection of contravening the legal construction of the contract, if it means, what is in some instances asserted in the cases above referred to, that the court and jury cannot apportion a premium, there being no rule whereby to determine the value of the risk "at" a place, and that "from" it to another place, or to assign the proportion of the premium for each of the distinct passages specified in the policy; it is plainly, as before remarked, not a sufficient reason, since there is generally no difficulty in making the apportionment, the value of the different risks being usually as familiar as that of the aggregate passages stipulated for. The difficulty, if any exists, belongs to peculiar and unusual risks, and is by no means insurmountable in those.

Though there is some ambiguity and very considerable discre-

ground in Donath *v.* North American Ins. Co., 4 Dallas's R. 463.

[1] Homer *v.* Dorr, 10 Mass. R. 26.

pancy in the jurisprudence just referred to, the general result seems to be, that

An entire premium cannot be apportioned, and a part of it be returnable, unless the policy contains some express provision or implication to serve as a basis of the apportionment.[1]

This rule admits of evidence of the usage of the voyage, or that of the place where the policy is made, according to the general rules for the admission of such evidence;[2] and there does not appear to have been a good reason for rejecting it in the Massachusetts case above referred to.[3] A usage is, as we have seen, impliedly referred to as a part of the contract, and it accordingly follows that the contract, of itself, thus points out, though rudely and imperfectly perhaps, a rule of apportionment. Lord Mansfield considered the warranty of convoy from Portsmouth, being an intermediate port, to be a sufficient indication of a rule of apportionment, which was surely a slenderer ground than that of a usage to apportion and make return.

It seems to be the more equitable doctrine, that an entire premium is apportionable into the part for the risk at a place, and that for the risk from it to another, and an entire premium for two passages is apportionable into two parts, one to be returned provided that, in either case, *no loss is claimed, and the underwriters are* unquestionably *exonerated* from the contract.

There has not, to my knowledge, been any usage to make a return in the former of these two cases.

The assured confessedly has, in all cases, the election to waive

[1] See Waters *v.* Allen, 5 Hill's R. 421.

[2] Supra, No. 132, et seq.

[3] The apparent jealousy of the court in that case, respecting the introduction of evidence of usage, was not without reason, since the success of a party to a suit in proving or disproving the fact of a usage, depends very much upon the comparative intelligence, skill, activity, and scrupulousness or unscrupulousness of the two litigants, and the court is bound to protect the public against a species of legislation by the more skilful or less scrupulous of two juridical combatants. The courts, however, have the means of protecting the public in such case, on the ground of the illegality, absurdity, and inconvenience of the alleged usage.

the whole contract by not incurring any part of the risk; and there seems to be no reason why he should not have the same privilege for any distinct stage of the risk, provided he makes no demand upon the underwriters for a loss. Some of the precedents will bear out this construction, and I do not see any legal or practical objection to it.

1835. A RETURN *on account of a less amount being put at risk than is insured, is called* A RETURN OF PREMIUM FOR SHORT *interest.*

1836. *There is no question, that, on an over-insurance in a policy subscribed by only one underwriter, or one company, or one set of joint underwriters, the whole or a proportional part of the premium is returnable on account of a total want of interest, or for short interest, though the contract contains no provision for such return.*

The exigencies of commerce require this rule in respect to marine insurance on goods, since there is very frequent occasion to make insurance provisionally without a knowledge of the amount which will be at risk, and sometimes as we have seen in divers cases before referred to, without a certainty that any goods will be shipped for the party in whose behalf the insurance is effected.

Accordingly, this practice of making a return for short interest is recognized by the ancient ordinances and old writers. Marshall says: "If, through mistake, misinformation, or any other innocent cause, an insurance, in a single policy, be made without any interest whatsoever in the thing insured, or to a much larger amount than its real value, in the one case the insurer shall return the whole premium, in the other he shall return in the proportion which the true value bears to the sum insured."[1]

It is observable that Mr. Marshall limits his proposition to "an insurance in a single policy," though the French Ordinance of 1681, and Valin's comment referred to by him, explicitly extend the rule to divers policies.

[1] Marine Insurance, 2d ed. p. 630. He cites Le Guidon, c. 2, a. 18; Ord. of Amsterdam, art. 22; Pothier, Ins. n. 77; Roccus, n. 82; Ord. 1681, tit. Insurance, art. 23.

1837. *Whether, in case of over-insurance in a policy having divers distinct subscriptions for separate amounts, any return is to be made for short interest, where there is no express provision for such a return?*

In a case of over-insurance before Chief Justice Holt and his associates, it was proved by "all the Exchange" to be a custom for the prior subscribers on a policy to be liable for losses to the full amount of the insurable interest, and the subsequent ones to be exonerated from losses and liable for a return of premium, and the court considered the custom to be reasonable.[1] Upon this case Marshall remarks: "The custom seems now to be forgotten; for at present the underwriters would be held all liable in proportion to their several subscriptions."[2]

In the chapter on return of premium,[3] he says: "All the underwriters upon a policy in which the effects are insured beyond their value, must bear any loss that may happen, and repay a part of the premium in proportion to their respective subscriptions, without regard to the priority of their dates."[4]

The cases in which the different sets of underwriters in double insurance had been held liable for the whole amount insured by them, until the assured had received the amount of the insurable interest, were by different policies.[5]

In respect to the same policy subscribed by several underwriters, each for a distinct amount, the presumption should rather seem to be, that an insurance only to the amount of the insurable interest was intended, and not an over-insurance, unless the contrary appeared on the face of the policy.

Accordingly, there appears to be reasonable ground for the conclusion, that

The construction of a policy subscribed by several underwriters,

[1] The African Company *v.* Bull, 1 Show. 132; S. C., Gilbert, 238.

[2] Marsh. Ins., 2d ed. 149.

[3] Page 630.

[4] A passage in Kuricke, Diatr. n. 16, is cited for the proposition, that all the underwriters are proportionably liable for loss, without distinction as to priority.

[5] Newby *v.* Reed, at N. P., 1 Bl. 416; and other cases cited supra, No. 361.

for distinct sums, will be in favor of a return of premium for short interest, though the policy contains no provision for such a return.

And if the subscriptions are considered to be simultaneous, or, as Lord Abinger says,[1] *if they are all made prior to the commencement of the risk, they all attach, and are all subject to a return of premium pro ratâ*, without any provision in the policy for the purpose.

In either of these cases, there seems to be no question as to the premium being returnable for short interest, the only question being, whether it is to be returned on the later subscriptions or on all of them pro ratâ; and in this respect the London custom seems, according to Mr. Marshall, to have changed after the time of Lord Holt.

1838. *Whether in divers distinct, independent policies* on the same subject, in favor of the same assured, and against the same risks, *to an amount exceeding in the aggregate the insurable* amount of the *interest, each being under that amount*, without any provision for return of premium, *the underwriters on each will be liable for the full amount insured until the assured is indemnified* for the amount at risk? Or, which is in effect the same question, *Whether, in such case, any return of premium can be claimed for short interest?*

If they are so liable, that is to say, if the policies take effect as double insurance, those who pay the loss can, as we have seen, recover a ratable contribution from the others.[2]

The case thus presented is quite different from a single policy with a single subscription, which could not be carried into effect as a double insurance; and to render a single policy with divers subscriptions a double insurance, it must be considered to be as many different insurances as there are subscriptions.

There is no objection on account of illegality or fraud, or inequitableness between the parties, in an over-insurance by different underwriters under different policies, where it is so intended by the assured, and known to the underwriters, or the knowledge of

[1] Fisk *v.* Masterman, 5 Mees. & Wels. 169. [2] Supra, Vol. I. c. 3, s. 15.

it is so within their reach that notice may be presumed. If the assured conceals the fact of over-insurance in case of loss, and receives an excess over its amount, it is a fraud, and he is liable to refund, since, according to the construction which has been put upon cases of over-insurance, the underwriters have a right to resort to the others for contribution. Provided they have the means of availing themselves of this right, and of knowing that the assured does not obtain a double indemnity, they cannot be prejudiced, and may be benefited; they are not prejudiced if they take the right of such resort over into account in estimating the premium, and if they do not take it into account, they are benefited in case of all the underwriters being solvent. Accordingly, where there is any pretence for the underwriters insisting on there being an over-insurance, they are sure to insist upon its being so construed.[1]

There is, then, no objection to double insurance upon general principles applicable to contracts, and its legality and validity have been too frequently recognized in English and American jurisprudence to admit of any doubt.[2]

The real questions, then, are, 1st, Whether, in over-insurance by distinct policies, the contracts are primâ facie valid, and take effect as being double insurances, where nothing to the contrary appears in the policies or otherwise, or whether the presumption is against so considering them? and, 2d, Whether the presumption, either way, is subject to be rebutted by proof of custom and by parol evidence?

According to the uniform jurisprudence of a whole century, beginning in England, and followed in the United States, the presumption has been that the policies were to be treated as double

[1] As in the case of Fisk *v.* Masterman, 8 Mees. & Wels. 165; Alliance Ins. Co. *v.* La. State Ins. Co., 8 La. R. 11, stated supra, Vol. I. No. 369.

[2] See Newley *v.* Reed, 1 W. Bl. 416; S. C., nom. Newby *v.* Read, Park, Ins. 106; Marsh. Ins. 146; Rogers *v.* Davis, Beawes, Lex. Mer. 242; S. C., Marsh. 147; Park, 423; Davis *v.* Gildart, ibid.; Godin *v.* London Ass. Co., 1 Burr. 489; Seamans *v.* Loring, 1 Mason's R. 127; Kent *v.* Manufacturers' Ins. Co., 18 Pick. R. 19; Craig *v.* Murgatroyd, 4 Yeates, 161; Millaudon *v.* Western Mar. & Fire Ins. Co., 9 La. R. 32; and other cases cited supra, c. 3, s. 16.

insurances.[1] This doctrine is confirmed by the provision in American policies for the exoneration of the underwriters and return of premium on the subsequent policies of a series exceeding in the aggregate the amount at risk. There is not, that I am aware of, any judicial decision or dictum to the contrary, unless the judgment of the English Court of Exchequer, to be presently noticed, is to be so considered.

A passage in Marshall, following the one last cited, seems to have a contrary aspect. He says: "If by several policies, made without fraud, the sum insured exceed the value of the effects, these several policies will, in effect, make but one insurance, and will be good to the extent of the true interest of the insured; and in case of loss, all the underwriters on the several policies shall pay according to their respective subscriptions, without regard to the priority of their dates. And it follows from thence, that all the underwriters on the several policies would be equally bound to make a return of premium for the sum insured above the value of the effects, in proportion to their respective subscriptions."[2]

This passage is plainly erroneous in reference to a return of the premium on prior policies effected while the risk is pending, until the value of the subject is covered, since, as Parke, B., of the English Court of Exchequer, remarked, the underwriters in those policies are liable for a loss to the full amount of their policies, at least until the subsequent insurances are effected, and are consequently not liable for a return of any part of the premium.[3] Accordingly, Lord Abinger, C. B., in the same case, said, that the doctrine stated by Mr. Marshall could only be applicable to prior policies where all the policies in question should be of a date prior to the commencement of the risk.

The case was one of over-insurance by divers policies, some made in London and some in Liverpool, on two successive days, on the cargo of a ship known to have sailed, destined for Liverpool, and to be out of time on the first day when an amount less

[1] See cases last cited.

[2] Marsh. Ins. 2d ed. 639; 3d ed. 649.

[3] Fisk *v.* Masterman, 8 Mees. & Wels. 165.

than that of the cargo was underwritten at a premium of fifty per cent., and, the ship being heard from on the next day, insurances were made at a premium of ten per cent., which, with the prior ones, exceeded in the aggregate the amount at risk. A suit was brought for a return of premium on two policies subscribed by the same underwriters, one on the first day, and the other on the second; presenting the questions whether any return of premium was due, and if any, whether it should be on all the policies pro ratâ or only on those subscribed on the second day. The latter question seems to have occupied the counsel and the court exclusively, and the decision "per curiam" was, as above stated, that since the first insurers had, during one day, been liable for the whole amount insured by their policies, no part of their premiums could be reclaimed. On this point the case admitted of no other judgment.

Though the first question was not discussed, the judgment is considered by Mr. Arnould[1] as overruling, or at least being inconsistent with, the whole array of antecedent rulings and judgments in England respecting double insurance, supported by the American jurisprudence, and that without any discussion, or any reasons given, so far as appears in the report of the case. I am reluctant to put so broad a construction upon the decision. It does not necessarily go beyond the doctrine, that,

Where it appears by the policies and the circumstances that an over-insurance was not intended by the assured, or understood by the underwriters, the premium for the excess of the insurance must be returned by the later of the policies made while the risk is pending, and a pro ratâ return must be made on all the insurances which take effect simultaneously, provided the policies contain no express provision for the case.

Very little, if any, of the English and American jurisprudence is irreconcilable with this doctrine, and it is not apparent that the practical application of it would be subject to any extraordinary embarrassment.

The jurisprudence imports that double insurance is to be pre-

[1] Arnould's Marine Insurance, 1231.

sumed, primâ facie, to be intended to take effect as such, and that the burden of proof is on the party asserting the contrary.

It is, however, of very little practical importance on which side the theoretical presumption lies, since a case can hardly be imagined in which the policy, the evidence of custom or the particular circumstances, would not countervail the opposite presumption, on whichever side it should be.

In respect to the admissibility of such evidence, it is recognized as being admissible by Lord Mansfield and his associates.[1]

SECTION II. STIPULATIONS FOR RETURN OF PREMIUM.

1839. American policies generally contain a provision, that, "*if the assured has made* any *prior insurance* upon the property, *the insurers shall be answerable only for so much as the* amount of such *prior insurance may be deficient towards covering the property, and shall return the premium upon so much* of the sum insured *as they shall be exonerated from* by such prior insurance," excepting one half per cent., or some other part of the premium.

Where the expression was "prior in date," the Supreme Court of Connecticut held it to be equivalent to "prior in time;" and different policies, bearing the same date, and being executed on the same day, evidence was admitted to show which was executed first.[2]

In a policy effected in New York, on the 29th of May, it was stipulated to return fifteen per cent. "in case an insurance had been effected in Europe." Another policy was effected at Hamburg on the 19th of June following. It was held by the Supreme Court of New York, that this stipulation referred to a prior insurance only, and accordingly that the assured were not entitled to a return of premium.[3]

[1] Godin *v.* London Ass. Co., 1 Burr. 489; S. C., 1 W. Bl. 103, stated supra, No. 373.

[2] Brown *v.* Hartford Ins. Co., 3 Day, 58.

[3] New York Ins. Co. *v.* Thomas, 3 Johns. Cas. 1.

It has been held in New York, in an action on a policy in which it was stipulated that this clause should take effect in case of a prior insurance "on the premises aforesaid," that, to make the clause applicable, the two policies must amount to a double insurance, or that they must be on the same subject, against the same risks, and for the same time. The policy in question was made in New York, on the 5th of October, "at and from Bayonne to the first port the ship might make in the United States." A previous policy had been made at Philadelphia, on the 27th of September, on the same cargo, "from Bayonne to New York."

The risk on the subsequent New York policy, therefore, commenced retrospectively earlier than that on the prior Philadelphia one, since the risk on the subsequent policy covered the time when the vessel was at Bayonne, whereas in the prior Philadelphia policy it did not attach until the vessel sailed; and if by "prior" policy had been meant the one on which the risk first commenced, the New York policy would have been the prior one. But the time of making the policy, and not that of the commencement of the risk, was apparently considered to be referred to in the clause in question.

The description of the risks differed in two respects; that in the New York policy commenced "at" Bayonne, and attached on a voyage to "any port" in the United States; whereas, the risk in the Philadelphia policy commenced only "from" Bayonne, and attached only on a voyage "to New York." The New York insurers might, therefore, have been liable for a loss to the whole amount insured by them, if it had happened "at" Bayonne, or on a voyage to some port of the United States other than New York. Since the New York underwriters had been liable for the risk on the whole amount insured by them "at" Bayonne, notwithstanding the Philadelphia policy, the assured was held not to be entitled to any return of premium.[1]

This clause is not applicable to simultaneous policies, since they are not prior and subsequent in respect to each other.[2]

[1] Columbian Ins. Co. *v.* Lynch, 11 Johns. R. 233.

[2] Wiggin *v.* Suffolk Ins. Co. 18 Pick. R. 145.

Such policies have, accordingly, as above stated,[1] been held to take effect as double insurances, where their amount in the aggregate exceeds the insurable value of the subject; and it follows that each of the underwriters is liable for loss to the whole amount insured by his policy, at the election of the assured, until the assured is fully indemnified for the loss, and those underwriters who thus pay above their ratable proportion of the loss are entitled to a pro ratâ contribution from the others. And, therefore, no return of premium can be demanded by the assured.[2]

1840. *The stipulation for a return in case of safe arrival, or arrival without any loss*, is of the same character as the abatement of one or two per cent. in the payment of losses; it *is an enhancement of the premium* in case of loss, as the abatement is an enhancement of it in general.

Under a stipulation for return of a part of the premium on sugars, if the vessel arrived, Lord Mansfield and his associates held it to be returnable on arrival, though a part of the sugars were lost.[3]

Under a like stipulation, Sir James Mansfield ruled in like manner.[4]

So, in like case, Lord Kenyon, C. J., and Grose and Lawrence, Justices, made a similar decision under a policy on the freight of a vessel, which arrived after capture and recapture.[5]

1841. *Whether a return of premium must be made, if the event on which the return is stipulated for is prevented by a loss not insured against, or if the policy is forfeited, making a case equivalent, at least so far as the underwriters are concerned, to the happening of the event?*

Lord Ellenborough and his associates decided against a return under a stipulation for return on arrival in a policy on freight, though the arrival was prevented by a capture which was not in-

[1] Supra, No. 1837, p. 516.

[2] See supra, No. 362, 363, 365, 366, and cases there cited.

[3] Simond *v.* Boydell, 1 Doug. 255.

[4] Horncastle *v.* Haworth, Marsh. Ins., 2d ed. 674.

[5] Aguilar *v.* Rodgers, 7 T. R. 421.

sured against,[1] which made the case as good a one for the underwriters as if the vessel had arrived.

Another case decided by Lord Ellenborough, C. J., and Grose, Le Blanc, and Bayley, Justices, is of a contrary aspect. The insurance was upon goods to some port in the Baltic, "until they should be arrived" at such port, and "there discharged and safely landed," free from seizure in port, and to return a part of the premium "for arrival." The ship arrived at Pillau, and the goods were seized in the outer harbor. Mr. Justice Bayley said, they "arrived safely for the purpose of exonerating the underwriters from all risks of the voyage." And the opinion of the court was in favor of a return.[2]

Under a policy from Malta to St. Petersburg, to return a part of the premium if the risk ended safely at Gothenburg, the risk ended at the Downs, where the captain gave over the voyage. It was held by Thompson, C. J., and Spencer, J., and their associates of the Supreme Court of New York, that the assured was entitled to a return.[3]

These cases favor the equitable construction, that the condition of arrival or other event on which the return is to depend, is satisfied by the underwriters being exonerated.

The stipulation for a return of premium, if, in the course of the voyage, the vessel did not proceed from T. to B., is satisfied by a deviation on leaving T.[4]

1842. Under a stipulation for *return* of premium *in case of there being no act of war* between France and Spain, within a certain time, the hostile entry of French troops into Spain, without any previous declaration of war, was held to be an act of war.[5]

1843. Under a *condition* in a policy *on a ship* for a "*return* of premium, *if sold or laid up*, for every uncommenced six months," it was held that the assured was not entitled to a return

[1] Kellner *v.* Le Mesurier, 4 East, 396.

[2] Dalgleish *v.* Brooke, 15 East, 295.

[3] Ogden *v.* Firemens' Ins. Co., 12 Johns. R. 114.

[4] Robertson *v.* Columbian Ins. Co., 8 Johns. R. 491.

[5] Pontz *v.* Louisiana Ins. Co., 4 Martin's R. (N. S.) 80.

in case of the vessel's being laid up for the winter merely, with the intention of employing her again in the spring.[1]

SECTION III. FORFEITURE OF A WARRANTY OR CONDITION.

1844. *If the insurance fails so that the underwriters are never liable, in consequence of misrepresentation, concealment without fraud, or by a non-fulfilment of a condition or warranty when the risk was to commence, the premium is returnable.*[2]

That non-compliance with an express warranty or condition is a ground for a return appears from many cases, some of which have been before referred to.[3]

The same rule is applicable to a non-compliance with the implied warranty of seaworthiness at the time when the policy must attach if at all.[4]

SECTION IV. ILLEGALITY AND FRAUD.

1845. *In case of fraud on the part of the underwriter,* as where he underwrites, knowing at the same time, of the arrival of the property, *he must return the premium.*[5]

[1] Hunter *v.* Wright, 10 B. & C. 714.

[2] As to misrepresentation, see Tyler *v.* Horne, Park, 8th ed. 437; Chapman *v.* Fraser, id. 450.

[3] Stevenson *v.* Snow, 3 Burr. 1237; S. C., 1 W. Bl. 318; Long *v.* Allan, 4 Doug. 276; Colby *v.* Hunter, 3 C. & P. 7; S. C., 7 Moody & M. 81; Henkle *v.* Royal Exch. Ass. Co., 1 Vezey, Sen. 317; Delavigne *v.* United Ins. Co., 1 Johns. Cas. 310. See also Scriba *v.* Ins. Co. of North America, 2 Wash. C. C. R. 107; Murray *v.* United Ins. Co., 2 Johns. Cas. 168; Vos *v.* United Ins. Co., id. 180; Elbers *v.* United Ins. Co., 16 Johns. R. 128; Duguet *v.* Rhinelander, 1 Johns. Cas. 360.

[4] Per Lawrence, J., Christie, *v.* Secretan, 8 T. R. 192; Porter *v.* Bussey, 1 Mass. 436; Penniman *v.* Tucker, 11 id. 66; Graves *v.* Marine Ins. Co., 2 Caines's R. 339. Condemnation under the "rotten" clause is said to be proof of unseaworthiness at the commencement of the risk. Per Johnson, J., giving the opinion of the court, Dorr *v.* Pacific Ins. Co., 7 Wheat. R. 581. Generally, the report of surveyors refers only to the condition of the ship at its date. Marine Ins. Co. of Alexandria *v.* Wilson, 3 Cranch's R. 187.

[5] 3 Burr. 1909; 1 W. Bl. 594; Park, 562.

And where the policy is void on account of his fraud, or where he knew, at the time of underwriting, that it was void, it is held by Valin,[1] Pothier,[2] and Emerigon,[3] that he is not entitled to deduct the one half per cent. Marshall cites their opinions as being law,[4] and of this there seems to be no doubt, since a party cannot have a right to retain money fraudulently obtained.

In all the cases *where the assured has recovered back the premium* on account of the failure of the risk by reason of the unseaworthiness of the ship or of any forfeiture of an agreement or warranty by him, *courts have* invariably *made honesty* and fairness *on his part, one of the conditions* on which he is entitled to recover it.

Where the insurance was void, on account of a fraudulent concealment of a letter containing information which would unquestionably have prevented the underwriter from taking the risk, the assured was held not to be entitled to a return of premium.[5]

Mr. Ellis doubts whether this rule applies where the policy is void, in consequence of the misrepresentation of an agent without the knowledge of his principal; and this seems to be the doctrine of a case cited by him.[6]

Under a policy on distinct successive risks stipulating for a separate premium on each, it was held by the Supreme Court of New York, that the assured did not, by his fraudulent act, in setting on fire and scuttling his vessel soon after sailing, forfeit the right to a return of the premium for the subsequent stages of the voyage.[7]

1846. *If the contract is void on account of illegality, the assured is, in general, not entitled to a return of the premium;* upon the principle that where parties are in pari delictu, neither has a remedy against the other.[8]

[1] Title, Insurance, art. 10, 16, 17.

[2] Insurance, n. 181.

[3] Tome II. p. 169.

[4] Page 677.

[5] Hoyt *v.* Gilman, 8 Mass. R. 336. And see Tyler *v.* Horn, 1 Park, 7th ed. 329; Chapman *v.* Frazer, 3 Burr. 1361; Chapman *v.* Kennet, 1 Park, 329.

[6] Dachett *v.* Williams, Ellis on Fire and Life Insurance, 142.

[7] Waters *v.* Allen, 5 Hill's R. 421.

[8] Vandyck *v.* Hewitt, 1 East, 96; Briggs *v.* Lawrence, 3 T. R. 454; Clugas *v.* Penaluna, 4 id. 466; Waymell *v.* Reed, 5 id. 599; Morck *v.* Abel, 3 B. & P. 35; Andre *v.* Fletcher,

In case of a gaming policy in violation of an act of Parliament, Lord Mansfield and his associates held that the premium could not be recovered back after the risk had terminated, but he and Mr. Justice Buller were inclined to the opinion, that the assured might have recovered it if he had rescinded the contract before the termination of the risk.[1] And a case of a wager policy was subsequently decided by Lord Mansfield in favor of a return of premium, on the same distinction,[2] though, as Mr. Marshall[3] remarks, by a misconstruction as to the contract not being executed.

Other similar judgments were given by the Court of King's Bench in Lord Mansfield's time,[4] and in Lord Kenyon's,[5] and Lord Ellenborough intimated that a return of premium might be claimed, where an insurance was void for being on trade with a public enemy, in case of the trade being undertaken through the misconstruction of a license.[6]

It is difficult to put these cases upon any ground which shall make them exceptions merely, and not contradictions, of the general doctrine stated above, and that which does not permit ignorance of the law to be alleged in support of a claim. Lord Ellenborough subsequently intimated some doubt of these decisions, and the court limited the right to claim a return strictly to the case of a renunciation of the contract by the assured before the termination of the risk and before bringing the suit.[7]

In case of insurance in England for a Russian, effected by his agent in England, when the agent and the underwriters had not learned that Russia had previously commenced hostilities against

3 T. R. 266; Lubbock *v.* Potts, 7 East, 449; Cowie *v.* Barber, 4 M. & S. 16; Polyart *v.* Leckie, 6 id. 290; Cope *v.* Rowlands, 2 Mees. & W. 67; Juhel *v.* Church, 2 Johns. Cas. 333; Browning *v.* Morris, Cowp. 790. It seems that under the French law the premium of an illegal insurance may be reclaimed. 1 Emerigon, 191; Pothier, Insurance, n. 27.

[1] Lowry *v.* Bourdieu, Doug. 468.

[2] Wharton *v.* De la Rive, Park, 373.

[3] Insurance, p. 362, n.

[4] Jaques *v.* Golightly, 2 H. Bl. 1073; Jaques *v.* Wilty, 1 id. 65.

[5] Lacaussade *v.* White, 7 T. R. 535.

[6] Siffkinn *v.* Allnutt, 1 M. & S. 39; Henry *v.* Staniforth, 4 Camp. 270; Hentig *v.* Staniforth, 5 M. & S. 122.

[7] Polyart *v.* Leckie, 6 M. & S. 290.

England, whereby the insurance proved to be void for its illegality, Lord Ellenborough and his associates decided for a return;[1] but this was a mistake of fact by the parties, and not of law.

A similar judgment was given by the same court in case of insurance on the reasonable presumption by the parties, that a vessel had not sailed from Riga until after the date of a license in England, where it proved to have sailed four days earlier, so that the voyage was illegal, and the policy void.[2] This also was a mistake of fact.

The British statute against the exportation of wool[3] makes an insurance upon such an exportation void, and provides that no return of premium shall be made on the policy.

SECTION V. WHAT PAYMENT IS A GROUND TO CLAIM RETURN.

1847. *To give a right to claim a return of premium, it is not requisite that the premium should have been literally paid*, though something equivalent to payment, as between the assured and underwriters, must have been done, as it would be absurd to claim repayment of a premium, that had not, as between the parties, been paid.

A foreign merchant ordered his agent in London to effect insurance, who employed a broker for that purpose; the underwriter charged the premium to the broker, he to the agent, and he to the foreign merchant; the broker at the same time crediting the insurer for it, he having an account both with the insurer and with the agent. A return of premium becoming due, a question was made whether the premium should be considered to have been paid as between the assured and insurer, the premium having only passed in account by the several parties, but not having been actually paid by either of them, and in the mean time the broker and the agent had both become bankrupt. It was held, that, as between the assured and insurer, the premium should be considered

[1] Oom *v.* Bruce, 12 East, 225. [2] Hentig *v.* Staniforth, 5 M. & S. 122.
[3] 12 Geo. II. c. 21.

as having been paid.[1] It is a general rule in England, that the broker is debtor for the premium, and his being so is a payment of it as between the assured and the underwriter.

It has been held in Massachusetts, that the assured has a right to a return of a premium for which he had given his negotiable note, which had not been paid by the maker nor negotiated by the payee. It was payable to the broker probably, and included the premium for the different underwriters, there being divers underwriters, the one of whom the premium was reclaimed being the last. Such a note was considered at the time[2] to be a payment.

The common clause for set-off of the premium note and other demands against any claim on a policy, precludes a recovery back of a premium which has never been paid.

SECTION VI. RETURN UNDER AN ASSIGNMENT.

1847 a. *Under an assignment the assignor may still be entitled to the return of premium.*

A policy in favor of a mortgager in a mutual company, being assigned by him to the mortgagee as collateral to the mortgage, and by the latter to a third party, with the consent of the company, and the mortgage being discharged by another party, grantee of the equity of redemption, it was held in Massachusetts that the assignee of the mortgage to whom the company returned a part of the premium paid by the mortgager, was liable for it to the latter in assumpsit.[3]

So it is held by the English Courts of Queen's Bench and Exchequer Chamber, that an assignment by the assured of all claims for loss under a marine policy does not transfer the claim for a return of premium.[4]

[1] De Gaminde *v.* Pigou, 4 Taunt. 246.

[2] Hemmenway *v.* Bradford, 14 Mass. R. 121.

[3] Felton *v.* Brooks, 4 Cushing's (Mass.) R. 203.

[4] Castelli *v.* Boddington, 16 Eng. Law & Eq. R. (Press of Little, Brown, & Co.) 127; S. C., 1 Eng. Law & Eq. R. (Exch.) 281; S. C., 22 Eng. Law J. (Q. B.) 5, 84.

SECTION VII. ABATEMENT OF MARINE INTEREST.

1847 b. The excess of marine interest in hypothecation over the ordinary rate, is the premium agreed by the parties for the chance of loss by the risks specified in the contract, as being assumed by the lender, and is usually the current rate of premium of insurance at the same port.

The premium of an insurance in the ordinary form, though not always actually paid at the time of effecting the policy, is frequently so paid, and if it stands on credit, still it is considered to be an absolute debt; and any reduction of its amount is treated as a return or repayment of so much, just as in case of actual payment and reimbursement. It is otherwise with marine interest, the claim for which as well as for the repayment of the sum lent, is, by the essential terms of an hypothecation, subject to contingencies during the continuance of the risk.

Marine interest is subject to abatement in divers ways.

No interest above the ordinary rate is allowed on a bond purporting to be an hypothecation, in which the lender does not assume any risk of loss on the principal lent.[1]

If an hypothecation by the master is void by reason of its not being authorized by the circumstances, no marine interest will be due, though the owner of the subject on account of which advances are made may be personally liable for the same, and for ordinary interest;[2] nor is marine interest due where the master might have had advances on the credit of his owners.[3]

[1] The Emancipation, 1 W. Rob. Ad. 124. If no risk is assumed by the lender the instrument is construed to be merely a mortgage. See also Marsh. Ins., 2d ed. 749, who cites De Guelder *v.* Depeister, 1 Vern. 363. See also Jennings *v.* Ins. Co. of Pennsylvania, 4 Binney's R. 244; Rucker *v.* Conyngham, 2 Peters's Ad. R. 295; The Sloop Mary, Paine's R. Cir. Ct. U. S. New York, 671; Thorndike *v.* Stone, 11 Pick. (Mass.) R. 183.

[2] The Augusta, 1 Dods. Ad. R. 283.

[3] The Eliza, 1 Moore's Cases before the Lords of the Privy Council, 5, Opinion by Lord Lyndhurst; The Prince of Saxe Coburg, 3 Moore's Cases before the Lords of the Privy Council, 1, Opinion by Dr. Lushington.

If after the contract is made the voyage becomes illegal before the risk begins, in bottomry or respondentia, the marine interest does not accrue, though ordinary interest may accrue; but if the voyage is given up voluntarily by the assured after the contract for the loan is made, or is prevented by any cause, for which he is answerable, the principal and marine interest or indemnity for damage is due.[1]

In hypothecation upon a loan for a voyage or passage, the general rule, as in ordinary insurance, is, that when the risk has once begun, the claim of the lender for the whole marine interest on the amount at risk accrues, subject only to the same contingencies as the claim for the repayment of the principal.[2]

If the risk ends at an intermediate port by reason of unseaworthiness of the vessel for which the owner is responsible, the whole marine interest is due.[3]

So the bond becomes absolute for the principal and marine interest in case of deviation.[4]

The marine interest in hypothecation may be reduced in admiralty,[5] and accordingly, if the bond is decreed to be good only in part, the marine interest will be correspondingly affected.

[1] Boulay Paty, Droit Com., tit. 9, s. 13, tom. 3, p. 170, ed. 1822, who cites Emerigon, tom. 1, page 550; and Pothier, Contr. à la Grosse, No. 39.

[2] Boulay Paty, Droit Com., tom. 3, p. 74, ed. 1822.

[3] The Dante, 2 W. Rob. Ad. R. 327; S. C., Notes Admiralty Cas. 408.

[4] Boulay Paty, Droit Com., tit. 5, s. 12, tom. 3, p. 15, et seq., ed. 1822, who cites Straccha, gl. 8, No. 4; Roccus, No. 28, 90; Casaregis, Disc. 1, No. 34, et seq.

[5] See The Ship Packet, 3 Mason's R. 255, and other cases cited supra, No. 1249, in the same note.

CHAPTER XXIII.

INSURANCE AGENTS. — THEIR APPOINTMENT, POWERS, RIGHTS, AND LIABILITIES.

SECT. 1. Insurance agents in general. — Appointment. — Revocation.
2. Agents of underwriters.
3. Subjects and extent of the agency.
4. Qualifications, duties, and liabilities of agents.
SECT. 5. Lien and set-off, and repayments between the agent and the assured.
6. Lien and set-off, and repayments between the agent and underwriters.

SECTION I. INSURANCE AGENTS IN GENERAL. — APPOINTMENT. — REVOCATION.

1848. INSURANCES are frequently effected, and losses adjusted, through the agency of brokers and other agents.

The appointment of an insurance agent may be by writing, or orally, or impliedly by the course of business and correspondence between the principal and the agent,[1] *and one is agent of another, for whom he volunteers to act without any authority to do so, where such other recognizes his agency and ratifies his acts.*[2]

A parol appointment by a corporation is held to be valid.[3]

1849. *In England*, as has been already mentioned,[4] *the broker is* generally *considered to be debtor* to the underwriter *for the premium. In the United States there is no distinction*, in this respect, *between an agent for insurance and any other broker or agent.* The broker may become a debtor to the insurer, or a creditor to the assured, for the premium, in virtue of an agreement to this effect.[5]

[1] Story on Agency, s. 45, 55.

[2] See cases infra.

[3] Perkins *v.* Washington Ins. Co., 4 Cowen, 645.

[4] Supra, No. 507, 508.

[5] Taylor *v.* Lowell, 3 Mass. R. 331. See also Bethune *v.* Neilson, 2 Caines, 139.

Marine insurance is usually done through insurance brokers in England.[1] In the United States insurance is not ordinarily effected by agents, except where the assured is at a considerable distance from the place where the policy is made; and, in such case, the insurance is most frequently made by the general commercial agent of the assured, but in some instances by an adjuster of averages, who also acts as an insurance broker.

The general custom of interposing the policy-broker as a middle-man and party, in respect to the premium, though he is not a party to the policy, seems to have arisen in England from the circumstance of the assured frequently being at a distance from the underwriters and unknown to them;[2] and, accordingly, in the United States, the factor who effects an insurance for a distant correspondent, if the premium is not paid immediately, very frequently, probably in most cases, becomes responsible for it by giving his own promissory note or otherwise.

In England the policy-broker usually keeps a running account with the assured by whom he is employed, charging premiums paid, and crediting losses and returns of premiums received on his risks, which account is settled between the parties periodically.

So the agent for an underwriter usually keeps a similar account, crediting premiums received, and charging losses and returns of premiums paid, the balance being settled from time to time.

Similar running accounts are, of course, kept by agents, factors, and correspondents of assureds and underwriters, in the United States, so far as the business of insurance is transacted through agencies, the difference being, that a smaller proportion of insurance business is thus done, and the agencies are not in so great a degree exclusively for insurance.

Where the agent gave his promissory note with a surety for the premium, the underwriters knowing that he acted only as agent, but not knowing who were the principals, it was held in Maryland, that the assured were not liable to the underwriters for the premium.[3]

[1] Arnould's Marine Insurance, 108.

[2] Per Bayley, J., in Power *v.* Butcher, 10 B. & C. 329, at p. 340.

[3] Patapsco Ins. Co. *v.* Smith, 6 Har. & Johns. 166. Had the underwriters not known that the agents acted

The mere circumstance of charging the premium to the managing owner of a vessel, is held not to exonerate the other owners, where it does not appear that credit was intended to be given to him exclusively.[1]

1850. *The same person may be agent of both assured and underwriters:*

As where the same broker is the agent of the assured for effecting the policy, and of the underwriter for delivering it to the assured and receiving the premium.[2]

Where both the assured and underwriters concurred in the employment of an auctioneer to sell damaged goods for the purpose of adjusting a particular average, the auctioneer being nominated by the underwriters, and the assured's agent being instructed by them as to the preparation of the goods for sale, his charge therefor and that of the auctioneer being part of the loss, the question arose, of which party the auctioneer was the agent for accounting for the net proceeds of the sales, which he, having become insolvent, had failed to pay over. If he was agent for the underwriters exclusively, for this purpose, they were liable for the whole value of the goods, as in a total loss, though no abandonment had been made; but if exclusively of the assured, or if of both parties, then the underwriters were not answerable for the proceeds. Oakley, C. J., and his associates intimate an opinion, that the auctioneer was agent of the assured.[3]

An agent who effects a policy "for whom it may concern," intended by him for T., is not authorized subsequently, without the consent of the underwriters, to make a valid agreement with B, by which the underwriters will be bound, to substitute B as the assured, though B, having a lien upon the subject, has a sufficient insurable interest in it.[4]

merely as such, the court were of opinion that the principals would have been liable, and cited Patterson *v.* Gandasequi, 15 East, 62.

[1] Robinson *v.* Gleadow, 2 Bingham, N. C. 156.

[2] Acey *v.* Fernie, 7 Mees. & Wels. 151.

[3] Jellinghaus *v.* New York Ins. Co., 4 Sandford's City of New York Sup. Ct. R. 18.

[4] Steele *v.* Franklin Fire Ins. Co., 17 Penn. (5 Harris's) R. 290.

The master of the vessel is, as we have seen,[1] the agent of both parties as to the navigation of the ship, and the sale of it in case of necessity,[2] so that neither is answerable to the other in respect of his acts done in good faith.

1851. *Insurance may be effected by either partner on the property of a firm for carrying on any branch of business generally:*

As a policy on a ship belonging to the firm.[3]

1852. It has been stated in divers cases, that one of several joint proprietors cannot, merely as such, and without the authority or assent of the others, express or implied, insure for all.[4] It is intimated by Mr. Justice (afterwards Chancellor) Kent, that one of two joint shippers of a cargo has not, merely as such, authority to insure for both.[5] The same doctrine is assumed in a Massachusetts case, in respect to an insurance of a ship ordered by one of the owners.[6] There are, however, divers authorities to the very reasonable doctrine, that

Where one of the joint owners, or parties jointly concerned in a particular vessel or cargo or other *subject, or* one of the parties jointly concerned in a particular voyage or *adventure*, or mercantile enterprise, *has*, by consent of the others, *the* direction or *management, he is* thereby *authorized to effect insurance*, and to represent the joint interest in all matters incidental to the insurance.

Where one of the two parties jointly concerned in the purchase and sale of a quantity of salt sent to market from the interior of New York, having charge of it as managing proprietor, signed a promissory note, in the names of himself and his co-proprietor, for some expenses incurred in forwarding the article, the Supreme Court of that State held the note to be valid as that of the partnership, without proof of any special assent of the other partner to the making of the note. Mr. Justice Sutherland, giving the

[1] Supra, No. 1049.

[2] Supra, No. 1569.

[3] Hooper *v.* Lusby, 4 Camp. 66.

[4] French *v.* Backhouse, and the same Plaintiff *v.* Toulston, 5 Burr. 2727; Ogle *v.* Wrangham, per Kenyon, C. J., Abbott on Shipping, 5th ed. p. 76; Bell *v.* Humphries, 2 Stark. R. 345.

[5] Lawrence *v.* Sebor, 2 Caines's R. 203. See also Lawrence *v.* Van Horne, 1 id. 276.

[6] Foster *v.* United States Ins. Co., 11 Pick. 85.

opinion of the court, says: "Partners in a specific purchase or adventure have, in relation to that adventure, all the rights, and are subject to all the liabilities, of general partners."[1] The proposition, however, should be limited to the managing partner, as it was doubtless intended to be.[2]

1853. *The agent* for one or both parties to a policy sometimes also himself *becomes a party*, in respect to one of them, collaterally, *as guarantor for the payment of premiums* to the underwriters, where he is not, as he usually is in England, himself the debtor for the premium; *or* by becoming answerable for *the payment of losses* and returns of premium to the assured.

This relation to the principal is assumed by the agent del credere, and sometimes otherwise. The responsibility of agent del credere is usually taken by merely charging a guarantee commission in the agent's accounts. Where the agent is himself, as he commonly is in England, the debtor for the premium, there is no room for his guaranty of the premium, but where he is not the principal debtor, he may guaranty the payment of the premium to the underwriter, and he sometimes guaranties the payment of the loss to the assured, especially where the insurance is by individual underwriters, or the assured is a resident in a foreign country.

In respect to the question, whether the contract of guaranty by an agent del credere for effecting an insurance is within the statute of frauds, and so void, if not in writing, Mr. Duer[3] understands the contract to be, not "a promise to answer for the debt or default of another," but an original independent contract of guaranty, and binding upon the agent, though not in writing, as being a distinct, independent contract between the agent and his principal. And so it has been held in Massachusetts[4] and New York.[5]

[1] Cumpston *v.* McNair, 1 Wend. R. 457; Watson on Partnership, 40; Holmes *v.* The United Ins. Co., 2 Johns. Cas. 329; Livingston *v.* Roosevelt, 4 Johns. R. 265; and Post *v.* Kimberly, 9 id. 479; are cited by Mr. Justice Sutherland in support of the decision.

[2] See also Robinson *v.* Gleadow, 2 Bing. N. C. 156.

[3] Vol. II. p. 339, Lect. 12, s. 43.

[4] Swan *v.* Nesmith, 7 Pick. R. 220.

[5] Wolff *v.* Koppel, 5 Hill's R. 458; S. C., 2 Denio's R. 368. See also Houlditch *v.* Milne, 3 Esp. 86; Williams *v.* Leper, 3 Burr. 1886; Cast-

The agent del credere being a guarantor, his liability depends on the debtor's failure to pay, and being in fault.[1]

1854. *The ship's husband has not, merely as such, authority to insure.*[2]

1855. *Nor is the master of the ship, merely as such, authorized to insure*; though in disasters, and by the exigency of the circumstances, he is sometimes invested with a general authority as agent of the parties for the management of the ship and cargo:

As in bottomry of the vessel by the master in an emergency, which is a species of insurance.[3]

1856. *The supercargo is not ordinarily agent for effecting insurance.* He may, however, be authorized by the particular circumstances to get insurance on the cargo; as where it is waiting for a market, after being landed.[4]

1857. An agent for procuring consignments is not, in that capacity merely, an agent for either consignor or consignee to effect insurance; though he may be such[5] in emergencies, and under peculiar circumstances, as in the cases before mentioned of the master and supercargo.[6]

1858. *A consignee, to whom property is consigned to be sold by him, merely as factor* of the consignor, or other party, though he has himself an insurable interest of his own to the amount of his commissions, and of his advances, for which he has a lien on the consigned subject, *is not*, merely in his character as such con-

ling *v.* Aubert, 2 East, 325; Leonard *v.* Bredenbrugh, 8 Johns. R. 29, at p. 39, per Kent, C. J. See also, as to the distinction between the consideration of the original debt, and a new and distinct one, the remarks of Parker, C. J., in Allen *v.* Thompson, 10 New Hamp. R. 32.

[1] Morris *v.* Cleasby, 4 M. & S. 566, 574; Peale *v.* Northcote, 7 Taunt. 478; Gall *v.* Comber, id. 558; Hornby *v.* Lacy, 6 M. & S. 166; Leverick *v.* Meigs, 1 Cowen, 645; Thompson *v.* Perkins, 3 Mason, 232. It was held in Gove *v.* Dubois, 1 T. R. 112, and in Bize *v.* Dickerson, id. 285, that the agent del credere was liable absolutely, and in the first instance; but this doctrine has been overruled by the cases above cited.

[2] French *v.* Backhouse, 5 Burr. 2727.

[3] See supra, No. 1561.

[4] Per Jones, J., in De Forest *v.* Fulton Ins. Co., 1 Hall, 84.

[5] Randolph *v.* Ware, 3 Cranch, 503.

[6] See 2 Duer, Mar. Ins. 101, Lect. 10, s. 8.

signee, *vested with authority to effect insurance on the subject for his principal, while it is in transit.*

Any insurance so made by him without instructions will, therefore, be a voluntary insurance, and its validity will depend upon its being ratified by the party for whose benefit it is made.

After goods have come into the hands of the consignee, he may be bound by the custom in like cases to effect insurance,[1] or by the unusual delay for a market,[2] or by any extraordinary circumstances under which a merchant of ordinary intelligence and diligence would, without doubt, effect insurance. The insurance usually required in such case is that against fire, but there is as good reason for insuring against any other impending peril threatening the destruction of the property at the time, and which is ordinarily insured against, and can be insured against at a reasonable premium.

A trustee in the full sense of the term is, as we have seen,[3] invested with all the authority and legal rights of absolute ownership in respect to insurance, as well as in other respects. The commissioners to whom the Dutch prizes, taken in contemplation of hostilities, were consigned by order of the British government, were considered to be trustees in the full extent of that term, in cases which arose upon the policies on the prizes.[4] Mr. Justice Jones considers a consignee, to whom a consignment is made for the purpose of taking charge and disposing of goods, to be a trustee in the full extent of the term, in respect to insurance of goods in his hands;[5] but this position is not sustained by the jurisprudence on the subject.

In case of a consignment to the general agent of the shipper, with instructions to pass over the bill of lading to a company for

[1] Per Washington, J., in Kingston *v.* Wilson, 4 Wash. C. C. R. 310, at p. 315. See also remark of Walworth, Chancellor, to the same effect, Brisban *v.* Boyd, 4 Paige's Ch. R. 17, at p. 20.

[2] Supra, De Forest *v.* Fulton Ins. Co., 1 Hall, 84.

[3] Supra, No. 293.

[4] Lucena *v.* Craufurd, 3 B. & P. 75; S. C., 5 id. 269; and other cases. See also Wolff *v.* Horncastle, 1 B. & P. 316; and see supra, 183, No. 324.

[5] De Forest *v.* Fulton Ins. Co., 1 Hall, 84.

which the goods were intended, that the company "might have an opportunity to insure" for themselves, where the company refused the consignment, the general agent was considered to be authorized to insure for the consignors.[1]

1859. *A prize agent is, as such, an agent to effect insurance:* As where he is appointed "to act on behalf of all interested in the capture."[2]

An agent authorized to treat and compromise with the captors, for ships and their cargoes, and defray costs and charges, and pay all demands on the ships and cargoes, and forward the same to London, was held by Lord Ellenborough and his associates to be thereby authorized to effect insurance.[3]

1860. *An agent for procuring consignments* to a foreign house *is not*, independently of any general custom, or any practice between the parties, *the agent of such house for receiving orders to make insurance* on consignments made to it.[4]

1861. *Where the relation of principal and agent subsists between parties, an undertaking by the agent to procure insurance* in a particular instance is binding, and *constitutes him the responsible agent of the principal for that purpose.*[5]

1862. *Where a party, having had no relation with another as his agent or correspondent, is requested to act as such, he is*, of course, *at liberty to decline, but seems to be bound to give notice of his declining*, provided he is a person to whom application would naturally be made, in the usual course of trade, and if the party making the proposal is liable to be prejudiced by the want of an agent.[6]

1863. *Although the agent may be under no obligation to com-*

[1] Wolff *v.* Horncastle, 1 B. & P. 316.

[2] Stirling *v.* Vaughan, 11 East, 619; and see Routh *v.* Thompson, id. 428, and Craufurd *v.* Hunter, 8 T. R. 13, and other cases of insurance on the Dutch prizes.

[3] Robertson *v.* Hamilton, 14 East, 522.

[4] Per Johnson, J., and Patterson, J., in Randolph *v.* Ware, 3 Cranch, 503.

[5] Thorne *v.* Deas, 4 Johns. R. 84, and cases generally.

[6] See Smith *v.* Lascellas, 2 T. R. 187, per Ashhurst, J.; 1 Emerigon, p. 148, c. 5, s. 87; and 2 Duer, Mar. Ins. p. 120, Lect. 10, s. 14.

ply with the order to get insurance, yet if he undertakes it, he will be answerable for its due execution.[1]

1864. *A party having possession of property*, as agent or trustee, *with a general authority and discretion as to the management and disposal of it, is agent to effect insurance under circumstances in which his principal*, or the party interested, *has no opportunity to instruct him* respecting insurance, *or it may be reasonably inferred to be left to his discretion.*[2]

1865. *The delivery of the policy to a person constitutes him an agent, and letting it remain in his possession as agent continues his agency for attending to the matters relative to the insurance for more or less purposes according to the circumstances.*[3]

1866. There is a distinction of agencies, as being gratuitous or for a compensation. *Where it is understood that the agency, if undertaken, is to be gratuitous, a mere promise to act as agent*, being without consideration, is not binding, and *does not constitute the promisor agent:*

As where a part-owner of a vessel promised the other part-owner to effect insurance for both, and neglected it, and the vessel was lost uninsured.[4]

1867. *If a person actually undertakes a commission*, the execution of an order, or the performance of any service, *for another, he thereby becomes* the *agent* of such other *for the* proposed *purpose, and assumes responsibility as agent.*[5]

1868. *Insurance being made by a person acting voluntarily*, without instructions or order from the party interested, for whom

[1] French *v.* Reed, 6 Binn. 308.

[2] See 2 Duer, Marine Ins. p. 114, Lect. 10, s. 11; De Forest *v.* Fulton, Ins. Co., 1 Hall, 84; Cornwal *v.* Wilson, 1 Vezey, Sen. 511.

[3] Lightbody *v.* North American Ins. Co., 23 Wend. R. 18; Shee *v.* Clarkson, 12 East, 507; Bethune *v.* Neilson, 2 Caines's R. 139.

[4] Thorne *v.* Deas, 4 Johns. R. 84, where the authorities from the Year Books downward, are thoroughly reviewed by Mr. Chief Justice, (afterwards Chancellor) Kent. See Delany *v.* Stodart, 1 T. R. 22.

[5] Thorne *v.* Deas, 4 Johns. R. 84; Coggs *v.* Barnard. 2 Lord Raymond, 909; see also this case with notes in Smith's Leading Cases. Wilkinson *v.* Coverdale, 1 Esp. R. 75; and see 2 Duer, Mar. Ins. 130; 1 Arnould's Mar. Ins. 151.

the policy is intended, *will, if* it is *ratified* by such other, *be available* to him.[1]

So where an agent exceeds his authority, the ratification of the principal will render his acts valid, and such ratification will be presumed from the silence of the principal, after he has received notice of what his agent has done.[2] This rule is limited by Parker, C. J., to cases where immediate notice is given by the agent. He says: "A delay to give notice until an election to approve or disapprove would be attended with no advantage to the principal, defeats the right to construe silence into ratification."[3]

In such case *the ratification,* by adopting the acts, *constitutes the agency retroactively,*[4] and the bringing of an action on the policy is a ratification.

A conditional ratification is good, if the contingency on which it depends has happened. Insurance being made in New York by B. for F., of Carthagena, in South America, for a voyage from the latter place to the former, without instructions therefor, though B. had been the general agent of F. in New York, and notice thereof being given to F., he answered, that, if other insurance which he had ordered should not have been made, and if the ship should not have arrived safe, he wished the policy to stand, otherwise to be cancelled, and the expense charged to him, F. The vessel had not arrived, and was out of time when this answer was received in New York, and in fact totally lost, and the other insurance ordered by F. had not been made. This was held by Mr. Justice Oakley, of the Superior Court of the City of New York, to be a sufficient ratification, and judgment was given for the loss.[5]

[1] Dorr *v.* New England Mar. Ins. Co., 4 Mass. R. 221; United Ins. Co. *v.* Robinson, 2 Caines's R. 280; Abbott *v.* Broome, 1 id. 302; De Forest *v.* Fulton Ins. Co., 1 Hall, 84; Story on Agency, s. 253, 261.

[2] Armstrong *v.* Gilchrist, 2 Johns. Cas. 424; Caines *v.* Bleeker, 12 Johns. R. 300.

[3] Amory *v.* Hamilton, 17 Mass. R. 103.

[4] Clement *v.* Jones, 12 Mass. R. 60; Finney *v.* Fairhaven Ins. Co., 5 Metc. R. 192.

[5] Bridge *v.* Niagara Ins. Co. 1 Hall, 247.

1869. *An agent may employ a sub-agent, but cannot, without the consent of his principal, delegate his authority and transfer his responsibility to another.*

A consignee of goods having indorsed the bill of lading to another, who sold them and became bankrupt with the proceeds in his hands, it was ruled by Lord Ellenborough, that the consignee was still agent and responsible to the consignor.[1]

1870. If the agent employed by the principal appoints a sub-agent who is adopted by the principal, the sub-agent thereby becomes the direct representative of the principal.[2]

Brokers residing in London employed another at Newcastle to effect a policy, and the assured afterwards corresponded concerning the recovery of the loss directly with the Newcastle broker, to whom the loss was paid by the insurers; but before paying over the amount to the assured, he became bankrupt. The assured then claimed the amount against the London brokers, but Mr. Justice Buller said: "If he had intended to insist on his right to recover the money of them, he should not have looked to the other broker at all."[3]

1871. *The revocation of the authority of the agent to effect an insurance, will not defeat any agreement he may have made for the insurance; though he will cease to be authorized to bind his principal further.*

Under the English law and practice, if, after the unstamped slip is signed, the order for the insurance is countermanded by the principal, and the agent, notwithstanding, proceeds to effect a policy, and pay the premium, he will pay it in his own wrong; for the slip, not being stamped, was, at most, a merely honorary engagement.[4]

Where a broker paid the premium to the underwriter, after notice from the assured not to pay it, as the property had not been put at risk, it was held that he could not recover it from the assured.[5]

[1] Corlett *v.* Gordon, 3 Camp. 472.
[2] Mann *v.* Forester, 4 Camp. 60.
[3] Smith *v.* Cologan, 2 T. R. 188, n.
[4] Warwick *v.* Slade, 3 Camp. 127.
[5] Shoemaker *v.* Smith, 2 Binney, 239.

SECTION II. AGENTS OF UNDERWRITERS.

1872. *Authority to an agent to subscribe policies or make or cancel contracts for another, is usually given* by a more *formal appointment* than that to procure insurance.

The secretary of a company is not presumed to have authority to bind it. The party alleging such authority must prove it.[1]

If the party, in whose behalf another has signed a policy, as his agent, has, by his acts or neglect, authorized third persons to suppose such other to be his agent for the purpose, he is bound by the subscription, whether the authority is given to the agent with greater or less formality, or has not been given at all, or has been, as between the agent and principal, wholly revoked, without notice of the revocation being given to parties interested and entitled thereto.

Lord Ellenborough ruled that proof of the agent's handwriting, and that the underwriter had before paid losses on policies subscribed for him by the same agent, was sufficient primâ facie evidence of the agency.[2]

In case of an agent in London of an Irish insurance company subscribing an indorsement on the policy for his principals, changing the voyage, and substituting St. Johns, in New Brunswick, for Quebec, as a port of destination, Lord Tenterden ruled that proof of the acquiescence of the principals in similar previous changes of the voyage, by an agreement made by the same agent, was evidence of his authority to make the change in this case.[3]

1873. *An agent to subscribe policies is not, merely in virtue of such agency, authorized to settle and pay losses* under it, *or* entitled to *set off a loss against premiums* due from him to the underwriter.[4]

[1] Williams *v.* Chester and Holyhead Railway Co., 5 Eng. Law & Eq. R. (Press of Little, Brown & Co.) 197; S. C., 15 Eng. Jur. 828; as to authority to waive forfeitures and cancel stipulations, see infra, No. 1875.

[2] Haughton *v.* Ewbank, 4 Camp. 88; Brockelbank *v.* Sugrue, 1 Mood. & Rob. 102; S. C., 5 C. & P. 21; S. C., 1 B. & Ad. 81.

[3] S. C.

[4] Bell *v.* Auldjo, 4 Doug. 48.

It must depend wholly upon the custom of the place, and the relation of the principal and agent to each other, in business and correspondence, whether authority to subscribe the underwriter's name to a policy is a ground to infer authority to adjust or pay a loss. It is stated by Lord Ellenborough in a nisi prius case, that authority to sign a policy is such to adjust a loss.[1] This proposition must have reference to the usage and course of business in England, or merely in London; for independently of the usage, or the course of business between the parties, as in the United States, for instance, where the course of business is different, it cannot be supposed that a power to subscribe policies, or any other species of contract, for a principal, however formally or informally given, is, merely of itself, a ground from which to infer authority to settle all claims arising on the contract against the principal.

1874. *Whether authority to subscribe a policy* for the underwriter *is such to settle a loss* under it for him?

Lord Ellenborough ruled it to be so.[2]

But surely no such general rule will hold. *The most that can be said is, that it is one circumstance tending to show such authority*, of greater or less weight according to the prior business relations of the parties, the profession of the agent, and the particular circumstances.

The fact that the underwriter has previously paid losses according to an adjustment made by a person assuming to act for him in settling a loss, is some evidence of his still being agent for the same purpose, of greater or less weight according to the circumstances.

Lord Ellenborough ruled that it was sufficient evidence to render an award binding upon the underwriter, which was made under a submission to arbitrators by an agreement of the agent.[3] It may be presumed, however, that there were circumstances in the case tending to move the acquiescence of the underwriter in the submission.

[1] Richardson *v.* Anderson, 1 Camp. 43, n.

[2] S. C.

[3] Goodson *v.* Brooke, 4 Camp. 163.

1875. *An agent in a foreign port to communicate information to insurers* respecting marine risks, *and advise them* generally *of matters affecting their interests, is not authorized to receive notice of an abandonment,* so as to bind them:

As the agents of Lloyd's.[1]

1876. *An agent of a fire insurance company* for making surveys of subjects proposed for insurance, and *for receiving applications for insurance, who is declared,* by the conditions annexed to the policy, *to be "the agent of the applicant as well as of the company,"* in making applications, *is* held by the Supreme Court of New York to be *their agent for receiving notice of a prior insurance, and of facts not stated by an applicant,* under a condition in the policy, that such notice must be given.

Verbal notice of a prior insurance to such an agent is held by Cady, Paige, Willard, and Hand, Justices of the Supreme Court of New York, in one of the judicial districts, to be notice to the company, though not communicated to them by the agent.[2]

Although the by-laws of an insurance company provide that the person making a survey in its behalf, of buildings proposed for insurance, shall be agent of the applicant, he is held by the Supreme Court of New York still to be the agent of the underwriters in making the surveys.[3]

Mr. Justice Crippen, of the Supreme Court of New York for one of the Judicial districts, speaking of the provision in the by-laws of a fire company, that an agent presenting an application shall be considered to be the agent of the party insured and not of the insurance company, says "I have always regarded this clause in the by-laws of these companies as a device resorted to by them for the purpose of shunning a just responsibility. They employ their own agents and send them abroad in the community with their printed blanks and instructions. The business of these agents is to obtain insurances. The public know nothing of their

[1] Drake *v.* Marryat, 1 B. & Cr. 473. Some expressions of the judges in Read *v.* Bonham, 3 Br. & Bing. 147, seem to imply the contrary.

[2] Sexton *v.* Montgomery County Mut. Ins. Co., 9 Barb. R. 191.

[3] Masters *v.* Madison County Mut. Ins. Co., 11 Barb. 624.

by-laws or instructions. They are regarded as the agents of the companies, and confided in as being competent to transact the business intrusted to them accurately and according to law." [1]

It is however held in Massachusetts that an agent of a company for procuring applications for insurance of life and health does not represent the company for the purpose of waiving objection to a non-compliance, by the assured, with a condition expressed on the face of the policy, and that where by an express condition the policy was made void by the assured's omitting to make a representation of a fact, the right of objection on that account was not cancelled by the circumstance that the fact was known to the agent,[2] though it is otherwise if the fact not stated in a representation is known to the underwriters themselves, since, by the very definition of a concealment, the omitting to state a fact that is known to them is not one.[3]

1877. *The bankruptcy of the underwriter is a revocation of the authority of his agent,* the broker, to settle losses.[4]

1877 a. An insurance company cannot authorize an attorney or trustee to vote on shares bought up by the company.[5]

SECTION III. SUBJECTS AND EXTENT OF THE AGENCY.

1878. The *various purposes of insurance agency* for assureds are, to make applications for insurance, to make representations, effect insurance, alter and cancel policies, pay premiums, make abandonments, settle losses and returns of premium, and receive and make payments.

An agency for underwriters is to solicit applications for insurance, make surveys or examinations of the subjects proposed to be insured, subscribe or deliver policies, receive notice of other insurances or of compliances with stipulations on the part of the

[1] Masters *v.* Madison County Mut. Ins. Co., 11 Barb. R. 624.

[2] Vose *v.* The Eagle Life and Health Ins. Co., 6 Cushing's R. 42.

[3] Supra, No. 531.

[4] Parker *v.* Smith, 16 East, 382.

[5] United States *v.* Ins. Co. of Alexandria, 2 Cranch, C. C. R. 266.

assured, receive premiums, adjust losses and returns of premium, and make payments.

An agency may extend to any or all of these objects for either of the parties, or the same person may be agent to both parties to the policy for divers of them.

1879. The *reciprocal rights and liabilities of the agent and principal* will depend upon the instructions given and the authority with which the agent is invested, by the principal, expressly or by implication, whether the instructions are made known to third parties or secret.

1880. *In respect to third parties* who contract with the principal through the agent, *the extent of the agent's authority* will depend upon the construction which the principal, either expressly, or by his acts, omission to act, or his silence, authorizes them to put upon the agency.[1]

The authority of the agent may accordingly be of very different extent when viewed in these different aspects.

If an agent has secret instructions, though they are binding as between himself and his principal, his authority, so far as third parties are concerned, is the same as if no such instructions had been given.[2]

1881. *The degree of authority and trust given by merely depositing a policy in the hands of another,* or leaving it in his possession, *must depend upon the relation previously subsisting between the depositor and the depositary, the profession or usual business of the latter, and the particular circumstances.* It surely cannot be supposed that merely putting a policy of insurance into the hands of another constitutes him, even primâ facie, the legal representative of the assured, to all intents and purposes in reference to it, though such effect has sometimes been attributed to such a deposit.[3]

[1] Lightbody *v.* North American Ins. Co., 23 Wend. 18; Perkins *v.* Washington Ins. Co., 4 Cowen, 645; Hatch *v.* Taylor, 10 N. Hamp. 538.

[2] Hatch *v.* Taylor, 10 N. Hamp. 538; Perkins *v.* Washington Ins. Co., 4 Cowen, 645, per Colden, Senator.

[3] See Dutilgh *v.* Gatliff, 4 Dallas's R. 446; Parker *v.* Towers, 2 Browne's (Penn.) R. in App. 80; Cassedy *v.*

In case of an abandonment in Baltimore by the agent who had effected the policy for the assured of Philadelphia, and whose authority to abandon was denied by the insurers, C. J. Marshall says, for the court: "The agent who made the insurance might certainly be credited, and in transactions of this kind always is credited, when he declares that by order of his principal he abandons to the underwriters."[1] This may, however, be considered to be merely an obiter dictum, since the jury had found that the assured had abandoned, which excluded any question respecting the authority of the agent.

It was held by the Supreme Court of New York, Mr. Justice Livingston dissenting, that an agent having possession of a policy was not thereby authorized to receive payment of a loss before the expiration of the credit of thirty days from proof, and that the underwriters were not authorized to infer that he had such authority; and accordingly, that where the assured ordered the policy out of the agent's hands within the thirty days, the underwriters were still liable to him for the loss though they had previously paid it to the agent.[2]

If an abandonment is made by an agent, and the underwriters intend to object to it on the ground of his not being authorized, they ought to give notice of their intention, so that he may produce authority before it is too late; for the assured may be at a distance, and time may be allowed to procure a power from him.

Since an abandonment is a transfer of title, and must, in order to be valid, be made by such authority as to bind the assured if the underwriters accept, and to bind the underwriters if the assured insists upon it, the authority ought to be clear; and it does not appear that the delay necessary for the purpose of communicating with the principal, where the agent doubts his authority or the expediency of making an abandonment, will occasion a forfeiture of the right to make an abandonment. The law does not require

Louisiana Ins. Co., 6 Martin, N. S. 421; Gray *v.* Murray, 3 Johns. Ch. R. 67. Contra, Bethune *v.* Neilson, 2 Caines's R. 139.

[1] Chesapeake Ins. Co. *v.* Stark, 6 Cranch's R. 268.

[2] Bethune *v.* Neilson, 2 Caines's R. 139.

of the assured to keep an agent in the vicinity of the underwriters with full authority to make an abandonment. Accordingly, in cases where it has been held that the agent for procuring the insurance, or the depositary of the policy, is authorized to abandon and adjust a loss, it usually appears that there were other circumstances tending to show that such authority existed, or that the agent procuring the insurance and subsequently adjusting a loss, was interested in the subject-matter,[1] or was the nominal assured,[2] or that by an express provision of the policy the loss is payable to him.[3]

1882. *The agent who has effected a policy is authorized to receive payment of a loss under it, after the loss has become payable; and payment will discharge the underwriters if the agent then has the policy* and the underwriters have had no notice of the revocation of his authority or reason to suppose it to have been revoked.[4]

1883. *Under authority to an agent of the assured to receive payment of a loss,* or a return premium, *he is not authorized to discharge the underwriter by merely crediting the loss,* or including such a credit in the settlement of his account with the underwriter. The underwriter is not discharged from the claim of the assured except by actual payment to the agent.[5]

The circumstance of the underwriter's name being struck off the

[1] Hunt *v.* Royal Exch. Ins. Co., 5 M. & S. 47; Briggs *v.* Call, 5 Mete. 504. See also Stewart *v.* Aberdein, 4 Mees. & Wels. 288.

[2] Reed *v.* Pacific Ins. Co., 1 Metc. R. 166.

[3] Reynolds *v.* Ocean Ins. Co., 22 Pick. R. 191, where it was held that the agent had such authority, at least until the underwriters had notice to the contrary.

[4] Erick *v.* Johnson, 6 Mass. 193; Wilkinson *v.* Clay, 6 Taunt. 110; S. C., 4 Camp. 171.

[5] Russell *v.* Bangley, 4 B. & Ald. 395, before Abbott, C. J., afterwards Lord Tenterden, and Bayley, Holroyd, and Best, Justices; Todd *v.* Reid, 4 B. & Ald. 210, before the same judges; Scott *v.* Irving, 1 B. & Adol. 605, before Lord Tenterden, C. J., and Parke, Taunton, and Patteson, Justices; Bartlett *v.* Pentland, 10 B. & Cress. 760, before Lord Tenterden, C. J., and Bayley, Littledale, and Parke, Justices; Ovington *v.* Bell, 3 Camp. 237, before Lord Ellenborough; Jell *v.* Pratt, 2 Starkie's N. P. Cas. 67.

policy is mentioned as being of some weight in divers of the cases above referred to, in respect to the effect of the settlement between the broker and underwriter in discharging the latter. Lord Ellenborough suggests, in one case at nisi prius, that this deprives the assured of all remedy against the underwriter;[1] and to this suggestion is probably to be attributed the assignment of so much importance to this circumstance in the subsequent cases. But Mr. Justice Bayley makes a material distinction upon this point. He attributes importance to the cancelling of the signature, if done with the assent of the assured.[2] Lord Tenterden says: "If the assured did not authorize the broker to accept a set-off in payment, he cannot be supposed to have authorized him to do an act which would amount to a release of the debt. The fact of the name of the underwriter having been struck off the policy may have that effect, provided it be shown to have been done with the consent of the assured." [3]

If a part of the loss is passed in account between the assured's broker and the underwriter, and the remainder paid to the broker, and the underwriter's signature to the policy erased, the underwriter is discharged for as much as is paid, and remains liable to the assured for the surplus.[4]

The circumstance of the broker's having rendered his general account to the assured, including, among other items, a credit for the loss or return of premium, and the assured's drawing a bill payable at a future time for the balance, at the suggestion of the broker, who accepts the same, and becomes bankrupt before it is due, is held not to discharge the underwriter.[5] It was considered not to be a consent by the assured, that the settlement between the broker and underwriter should be construed to be a payment of the loss by the latter, and a substitution of the broker as the debtor to the assured.

[1] Andrew *v.* Robinson, 3 Campbell, 199.

[2] Russell *v.* Bangley, 4 B. & Ald. 395.

[3] Bartlett *v.* Pentland, 10 B. & Cr. 760.

[4] Scott *v.* Irving, 1 B. & Adol. 605.

[5] Russell *v.* Bangley, 4 B. & Ald. 395.

The previous habits of business between the assured and broker, and their correspondence in the particular case, and a usage known to and affecting them both, may be the ground for the construction that a set-off between the broker and underwriter is acquiesced in by the assured, and is equivalent in its effect to a cash payment of the loss to the broker.[1]

SECTION IV. QUALIFICATIONS, DUTIES, AND LIABILITIES OF AGENTS.

1884. *The* degree of *knowledge and skill required of an agent depends upon the manner of his appointment and his profession.* A greater knowledge and skill in matters of insurance are required in a professed insurance broker or insurance agent, than in a general mercantile agent and correspondent; but a greater knowledge and skill are requisite in the latter than in a person not professing, or who cannot reasonably be presumed by the principal asking his services, to be specially conversant with insurance or mercantile affairs.[2]

A professional insurance broker is bound to know the usages of the place where he practises his business:[3]

He is, however, excusable for a mistake as to a doubtful point of law.[4]

1885. *Different degrees of diligence are required of different descriptions of agents.*

An agent who acts gratuitously is, it seems, liable for damage only in case of gross negligence.[5]

Though a party is not bound to act, yet, if he volunteers, he is responsible either for gross negligence or want of ordinary diligence, according as he acts gratuitously, or for a commission.[6]

[1] Stewart *v.* Aberdein, 4 Mees. & Wels. 288.

[2] Story on Bailments, 435.

[3] Mallough *v.* Barber, 4 Camp. 150.

[4] Pitt *v.* Yalden, 4 Burr. 2060. See Park *v.* Hammond, 1 Holt's R. 80; S. C., 4 Camp. 344; S. C., 6 Taunt. 295; and S. C., 2 Marsh. R. 189; Mechanics' Bank *v.* Merchants' Bank, 6 Metc. R. 13. See also 2 Duer, Ins. p. 204, c. 11, s. 21, 22.

[5] Tracy *v.* Wood, 3 Mason's R. 132; Beardslee *v.* Richardson, 11 Wend. 25.

[6] Wilkinson *v.* Coverdale, 1 Esp. 75;

Lord Ellenborough ruled that an attorney for collecting a debt is personally liable only for gross negligence.[1]

1886. *Every agent*, of whatever description, if he proceeds in the execution of an order to procure insurance, *is bound to follow* the *instructions* of his principal,[2] according to the construction which he can reasonably be presumed to put upon them on an attentive examination.[3]

Where the master, in a prior conversation with the broker, said he should take similated papers, but, in his written order for the insurance, said nothing of such papers, Lord Ellenborough ruled, that the agent was not bound to have liberty to carry the same inserted in the policy, as he might suppose that the master had changed his purpose.[4]

The omission to insure against an illegal risk which the agent was instructed to insure against, whereby the policy would have been void at law pro tanto, was held by Lord Ellenborough not to be a sufficient excuse for omitting to cover the premium which he was specially instructed to cover.[5]

1887. No person has a right to extort a credit without the consent of the creditor, and as the premium is usually to be actually paid, or to be secured by the note of some person in good credit, at the time of effecting the insurance, *an agent*, or party requested to act as such, *is under no obligation to effect insurance until he is supplied with* funds or *means* for paying or securing the premium, *unless from the previous course of dealing* between the parties, *or by express agreement, he is bound to make an advance, or use his own credit* for the purpose. In all cases, therefore, where the obligation of an agent to insure is inserted, some provision or implied or express agreement for the payment of the premium, or some ground to expect an advance for the purpose, is presupposed.

Wallace *v.* Tellfair, id. 76; S. C., 8 T. R. 188, n.; Sellar *v.* Work, Marsh. Ins. 299; Thorne *v.* Deas, 4 Johns. R. 84.

1 Barkie *v.* Chandless, 3 Camp. 17; and see Pitt *v.* Yalden, 4 Burr. 2060.

2 Glaser *v.* Cowie, 1 M. & S. 52.

3 Leverick *v.* Meigs, 1 Cowen, 645.

4 Fomin *v.* Oswell, 3 Camp. 357.

5 Glaser *v.* Cowie, 1 M. & S. 52. See also Thompson *v.* Read, 12 S. & R. 440.

1888. "*There are*," says Mr. Justice Buller, "*three instances in which the orders to insure for a correspondent abroad must be obeyed:* —

"1st. *Where the merchant abroad has effects in the hands of his correspondent* here;

"2d. *If he has been used to send orders for insurance, and the correspondent* here *to comply with them*, he has a right to expect his orders will be obeyed, unless he has notice to discontinue that course of dealing;

"3d. *If he sends bills of lading with orders to insure*, the correspondent here must obey the orders, if he accept the bills of lading, for it is one entire transaction."[1]

1889. *A general agent* is not an agent for effecting insurance, where it has not been in the course of business between him and his principal to do so;[2] but *the agent may be authorized to insure* for his principal *under special circumstances:*

As where the general agent of a foreign party received bills of lading, with directions to transmit them to a party named as consignee, *that he might insure*, and the latter refused to accept the goods.[3]

So *he may be bound to insure by the custom* in like cases, though he has no order;[4]

And so *he may be bound to insure, if the goods* consigned *are exposed to extraordinary risks*, as by transshipment, or delay for a market, which were not expected by the consignor.

1890. The distance to which applications must be made to procure insurance, and the number of insurance offices to which the agent must apply in order to comply with an order to effect insurance, must depend upon the terms of the order, the amount at risk, the ordinary course of business at the place where the

[1] Smith *v.* Lascelles, 2 T. R. 187. See also French *v.* Reed, 6 Binn. 308; De Tastet *v.* Crousillat, 2 Wash. C. C. R. 136; Morris *v.* Summerl, 2 Wash. 203; Ela *v.* French, 11 N. Hamp. R. 356; Corlett *v.* Gordon, 3 Camp. 472.

[2] Shirtleff *v.* Whitfield, 2 Brevard's (S. Car.) R. 71.

[3] Wolff *v.* Horncastle, 1 B. & P. 316.

[4] De Forest *v.* Fulton Ins. Co., 1 Hall's R. 84.

order is received, and the facility of communication with other places for the purpose, and other circumstances of the case.

Thus Mr. Justice Buller intimates, that application at Lloyd's was sufficient under an order to a broker in London, that being all which was customary.[1]

Merchants of Boston, having orders from Surinam, in 1801, to procure insurance on a valuable cargo of a vessel which was out of time when the order was received, made application for the purpose, without success, in Boston, Salem, Newburyport, Portsmouth, and Providence, which were the principal commercial places within sixty miles, and also wrote to New York for the same purpose, where a part of the amount was eventually insured at high premiums, the highest being $33\frac{1}{3}$ per cent. In an action against the agents for not effecting insurance to cover the whole amount of the cargo, the jury were instructed that the applications at the places first above named were, at that time, a sufficient discharge of their duty; and this ruling was confirmed by the court, consisting of Parsons, C. J., and his associates.[2]

1891. From the fact of the policy being left in possession of an agent by whom it was effected, or any other agent, it will usually, by reason of the prior relations of the principal and agent, or the profession of the agent, as in case of his being an attorney at law or adjuster of averages, or by the correspondence and communications between the principal and agent, or by other circumstances, appear with greater or less certainty what is the object and extent of the agency; as whether it be such as to constitute the agent a depositary merely, or to invest him with an absolute authority, or something between these extremes. *Whatever by a reasonable and obvious construction may be the extent of the agency, the agent will be bound to discharge the duty which he thus assumes, and be answerable to his principal for neglect and misfeasance.*[3]

[1] Smith *v.* Cologan, 2 T. R. 188, n.

[2] Sanches *v.* Davenport, 6 Mass. R. 258. Mr. Samuel Dexter, for the plaintiffs, contended, that, though the agents were not bound to apply in New York, yet having done so, they were bound to persevere, and effect policies to cover the whole amount at risk.

[3] Shirtleff *v.* Whitfield, 2 Brevard's (S. Car.) R. 71.

Under an order to ship goods for the principal, the agent is not bound to effect insurance upon them unless he has orders to do so.[1]

1892. *If an agent bound to insure neglects to procure insurance, or the policy procured is void through his fault, he is himself liable to the principal as an underwriter in such a policy as he was bound to procure, and could have procured.*[2]

As by not attending to the procuring of the insurance within a reasonable time, whereby the principal fails to obtain insurance:[3]

Or where the insurance fails by neglect to give a sub-agent a letter containing facts material to be disclosed to the underwriters:[4]

Or where insurance fails to be effected by reason of the agent's limiting the broker to too low a premium, when the foreign correspondent had not prescribed any limit:[5]

Or if the risk does not attach, by reason of the agent's neglect to pay the premium:[6]

Or the insurance fails by reason of a misrepresentation,[7] or concealment,[8] through the fault of the agent:

Or the omission by the broker to have it stated in a policy on goods "at and from Gibraltar," that they were shipped at Malaga.[9]

1893. The query has been suggested, *whether it is the agent's duty to effect new insurance, in case the underwriters* on the pre-

[1] Shirtleff *v.* Whitfield, 2 Brevard's (S. Car.) R. 71.

[2] Delaney *v.* Stoddart, 1 T. R. 22, coram Buller, J.; Wilkinson *v.* Coverdale, 1 Esp. R. 75, coram Kenyon, C. J., Harding *v.* Carter, coram Lord Mansfield, Park, Ins. 4; Marsh. Ins., 2d ed. 303; Webster *v.* De Tastet, 7 T. R. 157; Miner *v.* Tagert, 3 Binn. R. 204; Turpin *v.* Bilton, 5 Mann. & Gr. 455; Pawson *v.* Watson, Cowp. 785; Maydew *v.* Forrester, 5 Taunt. 615; Ela *v.* French, 11 N. Hamp. 356; Strong *v.* High, 2 Rob. (La.) 103.

[3] See Turpin *v.* Bilton, 5 Mann. & Gr. 455. It seems probable from the report of this case, that a policy had been made in due time, but the broker, on repeated demand made, did not produce it, and the insurance may have failed by reason of the broker's delay to demand the stamped policy from the office of the underwriters.

[4] Sellar *v.* Work, Marsh. Ins. 2d ed. 299.

[5] Wallace *v.* Tellfair, coram Buller, J., 2 T. R. 188, n.; S. C., 1 Esp. R. 76.

[6] Perkins *v.* Washington Ins. Co., 4 Cowen's R. 645.

[7] Pawson *v.* Watson, Doug. 785.

[8] Sellar *v.* Work, Marsh. Ins., 2d ed. 299.

[9] Park *v.* Hammond, 1 Holt's R. 80; S. C., 4 Camp. 344; S. C., 6 Taunt. 495; S. C., 2 Marsh. R. 189.

vious policy *have become notoriously insolvent?*[1] *which*, if his agency continues, *he surely ought to do*, if it is practicable, no less than where the underwriters who are first applied to reject the application.

1894. *If, through the negligence of the agent, or want of the degree of knowledge and skill which he is bound to have, the insurance fails in some respect* to afford the indemnity which would have been secured by such a policy as he was bound to effect, *he must make good the deficiency:*[2]

As in case of the broker's insuring the shipments of divers shippers under one valuation, where the loss on all the goods did not exceed ten per cent., being the lowest rate of exception of losses, and that on one of the shipper's goods exceeded that rate, which he could accordingly have recovered had his goods been separately valued, but failed to recover under the policy as it was made:[3]

And in case of the broker's omitting to cover the premium as he was instructed to do:[4]

And in case of the broker's omitting the customary provisions in the policy; as where, in an insurance on a voyage from Teneriffe to London, the broker omitted to insert "liberty to touch and stay at all or any of the Canary Islands," which was customary in policies upon that voyage:[5]

And where the consignee of books neglected to insure their full value as he was instructed.[6]

1895. *It is the duty of the agent to insure with underwriters* reputed to be *of* good *credit* and responsibility.

Where the agent agreed to get insurance by underwriters to the satisfaction of the assured, it was held that the assured could not refuse to reimburse to him the premium, under the pretence that

[1] Petrie's Ex'rs *v.* Aitchison, 3 Session Cas. 501.

[2] Glaser *v.* Cowie, 1 M. & S. 52.

[3] Klendyen *v.* Widow, a Hamburg decision reported 1 Benecke, 399, which I take from 2 Duer, Ins., 226, 227, Lect. 11, s. 30.

[4] Glaser *v.* Cowie, 1 M. & S. 52.

[5] Mallough *v.* Barber, 4 Camp. 150.

[6] Ela *v.* French, 11 N. Hamp. R. 356.

the agent had not submitted to him the names of the underwriters for his approbation.[1]

1896. The agent must make *representations* of the subject and risk, as he is instructed, and disclose such material facts as are communicated to him on behalf of the principal, or have otherwise come to his knowledge.[2]

1897. *If the agent does not comply with the instructions of his principal, he is answerable* in damages:[3]

Or if he mistakes his instructions through negligence, he is liable.[4]

1898. *Where an order to effect insurance is absolute, the agent must procure the insurance at any rate of premium at which it can be obtained, if the application of funds of the principal in his hands, or the requisite advances or credit for the purpose, are not beyond the amount which the principal has a right to demand.*

If the insurance fails to be effected by reason of the agent's limiting the broker to too low a premium, the agent is liable.[5]

If the assured fails in a suit on the policy by a defect occasioned through the agent's fault, the latter is not only answerable as insurer, but also for the costs of such suit, if the action was brought at the request, or with the concurrence, of the agent, or if it was brought on any reasonable ground, or after notice to the agent. If the defect is palpable on the face of the policy, or well known to the assured, and such that the liability of the agent as underwriter can evidently be established without a previous action on the policy, the agent will not be liable for the costs of such action.

It was so ruled by Lord Eldon, in case of a policy void by reason of a concealment, through the negligence of the agent.[6]

[1] Dixon *v.* Hovill, 1 M. & P. 656; S. C., 4 Bing. 665.

[2] See supra, Vol. I. c. 2, s. 4; also Maydew *v.* Forrester, 5 Taunt. 615.

[3] Moore *v.* Morgue, Cowp. 479.

[4] Rundle *v.* Moore, 3 Johns. Cas. 36.

[5] Wallace *v.* Tellfair, 2 T. R. 188, n.

[6] Seller *v.* Work, Marsh. Ins., 2d ed. 299.

Where the foreign consignor and vendor made such a representation to the consignee and purchaser, that an insurance upon the representation would have been void, it was held

Though the agent deviates from his instructions, he is not liable for damage if his principal has not sustained any.

As in case of his omitting to cover the premium as he was ordered to do, and the policy proved to be invalid for a cause for which he was not answerable;[1] since the principal, instead of sustaining loss, was benefited by saving the premium on the premium.

1899. *In respect to the risks insured against and the stipulations of the policy, it is sufficient,* where no instructions are given on the subject, *that they are those usually introduced into policies* at the same place on a similar voyage.

An agent for procuring insurance in Philadelphia effected a policy against all "unlawful arrests." This limitation of the description of arrests for which the underwriters were to be answerable, was not usual at the time in Philadelphia policies. The property being lost by an arrest which would have been covered by a policy in the usual form, but which was not covered by the one underwritten, the agent was held to be liable to his principal for the amount insured.[2]

The agent in London, being ordered by his principal at Alicant to effect insurance on a cargo of fruit, effected a policy with the London Assurance Company by their usual form of policy, "free from average," unless general. Nearly the whole cargo was lost by particular average. Two companies in London were in the practice of insuring the article without that exception. Lord Mansfield, giving the opinion of the court, said, that, to render him liable, he must be guilty either of a breach of orders, gross negligence, or fraud; and that, as the plaintiff did not direct the insurance to be done at any particular office, he left the choice to the discretion of the agent, who, having acted in good faith, was not liable.[3]

that the consignor thereby made himself insurer; and the goods being lost by the perils usually insured against, he was not entitled to recover the price of them. Arnot *v.* Stewart, 5 Dow, 274.

[1] Fomin *v.* Oswell, 3 Camp. 357.

[2] Thompson *v.* Read, 12 S. & R. 440, App.

[3] Moore *v.* Morgue, Cowp. 479.

Lord Ellenborough ruled in like manner, in case of an order for effecting insurance upon wheat. The broker effected the insurance at the office of the London Assurance Company, which did not pay particular average on the article in case of stranding, whereas by the policies of other companies the insurers were liable in such case. Lord Ellenborough said the principal was bound to know the form of policy of the different companies, and if he preferred any one, to give his orders accordingly.[1]

The rule in such case ought to depend on usage. If it were as usual to insure the article specified in the companies which took the lesser risk, as in those which took the greater, which is improbable, it should seem to be a justification of insurance in the former, though the premium were the same; but not if the article were usually insured at the offices in which stranding defeated the exception of average.

1900. *It is the duty of the agent to keep his principal advised of the concerns of his agency:*[2]

Especially in case of failure to effect insurance.[3]

1901. *The agent, though he has a lien on the policy, is bound to produce it in evidence if requisite to the interests of his principal;* and, on demand, to deliver it over to the principal when his lien is discharged.[4]

And he *must keep* and duly render *accounts* of the business of his agency:[5]

And select brokers and other sub-agents with proper vigilance and discretion:

And give them proper instructions[6] to collect and preserve the evidence, if his agency is for making an abandonment, or adjusting or prosecuting for a claim;

[1] Comber *v.* Anderson, 1 Campbell, 523.

[2] Harvey *v.* Turner, 4 Rawle, 223; Devall *v.* Burbridge, 4 Watts & Serg. 305.

[3] Callender *v.* Oelrichs, 5 Bing. N. C. 58.

[4] Hunter *v.* Leathly, 10 B. & C. 858.

[5] Devall *v.* Burbridge, 4 Watts & Serg. 305; Harvey *v.* Turner, 4 Rawle, 223.

[6] Foster *v.* Preston, 8 Cowen, 198.

And such agent in settling a loss is bound to use reasonable diligence.[1]

1902. Lord Ellenborough ruled, that, *where the assured leaves it to the discretion of the agent to abandon or not, he is not liable if he acts bonâ fide* in not abandoning.[2]

1903. *Whether an abandonment to the agent is necessary*, in order to recover against him damages to the amount of a total loss?[3]

It seems to follow from the agent's liability as underwriter, if there be a failure of insurance through his fault, that he is liable for a constructive total loss; and if so, then that *the rules respecting abandonment are the same under his liability as under a policy.*

1904. *A del credere agent, who is liable to pay a loss* to the assured in consequence of the insolvency of the underwriter, *and an agent* who is liable for a loss in consequence of the failure through his fault to procure insurance, *are entitled to* allowance for *salvage.*

And, in general, where the agent is liable as underwriter, he is of course entitled to an allowance for the premium, and all deductions to which the underwriter would have been entitled had a valid policy been effected.[4] He may also set up the same defences against his principal which the underwriter might have made had a policy been effected.

The owner of a vessel wrote to his correspondent to effect insurance, stating that she would sail as soon as the frigates, "calculating to take advantage of their protection." She sailed before the frigates, and was captured. The agent had made no insurance, but the court held him not to be liable; for if he had effected a policy, with a warranty that the vessel would sail with the frigates, as he was authorized to do, nothing could have been recovered against the underwriters under the policy.[5]

[1] Bousfield *v.* Creswell, 2 Camp. 545.
[2] Comber *v.* Anderson, 2 Camp. 545.
[3] See 2 Duer, Ins. c. 12, s. 36, p. 326.
[4] Harding *v.* Carter, Marsh. Ins. 303; Miner *v.* Tagart, 3 Binn. 204; Morris *v.* Summerl, 2 Wash. C. C. R. 203.
[5] Alsop *v.* Coit, 12 Mass. R. 40.

1905. *An agent del credere of the assured, on paying a loss in case of the insolvency of the underwriter, is entitled to prosecute* the underwriters *for it*, in the name of the assured, where the policy is payable to the assured only,[1] or in his own name for his own benefit, if the policy is in his own name. He is in the character of insurer collaterally to the underwriters, and the failure of the latter to pay is, in effect, a loss under his insurance, and on payment, the benefit of the remedy over against the underwriter belongs to him in the nature of salvage.

1906. In respect to the party to whom the agent is liable, *where there are divers persons named as assureds in the policy, without* any *discrimination* of the subjects or amounts of each, *the agent may pay over to either* of them the amount received by him for a loss or return of premium, if he has no notice to the contrary.

If, in such case, the agent has notice from any of the assureds not to pay any part of a loss or return of premium, or only a certain part of it, to certain others, and evidence is produced to him of the distinction and proportions of their interests, he is bound by such notice, and it behooves him, where such notice is given, though no such evidence is produced, not to pay over to either without indemnity.

A part-owner of a vessel having ordered an insurance for himself and the other part-owners, and a loss having occurred, the other part-owners gave notice to the broker who had received the amount of the loss, not to pay it over to him. The broker, however, paid it over to that part-owner, and the English Court of Exchequer decided that he was authorized to do so, being answerable only to him, and not liable to a suit by the others, there being no privity between him and them.[2]

1907. If notice is given to the agent of the assignment of a policy, and evidence of the assignment produced to him, he thereafter becomes the agent of the assignee, and is accountable to him accordingly.

1908. *The agent is bound to pay over moneys received by him*

[1] See 2 Duer, c. 12, s. 42, p. 336. [2] Roberts *v.* Ogilby, 9 Price's R. 269.

for the principal, for premiums or losses or returns of premium, *even though the insurance may have been in contravention of statute regulations of insurance, where* the agent has not had notice from the party from whom he received it to refund it, and *the contravention in respect to the agent is inter alios*, and one to which he is not a party : [1]

As in case of money received on a policy upon a voyage, in violation of the privileges of the East India Company.[2]

Where the insurance broker had charged the premium of a re-insurance, being illegal, and given credit for the same to the underwriter, but, before paying it to the underwriter, had notice from the assured not to pay it, Lord Ellenborough and his associates held that the underwriter could not recover the premium from the broker.[3]

G. and H. and E. agreed on a partnership in underwriting, G. alone to sign the policies, contrary to the English statute against partnerships for underwriting marine policies. One of the three partners, viz. E., and a fourth party, T., were partners as insurance brokers, and received premiums on policies subscribed by G. in behalf of the illegal partnership. G. becoming bankrupt, his assignees brought assumpsit against the brokers for those premiums. It was held by Lord Kenyon and his associates, that they could not recover.[4]

In this case, one of the parties on each side, namely, G. on one side, and H. on the other, were parties to the illegality.

If the agent has been paid a loss on the goods of his principal, he is liable to his principal for the amount, whether the goods were described in the policy as being those of the principal or those of the agent,[5] unless it appears that the policy was applicable to some other party's interest in the goods.[6]

[1] See supra, No. 1883, as to what is a payment by or to the agent.

[2] Tenant *v.* Elliot, 1 B. & P. 3. See also Farmer *v.* Russell, 1 B. & P. 296.

[3] Edgar *v.* Fowler, 3 East, 222.

[4] Booth *v.* Hodgson, 6 T. R. 405.

[5] Sidaway *v.* Todd, 2 Starkie's N. P. Cas. 400. See also Briggs *v.* Call, 5 Mete. R. 504; supra, pp. 499, 500, No. 1817.

[6] Armitage *v.* Winterbottom, 1 Mann. & Gr. 130.

SECION V. LIEN AND SET-OFF, AND REPAYMENTS BETWEEN THE THE AGENT AND THE ASSURED.

1909. *The agent who effects a policy* for his principal, and advances the premium, or becomes responsible for it, and retains the policy in his hands, *has a lien upon it for his commission and the premium until the same are paid to him*, or he is supplied with funds for the payment,[1] whether his immediate employer is the assured himself, or an intermediate agent; and in the latter case, whether the intermediate agency was known, or not known, to the sub-agent claiming the lien.

A broker or other agent's lien on the policy, as security for his commission and advances on it, seems to be supported by the general principles which govern in the cases of bailments for work to be done, locatio operis faciendi.

Where a policy is not effected by the general agent of the assured, and is left in his hands for safe custody merely, without any advance made by him, or any liability incurred, on account of it, he has no lien upon it or right of set-off, though the depositor may be indebted to the depositary for money advanced, independently of the policy.[2]

A party retaining and having a lien upon a policy has, in virtue of the lien, a right to retain and set-off all returns of premium, and all losses accruing upon it, until he is satisfied for his advance of premium, or any other claim, as security for which he holds it.

1910. A general mercantile agent, who, in the course of his agency, effects a policy for his principal, and retains it in his possession, has a lien upon it for the general balance of his account, as agent, with his principal.

1911. Besides such lien by contract, express or implied, *a right of set-off may arise* between the agent and the assured, *under the statute* of the country where the policy is made, or the parties

[1] Spring *v.* South Carolina Ins. Co., 8 Wheat. 268.

[2] Muir *v.* Fleming, Dowl. & Ryl. New Prac. Cas. 29.

reside, providing for the setting off of mutual debts and credits, and liabilities. And *in case of the policy itself not being pledged*, either by any express or implied contract of the parties, or any provision of law, *the agent may have a right to set off the amounts received upon it* by him for loss or return of premium, *in satisfaction of his demands* against the assured.[1]

1912. *The agent has no lien on the policy, and no right to retain it* without the consent and against the wishes of his principal, *for other demands than his advances and commissions on account of it, except* as general mercantile agent, or *in consequence of some agreement, or of a usage of the place* of which the principal is bound to take notice, *or a usage between him and his principal* in the course of their business.[2]

It is adjudged or implied in some cases, that an insurance broker has, by virtue of the general usage of the place, especially in London, a right to retain any policy he may effect for the principal, on account of his demands against him for previous advances and charges, in case of the principal having notice, or being bound to take notice, of the usage.

So if, in the previous intercourse between the parties, as principal and agent, the agent has made advances or become responsible for the payment of premiums on policies or otherwise, and retained policies as security, a right to retain a policy in virtue of a lien may result from such practice.

1913. *The right of the agent to retain and set off* sums received from underwriters for *losses and returned premiums* on policies, *on account of any liability he may have assumed for the future* for the principal, *will depend on his having a lien on the policy for his commissions, or his having made advances upon the credit of the policy.*[3]

1914. *The right of the agent of the assured to set off any sums received on any policy of his principal, on which he had no lien*, against his existing demands against his principal, *will depend on the general law merchant, or the usage of the place* as to the

[1] Olive *v.* Smith, 5 Taunt. 56. [2] Green *v.* Farmer, 4 Burr. 2214.
[3] Olive *v.* Smith, 5 Taunt. 56.

particular business of his agency, and his principal being affected by the usage; *or* upon *the practice between the principal and agent, or upon the statute of set-off.*

1915. *The broker* or other agent of the assured for effecting insurances *has*, by the general mercantile law, *a lien on policies which he retains in his hands, for his general balance* against his principal.[1]

Where the broker had effected two policies, and paid the premium on both, a loss took place on one of them. It was held that he had a lien for both premiums.[2]

An agent having effected a policy on goods that were to be shipped by his correspondent, the same having been lost, has been held to have a lien on the proceeds of the policy for his general balance against the shipper, notwithstanding that the goods are consigned to the agent on condition of his agreeing to pay over the proceeds of the shipment to a third party.[3]

An insurance broker has not a lien on policies of his principal in his hands, nor any right to retain them as security for money previously lent to the assured, independently of his agency as insurance broker.[4]

A part-owner of a vessel having ordered the other part-owner, who had been the ship's husband, to effect insurance upon his share, and transmit the policy to him, the latter effected the policy accordingly, and claimed to retain it as having a lien upon it for the general balance of his account as ship's husband. Shaw, C. J., giving the opinion of the Supreme Court of Massachusetts, said: "By undertaking to execute the order, he bound himself to comply with the terms and forward the policy, and this precludes the supposition that he was to have any lien upon it." It was accordingly adjudged, that he could not commence a suit upon it, or retain it so as to avail himself of it on account of his general balance.[5]

[1] Godin *v.* London Ass. Co., 1 Burr. 489; Kinloch *v.* Craig, 3 T. R. 783; Hammonds *v.* Barclay, 2 East, 227; Castling *v.* Aubert, id. 325.

[2] Leeds *v.* Mercantile Ins. Co., 6 Wheat. 565.

[3] Man *v.* Shiffner, 2 East, 523.

[4] James *v.* Rodgers, 15 Mees. & Wels. 375.

[5] Reed *v.* Pacific Ins. Co., 1 Metc. 166. And he was nonsuited in a suit commenced upon the policy against the orders of the assured.

So, if the agent had promised to forward the policy to the assured, he would be bound to forward it, and not detain it on account of his general balance.[1]

In case a broker employed to effect insurances employs another for the purpose, who effects divers policies, and pays the premiums, and puts some of the policies into the hands of the broker employed by the assured, he has no lien on the policies remaining in his hands for the premiums on those so delivered.[2]

A sub-agent being ordered by the agent, knowing him to be agent and not owner, to effect a policy on goods, has no lien on the policy for his general balance against the agent.[3]

1916. *Whether a sub-agent has a lien for his general balance against the immediate or first agent, where the assured himself has no concern with that balance, in case the first agent* at the time of employing the sub-agent *represents himself to be principal?*

L. inclosed to C. an indorsed bill of lading of tallow, requesting him to employ a house at Liverpool to sell it for the benefit of the shipper, and also requesting him to effect insurance. C. employed B., an insurance broker, to effect the insurance, representing to him at the same time that he, C., had authority to indorse the bill of lading, which he did indorse to a person at Liverpool, named by the broker. A loss having taken place, it was paid over to the broker, and in a suit by L. against him for the amount, the question was, whether the defendant had a lien on the amount to satisfy a balance due to him from C. Lord Ellenborough ruled that he had not such a lien. He said that, if an agent represents himself to have a power which he has not, the person who gives faith to his representation must run the risk of its being true or false.[4]

Mr. C. J. Gibbs considers this case as resting on the circumstance that the broker had notice, by the representation respecting

[1] See Walker *v.* Birch, 6 T. R. 258, a case of promise by a depositary to pay over the proceeds of the sale of goods deposited for sale, which was held to preclude a lien on the goods for a general balance.

[2] Snook *v.* Davidson, 2 Camp. 218.

[3] Man *v.* Shiffner, 2 East, 523.

[4] Lanyon *v.* Blanchard, 2 Camp. 597.

the indorsement of the bills of lading, that his immediate employer was himself an agent.[1] This, however, was not the reason which Lord Ellenborough is reported to have given for his ruling.

A case decided by Lord Kenyon and his associates intimates that, if the sub-agent has ground to suppose his employer to be the principal, the former will have a lien on the policy for his general balance.[2] But if his ground for such a supposition is merely the statement of the first agent, which is ordinarily the only ground, it does not agree with the reason given by Lord Ellenborough for his ruling above referred to.

In subsequent cases Lord Ellenborough ruled in favor of the lien of the sub-agent for his general balance.

A London house, having orders from a merchant of Boston to ship and insure a cargo, employed a broker to effect the policy, without mentioning to whom it belonged, which he did, and charged the London house with the premium. The policy remained in the broker's hands, and a payment was made to him on account of a loss after he had notice that the cargo belonged to the Boston merchant. Lord Ellenborough ruled that he had a right to set it off on his general balance against the London house, which had become bankrupt, on the ground that the broker "must be supposed to have made advances on the credit of the policy."[3] It does not appear why any such supposition must be made.

Gibbs, C. J., on discussion, deliberately ruled in like manner subsequently, citing this case as authority, on the ground that, when the broker effected a policy for an agent, supposing him to be the party interested as principal, he has a lien on the policy in his favor as security for his whole general balance against the intermediate agent by whom he was employed, as much as if it had been expressly so agreed between him and the intermediate agent as being the principal.[4] This is, however, a mere reiteration of the doctrine, and not a reason for it. Nor is it easy to give a reason which is satisfactory. So far as the broker makes advances and earns commissions on a policy, which he has good authority

[1] Westwood *v.* Bell, 4 Camp. 349.
[2] Maanss *v.* Henderson, 1 East, 335.
[3] Mann *v.* Forrester, 4 Camp. 60.
[4] Westwood *v.* Bell, 4 Camp. 349.

to suppose to be upon the property of his employer, who has been enabled by the principal to hold himself out as owner, the broker seems to have an equity in favor of his lien, but not further. The counsel for the assured, in the case last cited, urged as a reason why the sub-agent should not have a lien for his general balance, that the first agent cannot pledge the goods of his principal, which the decisions just stated permit him to do. Mr. C. J. Gibbs notices this argument, but does not seem to make any satisfactory reply.[1]

Analogy to the doctrine against a pledge of the goods of the principal by the agent for his own debt, and to the doctrine against mere set-off between an agent and underwriter being a payment in respect to the assured, and also the apparent equity of the case, lead to the conclusion, as being the better doctrine, that

A sub-agent, though he has a lien on the policy for his commission and advances on account of it, *has no lien for his general balance against the agent* by whom he is immediately employed, where such general balance has accrued independently of the principle, and of his own sub-agency.

The doctrine stated by Lord Ellenborough, that, where one of two parties must suffer by a third, it must be the one who has trusted him, is as true in law as it is in ethics. But that is not the question in the present case. If the principal has enabled the agent to treat the subject as being his own, he trusts the agent no less than the sub-agent trusts him. If either the principal or the sub-agent must bear a loss in such case by reason of the insolvency of the agent, where neither the principal nor the sub-agent is in fault, it seems that it should rather fall upon the principal.

But the question is not which of the two shall bear a loss that

[1] The cases of sale of goods by a factor, supposed by the buyer to be principal (George *v.* Claggett, 7 T. R. 359, per Lord Kenyon and his associates; and Rathbone *v.* Williams, before Lord Kenyon, 7 T. R. 360, n.), and that of goods sold by an ostensible partner, which was before the same judge (Stracey *v.* Deey, 7 T. R. 361, n.), in which it was adjudged that the buyer had a right of set-off, are not inconsistent with the doctrine, that an agent has not a right to pledge the goods of his principal for his own debt.

must fall upon one of them, for we assume that the sub-agent is to be paid his commission, and repaid advances to the agent on account of the policy. If we admit that the sub-agent may have a lien on it for his general balance, where he has expressly extended credit on such balance in consideration of such lien, though it is in palpable contradiction of the doctrine against the agent's pledging the goods of his principal for his own debt, still we are far short of the doctrine expressed in the cases above cited. I say "the doctrine expressed," for it may be that the authority of the cases, if more fully stated, would admit of some limitation; for it does not appear how the general balances arose in those cases, and what particular grounds there may have been for extending the lien to them. The doctrine, as expressed, goes to the case of a general balance in favor of the sub-agent against the agent without limitation or qualification; and it stands upon a mere nisi prius ruling of Lord Ellenborough, sanctioned deliberately by Sir Vicary Gibbs, without any good reason, legal or equitable, or founded on principle or considerations of expediency.

According to this doctrine as expressed, if goods are consigned to a merchant with orders to insure, who employs a broker to effect the insurance, with whom he has a long standing account with a general balance, however large, with which balance the consignor has no concern directly or indirectly, the broker, if he has ground to suppose, or has no ground not to suppose, — whichever is the proper construction of the doctrine, — that the policy is for the consignee, has a lien on the policy for his whole general balance, though it may be equal to the whole value of the consignments. The question is not, therefore, whether the sub-agent or the principal shall sustain a loss as between themselves, since the sub-agent is not liable to any loss in any event. As between him and the principal, the question is, whether he shall incidentally, and accidentally, or through fraud of the agent alone, or to which he, the sub-agent, is privy, obtain the advantage of inflicting upon the principal a liability to pay gratuitously his, the sub-agent's, own stale, desperate demand against the agent. He has already lost his debt; the question is, whether he shall get indemnity from a stranger for his loss.

Suppose the merchant gives his broker orders to effect policies for divers consignors, in his, the merchant's, name, for whom it may concern, and the policies remain in the broker's hands; by what rule will a court apportion the lien for his general balance among them, under this doctrine?

I cannot but dissent from such a doctrine.

1917. *The agent, by parting with the possession of the policy, forfeits his lien.*[1]

But he will not forfeit his lien by putting the policy into another's hands for the purpose of preserving it, and availing himself of it.[2]

The agent would forfeit his lien by pledging the policy as his own, which he may attempt to do where it does not appear on the face of the policy but that it is his own.[3]

1918. *The agent may assign to another his balance against the principal*, for which he has a lien on the policy, *and leave the policy in the hands of such other*, with notice of his lien upon it, authorizing the assignee of the balance *to keep* the policy for him *subject to his lien.* In this case the agent is not considered as pledging the policy, and so does not violate the rule that a lien is a personal privilege, which cannot be transferred.[4]

1919. *The taking of a* promissory note, bill of exchange, or other *security payable in future, for a debt* due to the agent for which he has a lien on goods or policies, in whatever way the debt may have arisen, *is a waiver of the lien.*[5]

[1] Wilson *v.* Creighton, Marsh. Ins. 297; Cranston *v.* Philadelphia Ins. Co., 5 Binn. 538. So, if a factor ships goods expressly on account and risk of the principal, he loses his lien. Sweet *v.* Pym, 1 East, 4.

[2] M'Combie *v.* Davies, 7 East, 5, where it is so held in respect of goods. Urquhart *v.* M'Iver, 4 Johns. R. 103.

[3] As in case of goods, Holly *v.* Huggeford, 8 Pick. R. 73. In Daubigny *v.* Duval, 5 T. R. 604, the doctrine that the agent cannot pledge the goods of the principal is maintained, though Lord Kenyon seems to have been of opinion, that the pledgee might have the right to hold them until the amount due to the agent should be paid. It seems, however, that nothing was in that case due to the agent, and the principals had offered, if the agent, by paying his acceptance, should bring the balance in his favor, to pay it.

[4] M'Combie *v.* Davies, 7 East, 52; Urquhart *v.* M'Iver, 4 Johns. R. 103.

[5] Hewison *v.* Guthrie, 2 Bing. N. C. 755, per Tindal, C. J., and Parke,

1920. *Whether, if the agent puts a policy out of his hands* on which he had a lien for his commission and advance of premium, *his lien revives on its coming again into his hands as agent*, if his demand still subsists ?[1]

If the policy comes into his hands again while only his principal, being his immediate employer, is interested, it has been held that his lien for a general balance will be revived. A broker having delivered the policy to the assured, afterwards, doubting his solvency, obtained it back, for the purpose, as he pretended, of receiving a loss, but in fact to retain it under his lien. It was adjudged that his lien revived, and that he had a right to retain the policy.[2]

But where assignees have in the mean time become interested, it has been held that his lien for a general balance will not revive. L. having effected a policy for P. and delivered it to him, P. assigned it to S., who sent it to L. merely for the purpose of putting it in suit. It was held by the Supreme Court of the United States, that the lien of L. for his general balance was not thereby revived ; but the court intimated that his lien, if any, for an advance of the premium, was thereby revived.[3]

Where a general balance of account is due to an insurance broker from a commission merchant, and the latter employs the broker to effect a policy for a foreign house, which policy is passed into the hands of the foreign assured, and, after payments have been made to the broker equal to such general balance, the foreign assured puts the policy into the hands of the same broker to adjust and effect a settlement of a loss, it is held by Tindal, C. J., and his associates of the English Common Pleas, that the broker's lien does not revive for his advance of premium, though,

Gaselee, and Bosanquet, Justices; Cowell *v.* Simpson, 16 Ves. 276, per Lord Eldon, who attributes the same effect to the taking of security payable on demand; but such a construction seems, in that case, to be less obvious.

[1] Spring *v.* South Carolina Ins. Co., 8 Wheat. 268.

[2] Whitehead *v.* Vaughan, Cooke's Bankrupt Laws, 579.

[3] Spring *v.* South Carolina Ins. Co., 8 Wheat. 268.

by new items, the amount of his general balance of account had, in the mean time, been always greater than that of the premium.[1]

1921. In case a policy retained by the agent subject to his lien is assigned by the principal, *the assignee takes the policy subject to the lien.*[2]

1922. *A broker having paid a loss*, not knowing that the insurer had previously become bankrupt, *Lord Ellenborough ruled that*, "according to the well-known course of dealing between the broker, underwriters, and assured, *the money could not be recovered back.*"[3]

SECTION VI. LIEN AND SET-OFF, AND REPAYMENTS BETWEEN THE AGENT AND UNDERWRITERS.

1923. *A broker of an underwriter, who is in the practice of paying losses* on policies *for his principal, and retaining the policies has a lien upon the salvages for his general balance against the underwriter.*[4]

A broker of an underwriter having policies in his hands on which he had paid losses, upon which policies he has a lien for his general balance against the underwriter, is entitled to the amounts allowed by a foreign state for captures of the subjects insured by the policies, until his general balance against the underwriter is satisfied.[5]

1924. Where a policy is left by the assured in the hands of the broker, that he may adjust and receive payment of losses upon it, the broker, if he has no lien, has not a right to set-off, against premiums due from him to the underwriter, a loss due from the latter to the assured; the debts not being mutual.[6]

[1] Levi *v.* Barnard, 8 Taunt. 149; S. C., 2 J. B. Moore, 34.

[2] Man *v.* Shiffner, 1 East, 523.

[3] Edgar *v.* Bumstead, 1 Camp. 411.

[4] Olive *v.* Smith, 5 Taunt. 56; Whitehead *v.* Vaughan, Cooke's Bankrupt Laws, 579; Parker *v.* Carter, id. 547; Castling *v.* Aubert, 2 East, 325; Foster *v.* Hoyt, 2 Johns. Cas. 327; Spring *v.* South Carolina Ins. Co., 8 Wheat. 268; Moody *v.* Webster, 3 Pick. 424.

[5] Moody *v.* Webster, 3 Pick. 424.

[6] Wilson *v.* Creighton, 3 Doug. 132; Houston *v.* Robertson, 4 Camp. 342; S. C., 6 Taunt. 448. It was held in

If, in an adjustment of an account between the broker and the underwriter, losses, or returns of premium due and payable to the assured, have been deducted from premiums due to the underwriter from the broker, such adjustment is binding upon the underwriter and his assignees in case of his bankruptcy.[1] And though the broker acts as agent del credere of the assured, he does not acquire thereby any additional right of set-off.[2]

1925. *If the broker of the underwriter has a lien on the policy left in his hands, whether for advances or commission, or a general balance, or for having paid a loss as agent del credere,* though it is not a case of set-off under the statute, he may insist on the underwriter's payment of the loss on the latter demanding the premiums; that is, *he may avail himself of a set-off* of the losses against the premiums, so long as the underwriter remains solvent.[3]

1926. *Whether, if the agent, or any other party than the assured has become liable to the underwriters for a premium,* on his promissory note for the same or otherwise, *he has a right to set off or deduct a return of premium?*

If the assured, the agent, and the underwriters are all solvent, it is not material to either of them what the rule is in this case; but if either of them is insolvent, his representatives, that is, his creditors, are interested not to have the return premium deducted.

Lord Ellenborough and Mr. Justice Bayley consider the agent,[4] and Kent, C. J., and his associates, Thompson, Spencer, and Van Ness, of the Supreme Court of New York, consider the indorser

Shee *v.* Clarkson, 12 East, 507, that returns of premium might be set off by the broker; but in most of the cases on this subject a disposition is shown not to extend the doctrine of that case beyond its peculiar circumstances.

[1] Parker *v.* Smith, 16 East, 382; Thompson, *v.* Redman, 11 Mees. & Wels. 487.

[2] Goldschmidt *v.* Lyon, 4 Taunt. 534; Houston *v.* Bordenave, 6 id. 451; S. C., Marsh. R. 141; Baker *v.* Langhorn, 4 Camp. 396; Peele *v.* Northcote, 7 Taunt. 478; Minett *v.* Forrester, 4 id. 541. See also the remarks of Putnam, J., in Moody *v.* Webster, 3 Pick. 424.

[3] Parker *v.* Beasley, 2 M. & S. 423; Davies *v.* Wilkinson, 4 Bing. 573; Shee *v.* Clarkson, 12 East, 507; Wienholt *v.* Roberts, 2 Camp. 586.

[4] Shee *v.* Clarkson, 12 East, 507.

of the premium note,[1] to be substituted for the assured in respect of payment and return or diminution of the premium, until it has been paid by the agent to the underwriter, or by the assured to the agent. And there seems to be ground for this doctrine, at least until the premium is due, or has been paid by one or the other party; for where the premium is on credit, as it is usually in the United States, in both marine and fire insurance, a part or the whole may be returnable, or, in other words, to be deducted before the credit expires.

There seems to be an irregularity in exacting the payment of the whole premium from the agent, when no part of it, or only a part of it, is due, and the whole or a part of what is paid is to come directly back, through the assured, to the agent or other party who is directly liable for it to the underwriter.

The judges just named, accordingly, consider the amount of premium that is payable not to be definitively settled until payment is made.

There seems, therefore, to be ground, in equity and convenience, and in order to avoid circuity of action, for the doctrine of the cases just referred to, namely, that

In case of the agent or his surety being answerable for the premium, so long as it remains not paid by the assured to the agent, or the agent to the underwriter, the agent or his surety is liable only for the amount for which the assured would himself be liable, if no agency were interposed. If the whole premium is returnable, by reason of no goods being shipped or otherwise, or a part of it, by reason of short interest or otherwise, then either nothing is payable, or only the remainder is so.

Judge Duer[2] suggests the objection to the decision in the cases above referred to, that the assured may have made advances to the agent, or put funds into his hands, to be applied in payment of the premium. He might, it is true, be prejudiced in that case, if the agent should be insolvent, but no rule can be adopted which would not sometimes work adversely to some of the parties interested.

[1] Per Curiam, Phœnix Ins. Co. *v.* Fiquet, 7 Johns. R. 383.

[2] Marine Ins. Vol. II. p. 303, Lect. 12, s. 19.

1927. *In case of a broker being agent of both parties to a policy, the underwriter on which becomes bankrupt, the underwriter is discharged from* the claims of the assured for *losses and returns* of premium, *and the broker, being debtor for premiums, is discharged therefor, so far as they have been* passed and *settled* by the broker and underwriter in account, *previously to the act of bankruptcy* of the latter. So far as the premiums and losses have not been so settled, they are not set off, whether the policies on which they accrue had been subscribed, or the losses known, before the bankruptcy or not.[1]

1928. *Under a policy* on a vessel *whereby B was insured for* whom it might concern, the concerned being specified in an indorsement to be *A, B, and C, "loss payable to B, all sums due from the assured* to the underwriters *being first deducted,"* the three parties named being plaintiffs in the action on the policy, and equally interested in it, *it was held*, in Massachusetts, by Shaw, C. J., and his associates, *that*, besides what was due from all jointly, *the underwriters had a right to set off only the amount due from each one against his* third part of the *loss*, and not what was due from either against the loss due to another.[2]

1929. *In case of payment by the underwriter to the agent of the assured through mistake, or for loss on a policy that is illegal as between the parties to it, where the agent is not a party to the illegality, the money may be recovered back, if demanded in time.*

Though the broker, instead of the assured, is debtor to the underwriter for the premium, he is not liable to him for it in a reinsurance made in contravention of a statute, whereby reinsurance is prohibited, before the premium has been paid to him by the assured, on the ground, as stated by Lord Ellenborough, that in an illegal transaction the money may always be stopped while it is in transitu.[3]

A broker paid a loss, and two years afterwards claimed repayment of the money, alleging that he had not been able to recover

[1] Parker *v.* Smith, 16 East, 389.

[2] Williams *v.* Ocean Ins. Co., 2 Metc. R. 303.

[3] Edgar *v.* Fowler, 3 East, 222. See supra, s. 3, as to recovery in an illegal transaction.

the loss from the insurers. Sir James Mansfield said: "After so great a lapse of time, the broker must be presumed either to have received actual payment, or to have settled with the underwriters in some way or other." [1]

1930. Where the underwriter paid a loss to the agent of the assured, who passed it to the credit of the assured, but the underwriter afterwards discovered that it was a foul loss, it was held that the underwriter was entitled to recover back the money from the agent, he having made no payment or remittance to the assured on account of it.[2]

[1] Jameson *v.* Swainstone, 2 Camp. 546, n. [2] Buller *v.* Harrison, Cowp. 565.

CHAPTER XXIV.

JURISDICTION.

1931. The first notice of a case on a policy of insurance, in the English Reports, is by Sir Edward Coke,[1] who says, an action of assumpsit was brought in one of the "courts of Westminster Hall, grounded upon an instrument called a policy, commonly made between merchants for assurance of their goods," on a voyage from Malcomb Regis to Abbeville in France. And the questions on which it is cited by him were, whether the suit could be brought in England, as the policy related to risks at sea, and whether, if brought in England, it should be brought in the county where the policy was made, or that from which the ship sailed. The most frequent mode of settling disputes on policies, previously to that time, was by reference to "certain grave and discreet merchants appointed by the Lord Mayor of London."

The jurisdiction of cases on insurance was given to a special tribunal in the reign of Elizabeth,[2] the first powers of which were subsequently modified and enlarged;[3] but its jurisdiction was curtailed by the common law courts,[4] and it seems to have early fallen into neglect and died out.[5]

1932. *The local jurisdiction on policies is usually determined by the residence of the parties*, and such suits are not distinguished in this respect from those on other contracts.

Mr. Justice Washington held that reference must be had to the residence of the party interested, and not to that of a merely nominal plaintiff.[6]

[1] 6 Co. 47.

[2] Stat. 43 Eliz. c. 12.

[3] Stat. 13 & 14 Car. II. c. 23.

[4] Bendyr *v.* Oyle, Sty. 166, 172; Came *v.* Moy, 2 Sid. 121; Delbye *v.* Proudfoot, 1 Show. 396.

[5] See Introduction to Park on Insurance, and Marshall's Preliminary Discourse to his Treatise.

[6] Ruan *v.* Gardner, 1 Wash. C. C. R. 145.

Mr. Justice Thompson was of opinion, that the courts of the United States had not jurisdiction in New York, in a suit by a citizen of another State against a corporation, a part of the members of which resided in New York, and a part in other States.[1]

The local jurisdiction of actions against an incorporated company are sometimes regulated by its charter.[2] But a provision in the charter of a company, that it shall, in a certain case, be liable to an action only in the State where it is chartered, does not exclude the jurisdiction which the courts of another State would otherwise have.[3]

1933. *Courts of law have the usual jurisdiction upon policies of insurance.*

Sir James Mansfield remarks, that "courts of equity formerly exercised an odd jurisdiction upon this subject;"[4] alluding perhaps to cases of interference by equity courts, where there was an adequate remedy at law. It does not, however, appear whether the chancery jurisdiction on this subject was less definitely settled than upon others. However this may have been, *the limits of jurisdiction in law and equity*, in respect to policies, *are* now as *well settled* as in respect to any other species of contract, the general jurisdiction being in the courts of law,[5] with exceptions upon the same grounds as on other contracts.

1934. *Contributions in general average,* being of very ancient date, *are introduced into insurance,*[6] *as losses by perils of the seas, and* also *under particular stipulations.*[7]

[1] Catlett *v.* Pacific Ins. Co., 1 Paine's R. 594. In Massachusetts a suit on a policy by a resident in another State was held to be maintainable against a corporation in any county. Allen *v.* Pacific Ins. Co., 21 Pick. 257.

[2] Boynton *v.* Middlesex Mut. Fire Ins. Co., 4 Mete. R. 212.

[3] Williams *v.* Fire Ins. Co., 29 Maine R. 465. The jurisdiction accrued in Maine in a suit against a garnishee.

[4] Cousins *v.* Nantes, 3 Taunt. 513.

[5] Deghetoft *v.* London Ass. Co., Mos. 83; Fall *v.* Chambers, id. 193.

[6] See supra, c. 15, s. 13.

[7] Though an apportionment of general average may be made in equity, (Sheppard *v.* Wright, Show. Parl. Cas. 18; Dobson *v.* Wilson, 3 Camp. 480,) a suit at law lies also for a contribution. Birkley *v.* Presgrave, 1 East, 220, before Lord Kenyon and his associates, in which case the jurisdiction at law was contested. See also Dobson *v.* Wilson, 3 Camp. R.

1935. *Equity has jurisdiction in case of there being no adequate remedy at law*, where the local courts of equity are vested with the ordinary equity powers:

As where the underwriters consented that the policy should "remain good" to the assured, and to an assignee of an undivided interest.[1]

A bill in equity may be brought on a policy on which, on account of the structure of the instrument, an action at law does not lie.

Under a fire policy by the English Hand in Hand Company, subscribed by the trustees for the time being, whereby the trustees at the time of any loss were directed to pay the same, a bill in equity being brought against trustees subsequently appointed, for a loss that happened when the business of the company was managed by trustees other than those who subscribed the policy, it was objected that a suit at law lay. Lord Tenterden was of opinion, that "the only remedy the plaintiffs had was in equity," on the ground that an action at law did not lie against either set of trustees.[2]

In a subsequent case, however, the English Court of Common Pleas adjudged that an action at law did lie on a similar policy against the trustees who signed it, upon the words that the assured "should be entitled" to indemnity out of the funds of the society, which were considered to import a covenant by the company.[3]

1936. Upon the general principles distinguishing the jurisdictions, *it belongs to courts of equity to compel a specific performance of an agreement to make or renew a policy.*[4]

480; and Mr. Justice Story's remarks, Ship Packet, 3 Mason's R. 255; Sims *v.* Gurney, 4 Binn. 513. On the continent of Europe, and in Scotland, courts of admiralty have jurisdiction of adjustments in general average, (2 Browne's Adm. n. 5.) to which courts it seems properly to belong, (see De Lovio *v.* Boit, 2 Gall. R. 398, the learned opinion of Mr. Justice Story,) though this jurisdiction has not been assumed by the admiralty courts in England.

[1] Bodle *v.* Chenango Mut. Ins. Co., 2 Comstock's R. 53.

[2] Alchorne *v.* Saville, 6 J. B. Moore, 199, n.

[3] Andrews *v.* Ellison, 6 J. B. Moore, 199.

[4] Bodle *v.* Chenango Mut. Ins. Co.,

"It has been decided," says Mr. Senator Colden in the New York Court of Errors, "that receipts for the premium are as binding as a policy, except that the assured is obliged to resort to a court of chancery." In this case the bill set forth the receipt, alleging an agreement to insure, and praying that the respondents might be decreed to pay the amount of the loss or to execute a policy. The decree was for the payment of the loss.[1]

In such a suit parol evidence is admissible to prove the mistake.[2]

1937. *A court of equity is the proper tribunal to reform a policy.*[3] But the evidence for this purpose must be very clear.[4]

Mr. Justice Washington says: "I take the rule to be, that, if by mistake a deed be drawn, plainly different from the agreement of the parties, a court of equity will grant relief, by considering the deed as if it had conformed to the agreement. If the deed be ambiguously expressed, so that it is difficult to give it a construction, the agreement may be referred to in order to explain such ambiguity. But if the deed be so expressed, that a reasonable construction can be given to it, and when so given it does not plainly appear to be at variance with the agreement of the parties, the latter is not to be regarded in the construction of the former."[5]

2 Comstock's R. 53; Neville *v.* Merchants and Manufacturers Ins. Co., 17 Ohio R. 192.

[1] Perkins *v.* Washington Ins. Co., 4 Cowen, 645; S. C., 6 Johns. Ch. R. 484.

[2] Keisselbrack *v.* Livingston, 3 Johns. Ch. R. 144; Gillespie *v.* Moore, 2 id. 592; Peterson *v.* Grover, 20 Maine R. 363; Rich *v.* Jackson, 4 Bro. Ch. R. 514; Shelburne *v.* Inchiquin, 1 id. 350.

[3] Motteux *v.* London Ass. Co., 1 Atk. 545; S. C., 4 Vin. Abr. 281, pl. 10; S. C., 3 Equity Cas. Abr. 636; Livingston, J., in Delavigne *v.* United Ins. Co., 1 Johns. Cas. 310; Graves *v.* Marine Ins. Co., 2 Caines's R. 343; Washington, J., in Hogan *v.* Delaware Ins. Co.; S. C., 1 Wash. C. C. R. 419; Delaware Ins. Co. *v.* Hogan, 2 id. 4; Graves *v.* Boston Mar. Ins. Co., 2 Cranch, 419; Dow *v.* Whetten, 8 Wend. 160; Franklin Ins. Co. *v.* Hewitt, 3 B. Monroe's R. 239; Ewer *v.* Washington Ins. Co., 16 Pick. R. 502.

[4] Henkle *v.* Royal Exch. Ass. Co., 1 Ves. Sen. 317. See also Br. C. C. 341; 2 Johns. Ch. R. 633; Truman *v.* Child, 1 Br. C. C. 94; Gillespie *v.* Moore, 2 Johns. Ch. R. 593; Lyman *v.* United Ins. Co., id. 630; Andrews *v.* Essex Fire & Mar. Ins. Co., 3 Mason's R. 6.

[5] Hogan *v.* Delaware Ins. Co., 1 Wash. C. C. R. 419.

1938. *A court of equity is the proper tribunal to which to apply to compel the assured to surrender a policy, fraudulently obtained, to be cancelled.*[1]

The condition on which relief is given in equity against a policy obtained by fraud, is analogous to bills for relief against usurious contracts, where equity requires the payment of the principal and legal interest, though the debt might be, according to the former statutes, forfeited by the creditor.

So at law, the premium on a policy which was fraudulently obtained by the assured is forfeited, since he cannot allege his own fraud as a reason for a return.

Though Lord Mansfield, in one case, seems to assume that, in a suit at law on a policy, if the defence is put upon the ground that the subscription of the underwriter was obtained by fraud, he must pay the premium into court, yet he afterwards thought otherwise.[2]

And in Massachusetts, where the defence at law was a fraudulent concealment on the part of the assured, and the defence was considered by the court as established by the evidence, the court remarked, that, if the jury had found a verdict for the amount of the premium, they should have set it aside and granted a new trial.[3]

But though the party chargeable with fraud cannot allege or take advantage of it at law or in equity, yet, if the other party apply for relief, equity requires as a condition, that he shall not himself profit by the fraud of which he complains.

1939. *Equity will interpose to order a set-off of* the agent's *premium notes*, against a judgment for loss which could not be set off at law: [4]

[1] Wittingham *v.* Thornborough, 2 Vern. 206; S. C., Practice in Chancery, 20; S. C., 3 Equity Cas. Abr. 635; Wilson *v.* Ducket, 3 Burr. 1361; Da Costa *v.* Scandret, 2 P. W. 170; S. C., 2 Equity Cas. Abr. 636. And see remarks of Lord Eldon, 5 B. & P. 322; Atlantic Ins. Co. *v.* Lunar, 1 Sandf. Ch. R. 91; French *v.* Connelly, 2 Ans. 454; Fenno *v.* Craig, 3 Y. & Col. 216.

[2] Wilson *v.* Ducket, 3 Burr. 1361.

[3] Hoyt *v.* Gilman, 8 Mass. R. 336.

[4] Leeds *v.* Marine Ins. Co., 6 Wheat. R. 565.

To compel a nominal assured to assign a policy to the party for whose benefit it was effected : [1]

To compel a trustee to permit his name to be used in a suit at law for the benefit of the parties interested : [2]

To compel the maker of a note payable to his own order, in pursuance of the charter of a mutual insurance company, as part of its funds for security of the assured, *to indorse the same :* [3]

To compel underwriters to pay over to the assured the *indemnity* received by them from a foreign government on his interest, for a wrongful seizure of an insured cargo : [4]

To order distribution of the *effects* of an insolvent insurance company : [5]

To order distribution of the *profits* of a joint-stock insurance company : [6]

And *to enjoin the master* of a foreign vessel *not to sell his cargo to pay his own debts* with the proceeds.[7]

Equity will not interpose to compel payment of a loss to a mortgagee on a policy effected on the mortgaged premises *by the mortgager*, who had become insolvent, where there is no agreement by the parties that the insurance was for the mortgagee's benefit.[8]

Where a company is liable for loss to a limited extent in its associate capacity under a policy, *and the individual shareholders are also liable* to a policy-holder, the only practicable and effective

[1] Scott *v.* Roose, 3 Irish Equity R. 170.

[2] Motteux *v.* London Ass. Co., 1 Atk. 545, per Lord Hardwicke ; De Ghetoft *v.* London Ass. Co., Mos. 83 ; 4 Bro. P. C. 436 ; Fall *v.* Chambers, Mos. 193.

[3] Brouwer *v.* Hill, 1 Sandf. Ch. R. 629. As to compelling him to pay the premium note of the ancestor for insurance on an inherited estate, see Indiana Mut. Fire Ins. Co. *v.* Chamberlain, 8 Blackford's (Ind.) R. 150.

[4] New York Ins. Co. *v.* Roulet, 24 Wend. R. 505. There was held to be a concurrent jurisdiction at law.

[5] Blanchard *v.* Alleghany Mut. Ins. Co., 1 Penn. 359 ; Coston *v.* Alleghany County Mut. Ins. Co., id. 323 ; Rhinehart *v.* Alleghany County Mut. Ins. Co., id. 359.

[6] Scott *v.* Eagle Fire Co., 7 Paige's Ch. R. 198.

[7] Morrison *v.* Noorman, Benecke, London ed. 1824, p. 259.

[8] Vandegraff *v.* Medlock, 3 Porter's (Ala.) R. 389.

remedy, in case of non-payment of a loss, by reason of the insufficiency of the funds of the association, *seems to be* by a proceeding *in equity*;[1] and such a remedy was given against a shareholder in such an association, by Parker, V. C., to the unpaid up amount of his subscription.[2]

Equity may order the surrender of a policy which the holder has no right to retain. Dalby, in behalf of the Anchor Assurance Company, in 1847, was insured by the India and London Life Assurance Company £1,000 on the life of the Duke of Cambridge, being a cross insurance or reinsurance, the Anchor Insurance Company having previously insured a Mr. Wright £3,000 on the same life. In 1848, the Anchor Company bought up their policy from Wright, by granting him an annuity instead of it. The premiums had been paid by the Anchor Company on the £1,000 policy until the decease of the Duke, after which they brought an action at law on £1,000 policy against the India and London Company, whereupon the latter brought a bill in equity against the Anchor Company to have the £1,000 policy delivered up to be cancelled on the ground that it had become void by reason of the £3,000 policy having been surrendered to the Anchor Company to be cancelled. On general demurrer to the bill, Bruce, V. C., decided "under the particular circumstances of the case," against the demurrer, and ordered the defendants to answer on the two-fold ground that if it should appear that the Anchor Company had no right of action at law on the policy, it ought to be delivered up, and if it should prove that they had a right of action upon it, still, as the action appeared to be for the whole £1,000, the case showed that there was an equity against the recovery of that whole amount.[3] There does not, however, appear upon what

[1] See Hallett *v.* Dowdall, 9 Eng. Law & Eq. R. (Press of Little, Brown & Co.) 347; S. C., 20 Eng. Law J. R. (N. S.) Q. B. & Exch. Cham. 98, stated more fully infra, No. 1957.

[2] Burton, ex parte, 13 Eng. Law & Eq. R. (Press of Little, Brown, & Co.) 435; S. C., 16 Eng. Jurist, 967; 21 Eng. Law J. R. (N. S.) Chan. 781.

[3] India and London Life Ass. Co. *v.* Dalby, 7 Eng. Law & Eq. R. (Press of Little, Brown & Co.) 250; S. C., 15 Eng. Jur. 982.

"particular circumstances" the bill was maintainable. The defendants cited an authority against the jurisdiction.[1] In a proceeding in equity, the plaintiff is of course required to set forth the ground of jurisdiction. If the policy was unavailable at law in this case, it must, so far as the bill seems to have shown, have been for want of an insurable interest at the time of the loss, or on account of the inadequate description of the interest in the policy, of both of which grounds the jurisdiction belongs to a court of law, except that the latter question may be brought into equity by a bill to reform the policy, which was not the object of the bill in this case. In respect to the possible equity on account of the action at law being for the whole £1,000, it is a familiar rule that under a declaration for the whole amount insured, the plaintiff recovers for only the amount of loss proved.

Equity has jurisdiction to apportion the amount payable for a loss among the parties interested, *where the apportionment cannot be made at law.* On a valid assignment of a life policy to a creditor of the assured as collateral security for his demand, the surplus, if any, to be paid to the assignor's wife, the Maryland Court of Chancery held that the policy was free from any claim, by the administrator of the assignor, and decreed the apportionment and payment of the sum insured between the creditor and the widow of the assignor.[2]

An agent of an insurance company having erased their signature and torn off their seal to a policy, the *court of chancery in New York, took jurisdiction* of the claim of the assured for a loss.[3]

1940. *A court of admiralty has jurisdiction of bottomry and respondentia contracts, made for* the purpose of *raising funds to defray the expenses necessary to the prosecution of a voyage, whether the contract is made by the master or owner.*

The admiralty jurisdiction of bottomry and respondentia made by a master in a foreign port for the purpose of raising funds necessary

[1] Thornton *v.* Knight, 16 Sim. 509.

[2] Harrison *v.* M'Conkay, 1 Maryland Chan. Dec. 34.

[3] Chase *v.* Washington Mut. Ins. Co. of Cincinnati, 12 Barb. Sup. Ct. R. 595.

for the prosecution of the voyage is a matter of familiar practice.[1]

The question has been made whether admiralty has jurisdiction of a bottomry effected by the owner, or, if it has in any case, what are the conditions requisite thereto. The jurisdiction is denied in one case,[2] and where the master, being a part-owner, hypothecated the ship, in pursuance of a special authority from the other part-owner, to raise funds generally, and not merely to meet the necessities of a pending voyage, it was held, that this did not give the court of admiralty jurisdiction in rem to enforce the payment of the bond.[3]

A distinction has been suggested, it being said that there is not the same reason for admiralty jurisdiction of hypothecation by the owner in a home port, as of one by the master when abroad.[4] But Mr. Justice Thompson remarks that the owner may give a bottomry, though not for funds necessary to prosecute a voyage, and may "thereby create an admiralty lien."[5] And Sir William Scott, afterwards Lord Stowell, took jurisdiction of a bottomry made by an English owner at a port of the island of Jersey, remarking that, in respect to the bottomry, that port might be considered a foreign one.[6] The weight of authority accordingly is in favor of the jurisdiction, at least, where the owner makes the bond in a foreign port.

The jurisdiction has been sustained where the foreign lender took the hypothecation merely as collateral security for his advances, without taking any risk; that is, in effect, as a mortgage.[7] But the admiralty jurisdiction of a mortgage of a ship has been deemed questionable,[8] and was directly declined by Dr. Lushington.[9]

[1] The Sloop Mary, Paine's R. 671; The Jerusalem, 2 Gallison's R. 191, and cases passim.

[2] Forbes *v.* The Brig Hannah, Hopkins's Adm. Dec. 741.

[3] Hurry *v.* Ship John and Alice, 1 Wash. C. C. R. 293.

[4] Blaine *v.* The Charles Carter, 4 Cranch, 328.

[5] The Sloop Mary, Paine's R. 671.

[6] The Barbara, 4 Chr. Rob. 1.

[7] London Law Magazine, Vol. III. p. 563; London Atlas, 1829, p. 48.

[8] Leland *v.* Ship Medford, 2 Woodbury & Minot's R. 92.

[9] The Emancipation, 1 W. Rob. Ad. R. 124.

In case of a vessel being sunk by collision with another, and claim of damage by the owners of the former, Dr. Lushington says obiter, that a court of admiralty may, on application by the owners against whom the claim is made, order *a sale of the sunk vessel* for the purpose of determining the amount of the damage.[1]

The question has been raised *whether* the *admiralty* courts in the United States, as such, have *jurisdiction of policies* of insurance, under the act of Congress giving those courts admiralty jurisdiction. This question was learnedly and profoundly discussed by Mr. Justice Story, in 1815, who came to the conclusion, that they have jurisdiction concurrently with courts of common law of cases on policies of insurance, as being maritime contracts.[2]

It appears, however, to have been held by Johnson, J., of the same court, in a Southern circuit, that the admiralty has not jurisdiction of those contracts.[3] And so the jurisprudence seems to rest.

1941. Marine policies generally, and some fire policies, contain an agreement to settle all disputes by arbitration; or, in other words, that they will mutually constitute a committee that shall have jurisdiction of the policy. The validity and effect of this provision have been subjects of doubt.[4]

[1] The Columbus, 3 W. Rob. Ad. R. 158.

[2] De Lovio *v.* Boit, 2 Gallison's R. 398; and see Peele *v.* Merchants' Ins. Co., 3 Mason's R. 27; Andrews *v.* Essex Fire & Marine Ins. Co., id. 6; Hale *v.* Washington Ins. Co., 2 Story's C. C. R. 176.

[3] Ramsay *v.* Allegre, 12 Wheat. 638; and see opinion of Chancellor Walworth, in the Court of Errors in New York, American Ins. Co. *v.* Ogden, 20 Wend. 287, at p. 298.

[4] See supra, Vol. I. No. 58, and n.; Thompson *v.* Charnock, 8 T. R. 139; Kill *v.* Hollister, 1 Wils. 129; Goldstone *v.* Osborn, 2 C. & P. 550; Allegre's Adm'r *v.* Maryland Ins. Co., 6 Har. & Johns. 408; Robinson *v.* Georges Ins. Co., 17 Maine R. 131; Avery *v.* Scott, 22 Eng. Law & Eq. R. 287, Trinity T. 1853; S. C., 20 Eng. Law & Eq. R. (Press of Little, Brown & Co., 327); supra, No. 865.

CHAPTER XXV.

PROVINCES OF THE COURT AND OF THE JURY.

1942. The jurisdiction of questions of insurance being, as we have seen, mostly in courts of law, it is to be inquired what questions are within the respective provinces of the court and of the jury; and in this respect there is nothing to distinguish this from other commercial contracts.

The question, as to *the form of the contract*, whether it must be in any particular form, as in writing, or under seal, or on paper that has paid a stamp duty, is for the court; but *whether the contract was made* is for the jury.

What is comprehended in the contract, that is, *whether an indorsement* on the policy, as, for instance, of the rules, regulations, and conditions of the insurance, which are usually indorsed upon fire policies, *or* whether *any other written document* referred to in the policy, *is a part of it*, to the same effect as if it had been embodied in it, or to what other effect, is a matter of law for the court; and so also is a question of implied reference, as that to a usage of trade, or written or verbal representations of the assured.

1943. *The court decides on the sense and construction of the common words* and phrases *of the language*, where no peculiar meaning is proved. *The meaning of technical words, or common words and phrases used in a technical or local sense, and of words other than the common words of the language, is for the jury.*[1]

Thus, whether the word "vacant" on a plan applied to one or another space, was held to be for the jury, since it depended on the usage in like cases.[2]

But where a statute has given a construction to a word or

[1] See No. 142–144; and Smith *v.* Eaton, 20 Pick. R. 50.

[2] Stebbins *v.* Globe Ins. Co., 2 Hall's R. 632.

phrase, or the parties themselves have defined it, this is matter of law; and since the construction and legal effect of stipulations, the meaning of the words and phrases being once ascertained by reference to dictionaries or other evidence of usage, belongs to the court, it belongs to them, consequently, to determine whether it is the legal effect of one part of a contract to limit, define, or explain another. The meaning of the words and phrases in the written, as well as the printed part of the policy, is determined by usage; the court decides that the written controls the printed part.[1]

1944. *The reasonableness of a usage is*, usually at least, if not without exception, *for the court;* but whether the usage in question comes within the general construction of reasonableness is, in most cases, if not in all, for the jury. Thus, in reference to a usage, in a Newfoundland voyage, to make an intermediate voyage, Lord Eldon instructed the jury as to what would be a reasonable and what an unreasonable usage, and submitted to the jury the existence of the usage, and whether facts in the case brought it within his ruling.[2]

The existence of a usage must, in general, when it is to be established by oral testimony, be determined by the jury.[3]

[1] Lord Mansfield appears in one case to have left a question of general construction to the jury. In a trial upon a policy against the risk of an East India fort being attacked, Lord Mansfield said: "The contingency insured against is, whether the place should be attacked by a European force, not whether it should be able to resist such an attack. It was particularly left to the jury, whether this was the contingency in the contemplation of the parties; they have found that it was." Carter *v.* Boehm, 3 Burr. 1905.

Mr. Justice Buller was of opinion, that the construction of the clause, "if the vessel sails with convoy and arrives," was law. Simond *v.* Boydell, Doug. 255. But arrival or not seems rather to be fact. What is convoy, if dependent on a statute, as in the case just referred to, is matter of law.

So, in Massachusetts, the court decided on compliance or noncompliance with the warranty of seaworthiness, where the facts were not in dispute, and the question was on the meaning of the word "sea-letter," or "register," according to acts of Congress and treaties.

[2] Ougier *v.* Jennings, 1 Camp. 505, n.; and see also Eyre *v.* Marine Ins. Co., 6 Whart. 247, and 5 Watts & Serg. 116.

[3] Greenl. Evid. s. 280, p. 319, ed. 1842, who cites Lucas *v.* Groning, 7

1945. *Whether a note* given to a mutual insurance company *was given as* an ordinary *premium note, or a stock note,* is for the jury.[1]

1946. *The question of the identity of goods* insured by one policy with those insured by another, is held in South Carolina to be for the jury;[2] but where the meaning of terms is not in question, it seems to be for the court.

1947. *The court decides what is a warranty or condition,* and the general effect of a non-fulfilment of a stipulation upon the rights and remedies of the party in fault; the jury decides the fact of the fulfilment or non-fulfilment, and the damage or specific amount of forfeiture by non-fulfilment where the contract is not forfeited.[3]

The court may instruct the jury what, in general, are the requisites to seaworthiness.[4] Whether the particular ship is seaworthy is for the jury.[5]

Whether the facts stated on the record amount to a waiver of the right to demand the production of a certificate, is for the court.[6]

The facts being found by the jury, the Supreme Court considered it for the court to decide what was reasonable time within which to produce a certificate of loss.[7]

1948. Whether there was a representation or concealment, and the fact of compliance or non-compliance with a representation, are usually for the jury.[8]

Taunt. 164; Birch *v.* Depeyster, 1 Stark. R. 210; M'Lanahan *v.* Universal Ins. Co., 1 Peters's Sup. Ct. R. 170.

[1] Brouwer *v.* Hill, 1 Sandford's City of New York Sup. Ct. R. 629.

[2] Neve *v.* Columbian Ins. Co., 2 M'Mullan's R. 220.

[3] Clifford *v.* Hunter, Mood. & Malk. 103; S. C., 3 C. & P. 16; Mutual Fire Ins. Co. *v.* Marseilles, 1 Gillman, 237.

[4] Prescott *v.* Union Ins. Co., 1 Whart. R. 399.

[5] Fuller *v.* Alexander, 1 Brevard's (S. Car.) R. 149.

[6] Columbian Ins. Co. *v.* Lawrence, 2 Peters's Sup. Ct. R. 25, 507.

[7] Columbia Ins. Co. *v.* Lawrence, 10 Peters's Sup. Ct. R. 507.

[8] Livingston *v.* Delafield, 1 Johns. R. 523; Littledale *v.* Dixon, 4 B. & P. 151; Willes *v.* Glover, 4 B. & P. 14; Walden *v.* N. Y. Firemens' Ins. Co., 12 Johns. R. 128; N. Y. Firemens' Ins. Co. *v.* Walden, id. 513; Huguenin *v.* Rayley, 6 Taunt. 186; Colum-

1949. *The fact of concealment,*[1] *or misrepresentation, and the materiality of a fact* as to representation and concealment *is usually for the jury.*[2]

1950. The *questions of deviation* and enhancement of risk are *usually for the jury, but may be law*, where the facts are admitted or found, and the only question is, whether they come within the description of the risk.[3]

Whether a vessel deviated by lying in the offing of the harbor, waiting for the master and for the papers, is for the jury :[4]

So whether the voyage is abandoned by delay :[5]

So whether a vessel insured free from capture "in port," was in port at the time of capture :[6]

So is the materiality of the time of sailing :[7]

The fairness of a valuation :[8]

What is a suitable crew :

What is pilot ground :[9]

What is due diligence in countermanding an order for insurance :[10]

When it is "thirty minutes after work" in a factory :[11]

Whether the assured has used due diligence :[12]

bia Ins. Co. *v.* Lawrence, 10 Peters's Sup. Ct. R. 507; Tyler *v.* Ætna Ins. Co., 12 Wend. 507; Hodgson *v.* La. Ins. Co., 2 La. R. 341; Houghton *v.* Manufacturers' Mut. Ins. Co., 8 Metc. R. 114.

[1] Sexton *v.* Montgomery Ins. Co., Barb. Sup. Ct. R. 191.

[2] 2 Mood. & Rob. 329; Lyon *v.* Commercial Ins. Co., 2 Robinson's (La.) 266; Flinn *v.* Headlam, 9 B. & Cr. 693; Livingston *v.* Delafield, 1 Johns. R. 523; S. C., 3 id. 49; Littledale *v.* Dixon, 4 B. & P. 151; Willes *v.* Glover, 4 B. & P. 14; Masters *v.* Madison County Mutual Ins. Co., 11 Barbour's R. Sup. Ct. of New York, 624.

[3] Lippincott *v.* Louisiana Ins. Co., 2 La. R. 399; Crosby *v.* Fitch, 12 Conn. R. 410.

[4] M'Lanahan *v.* Universal Ins. Co., 1 Peters's Sup. Ct. R. 170.

[5] Grant *v.* King, 4 Esp. 175.

[6] Rayner *v.* Pearson, 4 Taunt. 662; and see Levie *v.* Newnham, id. 722.

[7] M'Lanahan *v.* Universal Ins. Co., 1 Peters's Sup. Ct. R. 170.

[8] Clark *v.* Ocean Ins. Co., 16 Pick. 289.

[9] M'Lanahan *v.* Universal Ins. Co., 1 Peters's Sup. Ct. R. 170.

[10] Ibid.

[11] Houghton *v.* Manufacturers' Mut. Fire Ins. Co., 8 Metc. R. 114.

[12] Edwards *v.* Baltimore Fire Ins. Co., 3 Gill's R. 276.

Or whether the addition of buildings,[1] or the alteration of the one insured,[2] has enhanced the risk.

1951. *The court decides on what general descriptions of loss come within the policy,* for this is a part of the construction of the instrument; but *whether* such *a loss has taken place, is for the jury.*[3]

The court decides on the necessity and effect of an abandonment, but the fact of abandonment is for the jury; and also, as held in Louisiana, whether it was made within reasonable time,[4] and so whether it was accepted;[5] but both of these latter facts must depend very materially upon the legal construction adopted by the court.

It was held also, in New York, to be in the discretion of the jury whether to allow interest on the loss.[6]

In case of the loss of goods,[7] or a life,[8] it is for the jury to find whether it was before or after the period to which the risk is limited.

1952. *In a very large proportion of the cases which come within the province of the jury, the verdict must, in effect, be determined by the legal construction.*

1953. *Under this contract there is a very intimate complication of the provinces of the court and jury, the questions very often being mixed of law and fact.*

The court usually states general principles, to be applied by the jury:[9]

The court rules what degree of necessity justifies a sale of the

[1] Mutual Fire Ins. Co., *v.* Marseilles, 1 Gillman, 237.

[2] Grant *v.* Howard Ins. Co., 5 Hill, 10.

[3] Merchants' Ins. Co. of Alexandria *v.* Tucker, 3 Cranch, 357; Milles *v.* Fletcher, Doug. 230; Abitbol *v.* Bristow, 6 Taunt. 464.

[4] Mellon *v.* Louisiana State Ins. Co., 6 Martin, N. S. 563.

[5] Bell *v.* Columbian Ins. Co., 2 Johns. R. 98.

[6] Neilson *v.* Columbian Ins. Co., 1 Johns. R. 301.

[7] Hare *v.* Travis, 7 B. & Cr. 14.

[8] Patterson *v.* Black, Marsh. Ins., 2d edition, 781; Brown *v.* Neilson, 1 Caines's R. 525.

[9] Center *v.* Union Ins. Co., 7 Cowen, 564; Columbian Ins. Co. *v.* Ashby, 4 Peters's Sup. Ct. R. 139; Ougier *v.* Jennings, 1 Camp. R. 505, n.; Fuller *v.* Alexander, 1 Brevard's (S. Car.) R. 149.

ship or cargo, the jury decides the fact of there being such a necessity : [1]

The court rules that abandonment must be made in reasonable time, the jury finds whether it was so made in the case in question.[2]

The court instructs the jury that an abandonment must be made in reasonable time, and what circumstances in general will justify delay ; the jury finds whether the particular circumstances of the case bring it within the general principles laid down by the court.[3]

The rule is similar in respect to notice "forthwith" of loss under a fire policy.[4]

Whether a blank after the words "on account of" is intended to be filled, is held in New York to be for the court ; and if they decide that it was intended to be filled, it is for the jury to find what words are to be supplied.[5]

The court rules that a voyage is to be commenced within reasonable time ; the jury finds whether it was in fact so commenced.[6]

The court decides that underwriters are liable only for extraordinary perils and losses ; the jury finds whether the peril or loss is such.[7]

The court rules what are in general the characteristics of a

[1] Bryant *v.* Commonwealth Ins. Co., 13 Pick. R. 543.

[2] Tindall *v.* Brown, 1 T. R. 167.

[3] Maryland Ins. Co. *v.* Ruden's Adm'r, 6 Cranch, 338; Cassedy *v.* Louisiana Ins. Co., 6 Martin's R. (N. S.) 421; Reynolds *v.* Ocean Ins. Co., 22 Pick. 191.

[4] Franklin Ins. Co. *v.* Hamill, 6 Gill's R. Court of Appeals, Maryland, 87. In Phillips *v.* Protection Ins. Co., 14 Missouri R. 220, the court appear to have instructed the jury directly that the delay of the assured to submit to an examination as to a loss while he was necessarily employed in removing his family during the prevalence of an epidemic at St. Louis, where he resided, and where the office of the insurance company was kept, was justifiable, but the question seems strictly to have come within the province of the jury.

[5] Turner *v.* Burrows, 5 Wend. R. 541.

[6] Charleston Ins. & Trust Co. *v.* Corner, 2 Gill's R. 410.

[7] Crofts *v.* Marshall, 7 C. & P. 597.

voluntary stranding; the jury finds the fact of its being such or not.[1]

Whether a representation of the time of sailing is countervailed by the shipping list posted up at Lloyd's, is for the court; the fact of the representation is for the jury.[2]

What notice must be given of a blockade is for the court; whether the captain had such notice is for the jury.[3]

[1] Barnard *v.* Adams, Sup. Ct. of U. S. 1850, MS.

[2] Mackintosh *v.* Marshall, 11 Mees. & Wels. 116.

[3] Rhodes *v.* Hunter, 2 Hudson & Brooks, 581.

CHAPTER XXVI.

FORM OF ACTION. — PARTIES. — RIGHT OF ACTION.

1954. *The general doctrines applicable to the legal proceedings on other contracts, apply also to those upon policies of insurance.*

It is proposed to notice only what may be peculiar to the proceedings on policies, and also the applications of the common doctrines so far as such applications have been made in the adjudicated cases of insurance.

1955. *Assumpsit is the ordinary form of action on a policy of insurance* not under seal.

Assumpsit lies against a corporation on a policy not under seal;[1] but not if it is under seal.[2]

1956. *Upon a policy under seal, the form of action is debt or covenant.*[3]

In debt, the plaintiff is not limited to the precise amount declared for, but may recover less.[4]

Covenant is the most frequent form on a sealed policy.[5]

[1] Kennedy *v.* Baltimore Ins. Co., 3 Harris & Johns. 367.

[2] Marine Ins. Co. of Alexandria *v.* Young, 1 Cranch's R. 332.

[3] The statutes of 6 Geo. I. c. 18, s. 4, and 11 Geo. I. c. 30, s. 43, provide the form of debt on policies of the Royal Exchange and London Assurance Companies, (Marsh. Ins. 693,) but Mr. Chitty (2 Ch. Pl. 429) says it is not usually adopted in practice.

The jeopardy to counsel and parties from a mistake in the form of action or the joinder of parties, has been much diminished in some jurisdictions by statute, and by the more liberal practice of courts in allowing amendments on equitable terms, instead of turning the plaintiff out of court; as was the frequent consequence under the old practice.

[4] Hughes *v.* Union Ins. Co., 8 Wheat. 294.

[5] Watson *v.* Ins. Co. of North America, 1 Binn. 47; Sullivan *v.* Mass. Mut. Fire Ins. Co., 2 Mass. R. 318; Stetson *v.* Mass. Fire & Mar. Ins. Co., 4 Mass. R. 330; Smith *v.* Universal Ins. Co., 6 Wheat. 176; Baltimore Ins. Co. *v.* Taylor, 3 Harris & Johns.

If new credit is given by a parol agreement for the payment of a loss in instalments under a sealed policy, the assured has covenant on the policy, or may bring assumpsit on the parol agreement.[1]

1957. *Where the assured has a right without a remedy at law, he must resort to equity.*[2]

Where a policy under seal contained a clause for renewal on payment of premium, and the premium was paid annually, and an indorsement made to continue the policy from year to year, the indorsements not being under seal, it was held, in Pennsylvania, that an action of covenant could not be maintained on the indorsements, but that the proper course was a demand of a policy duly executed.[3]

Where a policy was subscribed by three out of twelve directors of an insurance association the liability of the members of which was limited to the amount of their subscriptions by the deed of settlement of the association and the provisions of the policy or notice of such limitation equivalent to such provision, and the association had no funds or effects other than the liability of members to calls on their subscriptions, a suit at law was brought against five of the members of the association, two only of whom were directors, none of them having subscribed the policy. The question as to the right of action, and the proper remedy on this policy, was much discussed in the English Court of Exchequer Chamber. Lord Campbell, C. J., was of opinion that the defendants were all jointly liable for the full amount of the policy, on the ground that the limitation of the liability of the members was void in the case in question. Cresswell J., and Williams J., seem to have concurred in that opinion. Martin B., Talfourd J., Platt B., Alderson B., and Parke B., were of opinion that the limitation of

198; Carrere *v.* Union Ins. Co., id. 324; Maryland Ins. Co. *v.* Graham, id. 62.

A New York statute gives an election of assumpsit or covenant, but the courts do not permit mixing the two in different counts in the same action. Ferris *v.* North American Fire Ins. Co., 1 Hill's R. 73.

[1] Per Lord Denman and his associates, Morton *v.* Burn, 7 Ad. & El. 19.

[2] See supra, c. 24.

[3] Luciani *v.* American Fire Ins. Co., 2 Wharton's R. 167.

the liability of the members was valid. Martin B., and Talfourd J., held them to be jointly liable to the extent of the funds of the association, and jointly bound to apply those funds to the payment of a loss under the policy. Platt B., doubted of the joint liability. Alderson B., was of opinion that only the subscribing directors were liable in an action on the policy, the remedy against the other members being through the subscribing directors. Parke B., was of opinion that there was no joint liability at all of the directors generally or the subscribers to the policy, but that it was a separate contract of each member of the association to the unpaid up amount of his subscription. Martin B., was of opinion that there arose on the policy a right of distinct actions, one against the subscribing directors to recover to the amount of funds of the association on hand, another against each member of the association to recover the unpaid up amount of his subscription for shares. Parke B., and Talfourd J., were of opinion that all the shareholders of the association were jointly liable in an action until the funds of the association should be exhausted. Williams J., was in favor of such general liability of the shareholders, in case the limitation of the liability of the association and the associates individually, should be held to be valid.[1]

The only adequate remedy in case of such limited liability of the association collectively, or the directors or subscribers to the policy, and also of the several shareholders, seems to be in a court of equity, and a proceeding in equity against a shareholder has been sustained by Mr. Vice Chancellor Parker.[2]

The divers distinct underwriters on a policy having paid their proportions of a loss to the broker who had, with their consent, paid over a part of the aggregate amount to the assured, when a fraud being discovered, they reclaimed the remainder from him. Sir Vickary Gibbs, C. J., and his associates, held that one of them had not a separate right of action to recover back his proportion,

[1] Hallett *v.* Dowdall, 9 Eng. Law & Eq. R. (Press of Little, Brown & Co.) 347; S. C., 21 Eng. Law J. R. (N. S.) Q. B. and Exch. Cham. 98.

[2] Burton, ex parte, 13 Eng. Law & Eq. R. (Press of Little, Brown & Co.) 435; S. C., 16 Eng. Jur. 967; 21 Eng. Law J. R. (N. S.) 781.

and that if there was any disagreement among them as to their proportions, resort might be had to a court of equity, which could apportion the amount among them.[1]

1958. *On a policy not under seal, effected by "A, for whom it may concern," assumpsit lies in the name of A, for the benefit of those concerned, or in the names of all the concerned.*

Parol proof of the party concerned is admissible.[2]

On a policy in the name of W, "for whom it may concern," the concerned being himself and another, an action may be by W alone.[3]

In an action by the "concerned" all of them must be joined unless it appears by the contract itself that the promise of the underwriter is to them separately or severally. The presumption is of a joint interest and right of action in all the assured.[4]

The proportions of a loss by several distinct underwriters on a policy having been paid over to the broker, for a loss amounting to £588, of which he had, with their consent, paid over £300 to the assured, when a fraud being discovered notice was given to the broker not to make any further payments over but to repay the remainder, it was held by Gibbs, C. J., and his associates, that one of the underwriters could not maintain a separate action at law for his proportion of the remainder, but that all must join.[5]

A policy "for ———" has been held in New York to be equivalent to one "for whom it may concern."[6]

In an action on a policy on cargo for whom it may concern, the party concerned may recover for his own benefit to the amount of his own interest as consignee of a part of the cargo with a lien, as well as in his character as shipper of a part on his own account and risk.[7]

1959. *On policy under seal, whereby a party is insured as*

[1] Silva *v.* Linder, 2 Marsh. R. 437, cited infra, No. 1958.

[2] Burrows *v.* Turner, 24 Wend. 276. See supra, c. 4.

[3] Ward *v.* Wood, 23 Mass. R. 539.

[4] This appears in the description of parties, supra, No. 396, and of the description of the subject, supra, No. 417, 418; see also infra, No. 1769, 1770, 1772, 1789.

[5] Silva *v.* Linder, 2 Marsh. R. 437.

[6] Burrows *v.* Turner, 24 Wend. 276.

[7] Aldrich *v.* Equitable Safety Ins. Co., 2 Woodbury & Minot's R. 272.

well in his own name as in the names of all other persons concerned, covenant lies only in his name,[1] for the benefit of the parties interested.[2]

Where a sealed policy effected by H. is expressed to be made for the benefit of G., it has been held that the latter may bring an action upon it in his own name.[3]

1960. *Where two persons are insured in the same policy on distinct interests, distinctly specified, in the same subject, each has a separate action on the policy.*

It was so held under a life policy.[4]

Where the undertaking is to divers persons and each of them and their interests appear to be separate, the right of action is several:

As in case of a covenant to pay to persons, in the proportions of a moiety to each, a certain amount, being the purchase money for an estate:[5]

Or of a promise to account and pay to ship-owners and their several and respective executors, &c., in "the parts and proportions" set against their names:[6]

Or of compensation due to two for supplying each of them three horses to a carrier to work in the same team:[7]

Or of a covenant by a grantor in the same deed with A. B. and

[1] Reed *v.* Pacific Ins. Co. 1 Metc. 166; Cranston *v.* Philadelphia Ins. Co., 5 Binn. 538; per Bayley, J., in Sargent *v.* Morris, 3 B. & Ald. 277; Piggott *v.* Thompson, 3 B. & P. 147; Skinner *v.* Stocks, 4 B. & Ald. 437.

[2] American Ins. Co. *v.* Insley, 7 Penn. R. 223.

[3] Maryland Ins. Co. *v.* Graham, 3 Harris & Johns. 62.

[4] M'Cormick *v.* Ferrier, Hayes & Jones's R. 12. It does not appear that each paid a distinct premium, though the apportionment of the amount insured would show what part of the premium was contributed by each; and this would be an answer to the objection, so far as it is one, that the consideration was joint.

[5] James *v.* Emery, 5 Price, 529; S. C., 8 Taunt. 245, and 2 J. B. Moore, 195. See also Slingsby's Case, 5 Coke's R. 19; S. C., 2 Leon. 47; also Jenk. 262, pl. 63, cited Tomlin's Law Dict. Art. Joint and Several; also Kelby *v.* Steel, 5 Esp. 194, per Lord Ellenborough; Mills *v.* Ladbroke, 13 Eng. Law J. (N. S.) Com. Pl. 125.

[6] Servante *v.* James, 10 B. & Cr. 410.

[7] Per Lord Ellenborough, Smith *v.* Taylor, 2 Chit. R. 142.

C. severally, grantees of three several lots, "and each of them," that he has a good title.[1]

If the contract in favor of two or more, does not show their interest to be distinct, and provide for a liability of the obligor to them separately or severally, they must all join in an action:

As under a stipulation by lessees in a house made by two, to make repairs and work furnaces and mines:[2]

Or a promise to two, in consideration of a sum paid by them, to procure their several distrained cattle.[3]

But an elaborate analysis of the cases, and full illustration of the phraseology and circumstances which distinguish joint from several rights of action and liabilities under contracts generally, including those of insurance, would take us quite beyond the proper limits of this treatise, into the provinces of elementary works on contracts and pleading, to which the reader is referred.[4]

1961. *In* case of *double insurance, the assured may sue either* or *all of the underwriters*, and they have a right of contribution among themselves.[5]

1962. *The mortgagee* of insured property *has no interest in a policy made by the mortgager*, for his, the mortgager's, own benefit;[6] and so can bring no suit upon it either at law or in equity,[7] unless he is made a party to the policy.

Insurance being effected on a building by the lessees, who were also heirs of the mortgager, with a clause that "in case of loss the insurance should be paid to the mortgagee," it was held in Maine that the mortgagee's bringing an action on the policy was sufficient

[1] Case cited 1 Williams's Saunders, 155, n., from 5 Coke's R. 18 b.; and see other cases cited by Lord Denman, in Foley *v.* Addenbroke, 4 Ad. & El. 179.

[2] Foley *v.* Addenbrooke, 4 Ad. & El. 197.

[3] Style, 156, 203; 1 Danv. Abr. 5.

[4] See particularly Parsons on Contracts, book 1, c. 2, where the general doctrines are stated in the text, and full abstracts of the jurisprudence is given in the notes. The jurisprudence is not free from perplexedness.

[5] Wiggin *v.* Suffolk Ins. Co., 18 Pick. R. 145; Newby *v.* Reed, 1 Bl. 416.

[6] Columbia Ins. Co. *v.* Lawrence, 10 Peters's Sup. Ct. R. 507.

[7] The mortgagee may adopt the policy made for his benefit by the mortgager. Motley *v.* Manufacturers' Ins. Co., 29 Maine R. 337.

evidence of his adopting it; and that he could, in an action in his own name, recover the amount insured, the same not exceeding that of the debt, although, after the fire, the mortgaged property was still sufficient to satisfy his debt.[1]

1963. *A mortgagee*, who, to make himself more secure, insures the mortgaged property *without any agreement* on the subject with the mortgager, express or implied, *cannot make the premium a charge* upon the mortgaged estate, or recover it of the mortgager.[2]

1964. *On a policy in the names of parties jointly interested, the action must*, as in other cases, *be in their names jointly*.[3]

A stipulation for set-off of all demands of the underwriters against the assured in a policy in which, by an indorsement, A, B, and C were described to be the assureds, was held in Massachusetts not to authorize the set-off of what was due from one against the amount of loss due to another.[4]

It is held by the Court of Appeals in New York, the opinions being given by Jewett, C. J., and Cady and Strong, Justices, that, in case of one of two parties jointly interested and jointly insured on a building having conveyed his interest in it to the other before the loss, they could not maintain an action jointly for the loss.[5]

1965. *On a policy* made *in the name of an agent or broker*, expressed to be for the benefit, or on the interest, of another person, or for whom it may concern, *an action may be brought in the name of the nominal assured*, for the benefit of the person interested, *or* in the name of *the party* really *interested*, for whose benefit the insurance was made. This is matter of common practice.[6]

[1] Motley *v.* Manufacturers' Ins. Co., 29 Maine, (16 Shepley's) R. 337.

[2] Saunders *v.* Frost, 5 Pick. R. 259.

[3] Blanchard *v.* Dyer, 21 Maine R. 111.

[4] Williams *v.* Ocean Ins. Co., 2 Metc. R. 303.

[5] Murdock *v.* Chenango County Mut. Ins. Co., 2 Comst. R. 210.

[6] Munson *v.* New England Marine Ins. Co., 4 Mass. R. 88; Kemble *v.* Rhinelander, 3 Johns. Cas. 130; Wolff *v.* Horncastle, 1 B. & P. 316; Stirling *v.* Vaughan, 11 East, 619; S. C., 2 Camp. 225; Parker *v.* Jones, 13 Mass. R. 173; Bell *v.* Gilson, 1 B. & P. 345; Riley *v.* Delafield, 7 Johns. R. 522; Hagedorn *v.* Oliverson, 2 M. & S. 485; Maryland Ins. Co. *v.* Graham, 3 Har. & Johns. 62. See Markington *v.* Vernon, 1 B. & P. 101, n.

1966. *The clause, "for whom it may concern," refers,* not to every person who may have an interest in the subject, but *to those only who have an interest in the policy;*[1] and they only can maintain an action upon it.[2]

1967. *Insurance by a part-owner in his own name will be construed to be on his separate interest, no evidence appearing to the contrary,* and he is not liable to the other part-owner for any part of the amount received from the underwriters on account of a loss under the policy.[3]

1968. If a *policy* is made *in the names of two,* the whole *interest being in one,* and the description of the subject is applicable to his interest, he may maintain a separate action on the policy.[4]

1969. Where *the proportion* of the interest *of each of two assureds* is *expressed* in the policy, a *separate action by one* may be sustained.

This is equivalent to a policy in favor of two on distinct interests distinctly specified.[5]

1970. Where a suit was commenced in the name of the nominal assured, on a policy for the benefit of four persons, and one of the four countermanded his authority to prosecute the suit, it was thereupon proceeded in for the benefit of the other three.[6] Consequently, *if one of the parties for whom a policy is effected refuses to authorize the institution of a suit, it may be prosecuted by the others for their benefit.*

Mr. Marshall says, citing a ruling by Le Blanc, J., that if a policy is made in the names of two, one may bring an action alone, and aver the sole interest to be in himself. In the case referred to by him,[7] the policy was made in the names E. M. and Son, and the action was brought by the son alone, who averred the interest to be in himself wholly. But this can be only where by the clause

[1] Newson *v.* Douglas, 7 Harris & Johns. 417; Pacific Ins. Co. *v.* Catlett, 4 Wend. 75; and see c. 5.

[2] Craufurd *v.* Hunter, 8 T. R. 13.

[3] Garrel *v.* Hanna, 5 Har. & Johns. 412; and see c. 5, No. 416, 417.

[4] Marsh *v.* Robinson, 4 Esp. R. 98.

[5] See supra, No. 1960.

[6] Copeland *v.* Mercantile Ins. Co., 6 Pick. 198.

[7] Marsh *v.* Robinson, 4 Esp. R. 98, cited Marsh. Ins., 2d ed. 687.

"for whom it may concern" or other similar clause supplies a ground to distinguish the nominal assured from the party interested, since otherwise the insurance would fail by reason of its not being applicable to the insurable interest intended to be covered.[1]

1971. Where L. is insured, "*loss payable to S.,*" by whom the policy is procured, *an action may be brought* on the policy *by S. in his own name.*[2]

An indorsement being made on the policy signed by the party to whom it is expressed to be payable, acknowledging payment of the demand intended to be secured by the policy and assigning all his interest to the assured, the clause for payment to him is thereby, in effect, cancelled:[3]

And so if he merely directs payment to the assured.[4]

1972. *It cannot be supposed that the agent can commence a suit in his name for a part of the principals, and that the other principals may sue in their own names, either jointly or severally; nor that actions can be brought by the assureds separately* in case of a policy being upon the aggregate of the respective proportions of the divers assureds in the same insurable interest and subject.[5] To permit this would be to split the right of action.[6]

1973. According to a familiar doctrine of the common law respecting choses in action, *the assignee of a policy, so long as there is no promise on the part of the underwriter to be answerable to him, cannot bring an action upon it in his own name.* He can avail himself of it only in the name of the assured.[7]

A policy made in the name of T. and G. was assigned to C.

[1] See supra, No. 417, 418.

[2] Lazarus *v.* Commonwealth Ins. Co., 19 Pick. R. 81.

[3] Rider *v.* Ocean Ins. Co., 20 Pick. R. 259.

[4] Farrow *v.* Commonwealth Ins. Co., 18 Pick. R. 53; Rodgers *v.* Traders' Ins. Co., and same Pl. *v.* Howard Ins. Co., 6 Paige's Ch. R. 583, per Walworth, Chancellor; and Motley *v.* Manufacturers' Ins. Co., 29 Maine R. 337. This last case was a policy by the mortgager in his own name, payable to the mortgagee, and the suit was after the mortgagee had ceased to have an interest.

[5] See the analogous case of Silva *v.* Linder, 2 Marsh. R. 437.

[6] See Parsons on Contracts, p. 13.

[7] Conover *v.* Mutual Ins. Co., 3 Denio, 254; Jessel *v.* Williamsburg Ins. Co., 3 Hill's R. 88.

and M., who brought a bill in equity upon it, setting forth that the underwriters refused to pay the loss, on the ground that the plaintiff had no interest in the subject, which, as they alleged, belonged to one J. Mr. Chanceller Kent, said: "The demand is properly cognizable at law. The plaintiffs are entitled to make use of the names of T. and G. in a suit at law, and the nominal plaintiffs would not be permitted to defeat or prejudice their right of action." [1]

In Louisiana an action is, it seems, sustainable in the names of the assignees of the policy, though the assignment has not been assented to by the underwriters.[2]

So in England an action was maintained in the name of the assignee of a marine policy assigned before the loss.[3] But in case of a policy on a house against fire, and the sale and conveyance of the house by the assured, and its destruction by fire, and a subsequent assignment of the policy by the assured to the vendee, it was held, on a bill being brought in chancery, that the complainant could not recover the loss, on the ground that a policy was not in its nature assignable; that there was a particular stipulation in the policy in this case against assignment; and that the assignment was not made until after the loss.[4]

Where the assured in a fire policy, in which a certain sum was insured on his house, another sum on his shop, and a third sum upon his stock of goods, took another into partnership and transferred to him a joint interest in the goods, and the company, at the request of the assured, consented that the policy should "stand good" to the assured on the house and shop, and to him and his partner on the stock of goods, this was held by the Court of Appeals of New York not to be an assignment of the policy, and that an action at law could not be sustained upon it in the

[1] Carter *v.* Union Ins. Co., 1 Johns. Ch. R. 463; and see Traders' Ins. Co. *v.* Roberts, 9 Wend. 474; Lucena *v.* Craufurd, 5 B. & P., 269, at p. 283; De Ghetoft *v.* London Ass. Co., Mos. 83; Fall *v.* Chambers, id. 193.

[2] Herman *v.* Louisiana State Ins. Co., 7 La. R. 502.

[3] Sparkes *v.* Marshall, 2 Bing. N. C. 761.

[4] Lynch *v.* Dalzell, 4 Bro. Parl. Cas. 431; and see the Sadler's Co. *v.* Babcock, 2 Atk. 554.

names of the two partners, and that it was a proper subject of equity jurisdiction.[1]

The interest of an assured in a policy on his life goes to his assignees on his bankruptcy.[2]

1974. *If the underwriters promise to be answerable to the assignee, he may sue in his own name.*

It is held by the Supreme Court of New York, that the assent of the underwriters to the assignment of a fire policy, containing a condition not to assign without such assent, does not authorize a suit at law in the name of the assignee,[3] to whom the insured subject had been sold.

The more obvious construction of such consent seems to be that it is a promise to be answerable to the assignee in a suit in his own name, and to come within the doctrine that such a liability arises where the creditor gives up the whole of his claim and relinquishes his right of action against the defendant, which seems to have been intended and understood by the parties in the above case. If only a joint, partial interest in the policy were assigned, the construction might be different. The question is, however, of a technical character, and is involved in the assignment of choses in action of all descriptions, the elaborate investigation of which, in this place, would be a digression.[4]

It is held by the supreme court of New York, that a provision by law, that, on a transfer of the property insured against fire and

[1] Bodle *v.* Chenango County Mut. Ins. Co., 2 Comstock's R. 53.

[2] Schondler *v.* Wace, 1 Camp. R. 487, under the English bankrupt law.

[3] Jessel *v.* Williamsburgh Ins. Co., 3 Hill's R. 88.

[4] See divers cases cited by the court in the above case of Jessel *v.* Williamsburgh, Ins. Co.; also Rand's note to Crocker *v.* Whitney, 10 Mass. R. 323; also Parsons on Contracts, b. 1, c. 14, s. 1, where the question is concisely and elaborately presented with references to a multitude of authorities. See also Surtees *v.* Hubbard, 4 Esp. R. 204, and other cases cited ibid., p. 191, n. 2. It is said, per curiam, in the New York case above referred to, and in some others, that an "express" promise to be answerable to the assignee is indispensable; but it does not appear why the obvious meaning and understanding of the parties may not be ascertained in respect to this promise as freely as in respect to others, so far as they are out of the range of the statute law.

of the policy, with the consent of the underwriters to the latter assignment, the assignee may bring an action at law in his own name, does not authorize an action in the names of the assignor and assignee jointly.[1]

1975. *The provision that an assignee* of the subject and policy *may maintain an action in his own name* upon it, *applies to an assignment made during the continuance of the risk.*

The charter of an insurance company provided, "In case a person insured shall sell, or convey, or assign, the subject insured, during the time for which it shall be insured, it shall be lawful for such insured to assign and deliver to the purchaser such policy, and the assignee may have the benefit of such policy, and bring an action in his own name." The sale, assignment, or conveyance to the plaintiff within the time for which the insurance was made, being the foundation of his right to maintain an action in his own name, he is bound in his declaration "to show that he comes within the provision of the act."[2]

1976. *The cestui que trust is a party in interest to a policy effected by the trustee.*

In case of a fire policy effected by an executor, on buildings belonging to an estate that was charged with an annuity, the buildings being a principal part of the estate, the Court of Chancery, on a bill being filed by the annuitant, ordered that the proceeds of the policy should be invested as security for the annuity.[3]

1977. *A fire policy* provided that any loss should be *payable to the assured, his executors, administrators, or assigns,* and that, when any assignment of the policy should be made, it should be entered in the office books within forty-two days, or else the assignee should have no benefit. *The assured died during the risk, and the premises descended* to her heir, *and a loss took place,* no assignment of the policy having been made to the heir. It was held, that *the loss was payable to the executors, and not to the heir.*[4]

[1] Ferris *v.* North American Fire Ins. Co., 1 Hill's R. 73.

[2] Carter *v.* United Ins. Co., 1 Johns. Ch. R. 463.

[3] Parry *v.* Ashley, 3 Sim. 97.

[4] Mildmay *v.* Folgham, 3 Ves. 472.

In this case, the estate itself had gone to the heir before the loss.

In another case, the amount remaining of a sum paid by underwriters on fire policies was decreed to the heir, under the construction put upon the provisions of a will, that it should be considered as real estate.[1]

1978. Where various parties claim distinct and conflicting interests in a policy, and the defendants, in a suit on the policy, bring the various hostile claimants before the court by a bill of *interpleader*, neither of the parties can call upon the other for an account of his claims, without first establishing his own interest in the fund, that is, in the amount of loss that has accrued under the policy.[2]

Where a tenant brought a bill in equity against the landlord for a specific performance of an agreement for a lease, and against an insurance company, in which the premises in question had been insured, praying that they should be decreed to lay out the amount insured in rebuilding the premises which had been burnt down; the insurance company filed a bill of interpleader against the landlord, who was the assured in the policy on which he had brought an action, and against the tenant. The court said, according to the best opinion it could form, this was a proper interpleading bill.[3]

1979. The underwriters on different policies, viz. the London Assurance Company, and the underwriters at Lloyd's, joined in a *bill of discovery* against the assured to obtain a discovery of evidence to be used in suits at law on the policies, the policy of the London Assurance Company being under seal, the other policy not so. The bill was objected to on the ground of misjoinder, but was sustained.[4]

1980. The *underwriters* to whom an abandonment had been

[1] Norris *v.* Harrison, 2 Madd. 268.

[2] Spring *v.* South Carolina Ins. Co., 8 Wheat, 268. See Haxall's Ex'rs *v.* Shippen, 10 Leigh's (Va.) R. 437; S. C., supra, No. 349; In re Hennesy, 2 Drury & Warren's Ch. R. 555; Glynn *v.* Locke, 3 id. 11, cited supra, No. 354.

[3] Paris *v.* Gilham, and Jones *v.* Paris, Cooper's Ch. Cas. 56.

[4] Mills *v.* Campbell, 2 Y. & C. 389.

made, and while a suit was pending on the policy, were *summoned as garnishees* in a suit against the assured, and after the summons, the proceeds of the property insured, being the salvage, came into the hands of the assured, and it was adjudged in the suit on the policy, that the abandonment was valid; it was held, that the underwriters were answerable under this process for the excess of value at which the property was insured over the amount of salvage that had come into the hands of the assured.[1]

1981. In general there is no question who are to be made defendants in a suit on a policy, which must of course be brought against the party who subscribed the policy. It is, however, provided by the policies of some of the joint-stock insurance companies in England, that an *action* may be brought *against the secretary or some* other *officer, or* any *member of the company.*[2] But if the policy contains no such stipulation, and the charter or articles of the joint-stock company contain no provision on the subject, it seems that all the partners or members must be joined in a suit at law on the policy where the company is not a corporation.

1982. *Under power to make* contracts of insurance and all kinds of *insurance, an incorporated company is authorized to make reinsurance.*[3]

1983. Where it was stipulated by the policy, that the *underwriters* shall *not* be *liable to pay the loss in less than twenty*, sixty, or ninety *days*, or any other period *after notice*, or proof, the *right of action does not accrue* to the assured *until after* the expiration of *that period.*[4]

Where the policy provided for the payment of the loss in sixty days after notice, it was held, that an action brought more than sixty days after notice of a total loss, but less than sixty days after notice of a general average loss, was premature in respect to

[1] Clamageran *v.* Banks, 6 Martin, N. S. 551.

[2] Etches *v.* Aldan, 1 Mann. & Ryl. 157; Seton *v.* Low, 1 Johns. Cas. 1.

[3] N. Y. Bowery Fire Ins. Co. *v.* N. Y. Fire Ins. Co., 17 Wend. 359.

[4] Norton *v.* Rensselaer and Saratoga Ins. Co., 7 Cowen, 645.

the latter.[1] The stipulations of this description have been construed liberally in favor of the assured. Where the policy provided for payment of the loss in three months after notice, it was held at nisi prius, that notice from the assured himself was not indispensably requisite, and it was a sufficient compliance with the provision, if the underwriter otherwise had notice of the loss.[2] So the act or neglect of the underwriter may be a ground for dispensing with a compliance with this provision; as where the policy provided for the payment of the loss three months after adjustment by a committee of the underwriters, and the committee refused to adjust it, it was held, that an action might be brought without any previous adjustment.[3]

Under a condition that *no action* shall be brought on the policy *after a year* from the time of the right of action accruing, at the end of the year, no action having been brought, the right of action is extinguished.[4]

1984. Under the *stipulation to pay* the loss in *ninety days after proof* and adjustment, the *proof must be sufficient* according to the usage of the place; but any *objection to the proof* exhibited *may be waived*, expressly or impliedly, by the underwriters, and then the suit may be brought in ninety days after the production of insufficient preliminary proof.[5]

1985. *The lender on a bottomry or respondentia bond has a remedy by action* of covenant or debt at common law for a breach of the stipulations, or forfeiture of a condition, of the bond.[6] But *for a specific compliance* with the bond, *his remedy is in a court of equity or of admiralty.* In case of hypothecation by the owners themselves, or by their authorized attorney or agent, for the purpose of raising funds generally, the remedy for a specific performance by a surrender, on the part of the borrower, of the pos-

[1] Bryant *v.* Commonwealth Ins. Co., 6 Pick. 131.

[2] Abel *v.* Potts, 3 Esp. R. 242.

[3] Strong *v.* Harvey, 3 Bing. 304.

[4] Croy *v.* Hartford Fire Ins. Co., 1 Blatchford's C. C. R. 280.

[5] Allegre's Adm'r *v.* Maryland Ins. Co., 6 Har. & Johns. 408.

[6] See cases cited from the Common Law Reports, supra, No. 298 et seq.; 307 et seq.; 1165 et seq.

session of the ship or goods to the lender, to be disposed of according to the provisions of the bond, is by bill in equity.

In case of a bottomry or respondentia by the master in the course of the voyage, for the purpose of raising funds, or making repairs, or procuring supplies that are necessary in the prosecution of the voyage, the remedy on the bond for a specific compliance is in admiralty.

To give this remedy, the bond must of course be valid in itself, and to render it so, the loan must have been made or the supplies furnished at a place too distant from the home port to afford any opportunity to the master to communicate with his owners, and at a place where there was no agent of theirs authorized and ready to act for them, in respect to the exigencies of the ship; nor will the hypothecation by the master be valid, if he had any other fund to which he ought to resort.[1]

If the freight is ordered by the owners to be paid over to another person, so that the master cannot avail himself of it in a foreign port to defray his expenses, and he has no other resource, he may bottomry.[2] Where the bottomried vessel has been sold by order of an admiralty court on capture, and the proceeds eventually restored,[3] or on a libel for seamen's wages,[4] it has been held that the lender may have assumpsit for his proportion of the proceeds.

1986. Policies not being negotiable instruments, but available only in behalf of the party for whom they are made, it follows, that, *if the party beneficially interested in the insurance ceases to have any interest* in the subject insured before a loss happens, *there remains nothing to which the contract can apply*, since he

[1] See cases cited, c. 3, s. 5. See also the remarks of Mr. Justice Story in the case of the Ship Packet, 3 Mason, 255; Ekins *v.* E. In. Co., 1 P. W. 395; Molloy, b. 2, c. 1, s. 10; Bridgman's Case, Hob. 11; Emerigon, tom. 2, p. 441; Reade *v.* Commercial Ins. Co., 3 Johns. R. 352; Jennings *v.* Ins. Co. of Penn., 4 Binn. 244; The Aurora, 1 Wheat. R. 96; Bruce *v.* Ship Mary, Bee's R. 120; Hurry *v.* Ship John & Alice, 1 Wash. C. C. R. 293.

[2] Ship Lavinia *v.* Barclay, 1 Wash. C. C. R. 49; and see Lloyd *v.* M'Masters, 7 Martin, N. S. 247, on the subject of lien for advances by consignee.

[3] Appleton *v.* Crowninshield, 3 Mass. R. 443; S. C., 8 id. 340.

[4] Hurry *v.* Assignees of Hurry, 2 Wash. C. C. R. 145.

cannot suffer by the damage or loss of the subject. This may happen in case of a sale of the subject.[1] So where the goods are insured by a purchaser, who becomes insolvent before they are delivered to him, in consequence of which they are stopped in transitu by the vendor, he loses his right of action on the policy, though, when it was effected, he may have had an insurable interest.[2] After judgment was recovered on a policy in the name of the mortgager for the benefit of a mortgagee, and before it was satisfied, the debt was paid to the mortgagee, under a bill for foreclosure. The mortgager thereupon came in and claimed the benefit of the judgment, on the ground that the payment of the debt by him was in operation of law an assignment of the judgment to him; but the court held that he could not avail himself of the fruits of the judgment.[3]

1987. The subject of actions for *contribution* in general average have already been considered in a preceding chapter.[4]

1988. The interests of the parties to a policy are sometimes affected by the right to freight, and it is a familiar doctrine, that, notwithstanding a written agreement by the charter-party or bill of lading for freight for a whole passage or voyage, if the voyage or passage is not performed, and accordingly no freight is earned under the written contract, still the ship-owner may be entitled to *freight pro ratâ* for the performance of a part of the voyage.

1989. *A policy subscribed by several distinct underwriters* is a contract between the assured and each of them; and *suits may be instituted against them severally.*

To avoid a multiplicity of trials on the same facts, it is usual to enter into a *consolidation rule*, that is, an agreement that all the suits shall abide the decision of one.[5]

[1] Lynch *v.* Dalzell, 4 Bro. Parl. Cas. 431, and supra, No. 1973. See also The Saddler's Co. *v.* Badcock, 2 Atk. 554.

[2] Clay *v.* Harrison, 1 Lloyd & Wels. 104.

[3] Traders' Ins. Co. *v.* Robert, 9 Wend. 474.

[4] Chap. 23.

[5] 2 Marsh. Ins. 710; 1 Tidd's Prac. 665; Read *v.* Isaacs, 6 Moore, 437; M'Gregor *v.* Horsfall, 4 Mees. & W. 321; Foster *v.* Alvez, 3 Bing. N. C. 896; Camden *v.* Edie, 1 H. Bl. 21; Kynaston *v.* Liddell, 8 J. B. Moore, 223; Cohen *v.* Bulkeley, 5 Taunt. 165.

Such a rule is made only by the consent of the parties.[1]

A new trial being refused in the action in which the trial is had, the rule will not be opened in respect to the others.[2]

On a writ of error on the action which is tried, the others are ordered on terms to await the judgment upon that.[3]

1990. It was heretofore held that an action can be maintained on a policy containing the arbitration clause without first offering a submission to arbitrators,[4] but a different judgment has been given by the Exchequer Chamber in England.[5]

1991. A right of *action* may, as we have seen, exist *on an agreement for a policy*, as well as upon a policy.[6]

1992. So *trover* will lie *for a policy.*

It lies where the agent has written that he had effected a policy, though none had been made.[7]

1993. *The premium may be recovered against the assured in indebitatus assumpsit.*[8]

In England, or at least in London, the premium is considered a debt due from the assured to the broker, and from the latter to the underwriter. Accordingly, the broker may there bring an action against the assured for the premium,[9] though he may not himself have paid it to the underwriters.[10] And though, in the United States, the premium is a debt due from the assured to the underwriter, yet by agreement the broker may be interposed as the creditor to one and debtor to the other party.[11]

1994. *The return premium is*, in England as well as in the United States, *due from the underwriter to the assured*, and not to the broker; the usual form of action for recovering which is

[1] Doyle *v.* Anderson, 1 Ad. & El. 635; Corporation of Saltash *v.* Jackman, 13 Eng. Law J., N. S., Queen's Bench, 105.

[2] Foster *v.* Alvez, 3 Bing. N. C. 896.

[3] Gill *v.* Hinckley, 1 J. B. Moore, 79; Aylwin *v.* Favine, 5 B. & P. 430.

[4] Supra, No. 58, and note.

[5] Supra, No. 865.

[6] Alchorne *v.* Saville, 6 J. B. Moore, 199, n.; Perkins *v.* Washington Ins. Co., 4 Cowen, 645; 6 Johns. Ch. R. 485.

[7] Per Lord Mansfield, Harding *v.* Carter, Park, Ins. 5.

[8] Jackson *v.* Colegrave, Carth. 338. See chapter 22.

[9] Airy *v.* Bland, Park, Ins. 36.

[10] Power *v.* Butcher, 10 B. & Cr. 329.

[11] Taylor *v.* Lowell, 3 Mass. R. 331.

assumpsit for money had and received. And the action for a return of premium may be brought in the name of the nominal assured,[1] or in that of the person or persons for whose benefit the policy was made.

1995. *Where a broker or other agent has received payment of a loss* from the underwriters, *he is answerable to the assured for the same.*

By a particular understanding between a broker and one of divers part-owners, the broker may be liable to such part-owner severally, for the amount received by him from underwriters for a loss under a policy made upon the interest of such part-owner and other part-owners, notwithstanding notice by such other part-owners not to pay over the loss to such one.[2]

1996. As the assured may recover back the premium where no risk has been run by *the underwriter,* so the latter *may recover back the amount paid* for a loss *conditionally:*

As where it is paid on a condition to be repaid upon a cargo being restored.[3]

1997. *If the loss be paid by mistake* under circumstances in which the underwriter is not estopped from reclaiming it, *the law raises a promise to repay it, on which assumpsit will lie.*

Where the underwriter had paid a loss, not knowing that the policy had been forfeited by a breach of warranty, he was held to be entitled to recover it back.[4]

A loss was paid to a mortgager, but on subsequent discovery by the underwriter that the policy was effected to cover only the interest of the mortgagee, he recovered back the excess.[5]

A mistake of the law is not a ground for recovering back the loss; as where a letter containing material intelligence had not been disclosed to the underwriter before subscribing the policy; but was shown to him before payment of the loss, it was held,

[1] Martin *v.* Sitwell, 1 Show. 156.
[2] Roberts *v.* Ogilby, 9 Price, 269.
[3] Jordaine *v.* Cornwell, 1 Stark. R 6.
[4] De Hahn *v.* Hartley, 1 T. R. 343; Elting *v.* Scott, 2 Johns. R. 157.
[5] Irving *v.* Richardson, 2 B. & Ad. 193. See also Cox *v.* Prentice, 3 M. & S. 344.

that he could not recover it back, for he had paid it upon a full knowledge of the circumstances, having all the necessary means of forming an opinion upon his liability.[1]

1998. *Where the underwriter is induced by a false and fraudulent misrepresentation to pay a loss, he may recover it back.*

And so one or two cases apparently favor the doctrine, that a loss paid on a policy fraudulently obtained may, on the subsequent discovery of the fraud, be recovered back.[2] A life policy having been fraudulently effected, and the assignment of it not bonâ fide, the office, having paid a loss upon it to the assignee, recovered back the same.[3] But an action to recover back in such case would not probably be sustained, except in such circumstances, at least, as to entitle a party to a new trial after a judgment against him, if it must not be even a stronger case. Where the underwriter has paid the loss to the broker, and after the broker had passed it in account to the credit of the assured, without, however, having made any payment over to him on account of it, the underwriter, having discovered it to be a foul loss, gives notice to the broker not to pay it over, and demands repayment of it, it is held, that he is entitled to recover it of the agent.[4] But if a loss has been paid under a judgment of a court, it cannot be recovered back in a distinct action, on the discovery of fraud on the part of the assured. The remedy in such a case is by a new trial in the former action.[5]

1999. *The consignee, who received goods without promising to pay a contribution to general average, was held* by Lord Tenterden, C. J., and Littledale, Parke, and Patteson, Justices, *not to be liable for the contribution*, though he knew of the goods being subject to it when they came into his hands.[6]

It was so held, on the ground that there was no proof of usage at the place, or between the consignor and consignee rendering the latter liable, nor any proof that he had funds sufficient to pay the contribution.

[1] Bilbie *v.* Lumley, 2 East, 469. See also Silva *v.* Linder, 2 Marsh. R. 437.
[2] Court *v.* Martineaux, 3 Doug. 161.
[3] Lefevre *v.* Royle, Ellis's Ins. 163.
[4] Buller *v.* Harrison, Cowper, 565.
[5] Homer *v.* Fish, 1 Pick. 435.
[6] Scaif *v.* Tobin, 3 B. & Ad. 523.

2000. *In case of double insurance*, the assured may recover against any one set of underwriters the whole amount insured by them, not exceeding that of the loss. *Each underwriter*, or set of underwriters, is regarded in the light of a co-surety, or guarantor with the others, and accordingly either one *who pays more than his proportion of the loss, may recover a ratable reimbursement* from the others. But if a policy provides that the underwriters shall be liable only in the proportion of the amount insured by them to the whole amount insured, and one underwriter voluntarily pays the whole loss, he cannot claim reimbursement for the excess from the others. If two policies are made on the same property, in the whole, to an amount exceeding its value, or exceeding the loss, and one only contains a clause limiting the underwriters to their proportion of the loss in case of over or double insurance, in such case the whole loss may be recovered of the underwriters in the other, not exceeding the amount insured by them. If they pay the whole loss, or more than their proportional part of it, as they are under a legal liability so to do, they may recover the excess over their proportion from the other set of underwriters;[1] but if the latter set had paid the whole loss, they would have had no such remedy over.

2001. The English statutes give a *remedy against the hundred*, in cases of the wilful destruction of property by fire; and it has been held, that an action may be sustained on these statutes in the name of the owner for the benefit of the underwriters after a payment of the loss by them.[2]

2002. In case of the underwriters having repaired the ship insured by them, the assured does not by receiving it waive all claim. He may still recover for a particular average, if it has been insufficiently repaired.[3]

2003. Lord Kenyon intimates, that *where the underwriter is* rendered *liable for a loss by barratry* of the master, *he may main-*

[1] Lucas *v.* Jefferson Ins. Co., 6 Cowen, 635.

[2] London Ass. Co. *v.* Sainesbury, 3 Doug. 245; Mason *v.* Sainesbury, id. 61; Clark *v.* The Inhabitants of Blytring, 3 Dowl. & Ryl. 489.

[3] Reynolds *v.* Ocean Ins. Co., 22 Pick. R. 191.

tain an action ex delicto against the master, though he said he knew of no action of the sort ever having been brought.[1] But as there is no contract or privity between the master and underwriter, the action can, it seems, be maintained only by the assured, unless the barratry is committed after the underwriter has, by abandonment, become owner in reference to the time of committing the barratry.

The assured is, as we have seen, under obligation, in case of total loss and abandonment, to concur in whatever means are requisite to give the underwriter the full benefit of the salvage, including any right to claim indemnity which the assured may have against third parties, and the use of his name in prosecuting such claims is frequently necessary.[2]

A written agreement being made by the assured to sell an insured house, and an agreement by parol to assign the policy, the purchaser to give a bond and mortgage for the purchase-money within one month, the house being burnt down after the month had expired, and before the execution of the agreement, the same being afterwards executed, the underwriters were held to be still liable to the assured for the loss, in a suit prosecuted for the benefit of the vendee, notwithstanding a condition against an assignment of the policy.[3]

2004. The *owners and master* of the ship are *liable* to the shippers *for losses by bad storage*, and *culpable negligence or mismanagement by the mate and mariners*,[4] as in case of damage by collision,[5] and in case of a capture in consequence of an inexcusable deviation.[6]

Where the bill of lading, after acknowledging the shipment on

[1] Bird *v.* Thompson, 1 Esp. 339.

[2] See, on this question, Paradise *v.* Sun Mut. Ins. Co., 6 La. Annual R. 3. And as to remedy in case of injury indirectly through another party, see Com. Dig., Action on the Case, A; 1 Bl. Com. 331; Philliter *v.* Shippand, 12 Eng. Jurist, 203; Code de Com. a. 383.

[3] Fire & Marine Ins. Co. of Wheeling *v.* Morison, 11 Leigh's (Va.) R. 355. See also S. C., supra, No. 348. See also No. 879.

[4] Griswold *v.* New York Ins. Co., 1 Johns. R. 205.

[5] Smith *v.* Scott, 4 Taunt. 126.

[6] Parker *v.* James, 4 Camp. 112.

board the vessel, added, "bound for London with convoy," a suit was brought by a shipper against the owners for not sailing with convoy, whereby he lost a return of premium; and the defendants not showing that the ship sailed with convoy, the plaintiffs had a verdict for the amount of return premium they had lost.[1] But if the shipper prevents the ship from sailing with convoy, by his delay in loading the goods, he cannot recover in such case against the owners of the ship.[2]

2005. It has been considered by a learned writer not to be determined whether sailing with convoy is a part of the contract, where the ship is advertised to sail with convoy, and the bill of lading contains no stipulation on the subject.[3] A case decided in the time of Lord Mansfield adopts the doctrine that the owners are liable in such case. A *ship* was *put up* at Lloyd's, "*to sail with* the first *convoy* from London to St. Lucia." A shipper, in consequence, obtained insurance, with warranty to sail with convoy. Peace having taken place, the ship *sailed without convoy*, whereby the insurance was defeated. The shipper, having failed in a suit against the insurers, recovered the loss against the ship-owners.[4]

2006. The bills of lading of the common form stipulate for the delivery of the goods, "the dangers of the seas excepted." The *carriers by river and inland navigation* have been *held to a very strict responsibility*, like other common carriers, as the exception in the bills of lading for foreign voyages does not apply to these.[5] The liability of the owners of British vessels, for the acts of the master and mariners, has been limited by statute,[6] and they are not liable by reason of embezzlement by the master or mariners of any goods shipped on board, or for any act of the latter without the privity of the owners, beyond the value of the ship with

[1] Sanderson *v.* Busher, 4 Camp. 54, n.

[2] Magalhaens *v.* Busher, 4 Camp. 54.

[3] Abbott on Shipping, 644, cites Snell *v.* Marryat.

[4] Philips *v.* Baillie, 3 Doug. 374.

[5] Morn *v.* Slue, Molloy, b. 2, c. 2, s. 1; Vent. 190, 238; Th. Raym. 220; 1 Danv. 12; 3 Keb. 72, 112, 135; Dale *v.* Hall, 1 Wils. 281.

[6] 7 Geo. II. c. 15; 26 Geo. III. c. 86; 53 Geo. III. c. 159.

its appurtenances,[1] and of the freight for the voyage. Where the damage to all the shippers exceeds this amount, it is apportioned among them pro ratâ.

Statutes in some of the United States limit the liability of shipowners for the acts of the master and mariners in a similar way.[2]

2007. The owners have a *remedy against pilots* for damage by their negligence or want of skill.[3]

2008. In case of the loss of a ship by an unlawful capture or seizure, the owners have a right to *claim* damages *against* the *captors*.[4] So far as the owners, master, pilots, or unlawful captors are liable in these several cases, the underwriter has a right of action over, in the name of the assured, for reimbursement of a loss paid by him.

2009. *In* the preceding *cases of liability to the assured for misfeasance or negligence, the action* for the benefit of an underwriter who has paid a loss *must be in the name of the assured*, whose name he is no doubt entitled to use on giving proper indemnity, on the general principle of his being entitled to salvage. Both of them are interested in such action, where the policy does not fully cover the property.

2010. The *transfer* of the subject insured *to the underwriters*, by abandonment, *gives them the salvage, and the rights of action growing out of it.*

This supposes the abandonment to be accepted or acquiesced in by the underwriters.[5] The underwriters on a ship, to whom the ship has been abandoned, but who have not accepted the abandonment, cannot be admitted as parties to a suit by libel in rem on a bottomry bond. On their claim to be so admitted, Mr. Justice Story said: "Underwriters, as such, cannot litigate here as to the rights of the libellants and claimants. They are

[1] Gale *v.* Laurie, 7 Dowl. & Ryl. 711.

[2] Stat. of Mass. 1818, c. 122.

[3] See Stat. 6 Geo. IV. c. 125, s. 55, and McIntosh *v.* Slade, 9 Dowl. & Ryl. 738, on this subject.

[4] Boehm *v.* Bell, 8 T. R. 154; Appleton *v.* Crowninshield, 3 Mass. R. 443; 8 id. 340.

[5] Ship Packet Barker, Master, 3 Mason, 255.

mere strangers, and no more entitled to be heard than any contingent debtor or creditor of either party."

If the salvage has been assigned to a third person with the consent of the underwriter, the latter has no right of action for it against the assured.[1]

In case of a loan on bottomry of an American ship, with condition that the money should be repaid on her return to the United States, the bond to be void if she should be lost, the ship was captured, and condemned as prize, and on appeal the sentence was reversed and compensation allowed to the owner. It was held, that an action of debt would not lie on the bond,[2] but an action of assumpsit was sustained for a ratable part of the compensation received by the owner.[3]

From analogy to other policies, the underwriter on the life of a debtor, having paid the loss to the assured, is entitled to an action against the assured for any amount he may receive from the executors or administrators of the insured life, on the debt to secure which the policy was made.[4]

[1] Ker *v.* Osborne, 9 East, 378.

[2] Appleton *v.* Crowninshield, 3 Mass. R. 443.

[3] S. C., 8 Mass. R. 472. In this case the defendant's counsel (the late Mr. Justice Story) went into a very learned and able investigation of the nature and incidents of a bottomry contract under the laws of different countries.

[4] See supra, c. 1, s. 7, and c. 17, s. 17.

CHAPTER XXVII.

DECLARATION.

2011. *The declaration on a marine policy* sets forth, that on, &c., at, &c., the plaintiff, or the plaintiff by one A. B., his agent in that behalf,[1] according to the usage and custom of merchants, or according to the custom of merchants,[2] caused to be made a certain policy of insurance,[3] or caused to be made and written a certain writing, commonly called a policy of insurance,[4] or caused to be made a writing or policy of insurance,[5] purporting thereby, and containing therein,[6] or in which said writing it was mentioned,[7] that the plaintiff did make insurance, &c. (reciting the policy, either in the past or the present tense,) as by the said policy of insurance, reference being thereunto had, will more fully and at large appear,[8] or as by that writing, or said writing or policy, of insurance, more fully appears;[9] that the policy was made by the plaintiff, as the agent (if the fact be so) of one A. B., and for his use and benefit, and that the plaintiff received the order for and effected the said policy as such agent, to wit, at, &c.,[10] of all which said premises

[1] 2 Chit. Pl. 179, n. (r). It is held in Maryland, however, to be unnecessary to name the agent. Maryland Ins. Co. *v.* Graham, 8 Har. & Johns. 62; See Sparkes *v.* Marshall, 2 Bing. N. C. 761.

[2] 2 Saund. 200. Mr. Chitty says, that, where the form differs from that usually adopted, this reference to the usage of merchants is omitted. 2 Chit. Pl., American ed. 1833, p. 179, n. (a). According to this distinction, the reference would be omitted in our declarations, since the forms vary, and no particular one can be said to be especially sanctioned by the usage of merchants. This reference to usage does not appear to be at all material.

[3] Chit. Pl., ut supra.

[4] 2 Saund. 200.

[5] Evans's Harris, 246.

[6] 2 Chit. Pl. 179; 1 Evans's Harris, 246.

[7] 2 Saund. 200.

[8] 2 Chit. 179.

[9] 2 Saund. 201; 1 Evans's Harris, 246.

[10] This averment has reference to the Stat. 28 Geo. III. c. 56, s. 1, which provides that no person shall cause

the defendant afterwards, to wit, on, &c., at, &c., had notice ;[1] or of which policy or writing, or policy of insurance, the defendant had notice ;[2] that thereupon, afterwards, on, &c., at, &c. in consideration that the plaintiff, at the special instance and request of the defendant, had then and there paid to the defendant a certain sum as the premium for the insurance of a certain sum upon the subject, in the policy mentioned,[3] or had agreed with the defendant to pay him at a certain rate,[4] and had then and there undertaken and faithfully promised the defendant to perform and fulfil all things in the said policy of insurance contained on the part and behalf of the assured to be performed and fulfilled ; or had undertaken to perform all and singular the other things in the said policy of insurance contained on the part of the assured to be performed for the insurance of $ — to be made by the defendant ;[5] the defendant then and there undertook and faithfully promised the plaintiff,[6] that he, the defendant, would become and be an insurer to the plaintiff of the said sum of $ — on the said ship, goods, freight, or profits, in the said voyage ; and would perform and fulfil all things in the policy mentioned on his part and behalf, as such insurer of the said sum of $ —, to be performed and fulfilled ;[7] that the defendant then and there became an insurer to the plaintiff, and then and there duly subscribed, or by one A. B., his agent in that behalf, duly subscribed the policy of insurance as such insurer, for the sum of $ —, upon the said ship, &c., or the premises ; that the goods were shipped, on, &c., at, &c., for the voyage ; or that the ship was at a certain port or place, at the time when the risk was to commence under the policy ;[8] that the insured or his

to be made a policy without inserting the name, or firm, of the persons interested, or of the consignor or consignee, or of the person in Great Britain who receives or gives the order for the insurance.

For the form of a declaration on a marine policy, see 2 Greenleaf's Evidence.

[1] Chit., ut supra.

[2] Saund. & Evans's Harris, ut supra.

[3] Chit., ut supra.

[4] Saund., ut supra.

[5] Ibid.

[6] The precedent in Saunders runs, "the defendant then and there agreed, and was contented with the said policy, beginning the adventure," &c., as in the policy.

[7] 2 Williams's Saund. 202, c.

[8] The precedent in Saunders here inserts, "in good safety."

principal was interested in the ship, goods, or premises, to a large amount, to wit, the whole amount by him ever insured, or caused to be insured thereon;[1] that the ship sailed, or that the ship with the said goods on board sailed on the voyage; and that afterwards, while pursuing the voyage, the ship was lost, or the goods were lost, by capture, perils of the sea, &c.;[2] of all which said several premises, the defendant afterwards, to wit, on, &c., at, &c., had notice, and was requested to pay the amount of his subscription.[3]

Where the policy contains an express warranty in the nature of a condition precedent, if the policy is recited, the declaration will not, on its face, show a cause of action, without an averment of a compliance, or of the truth of the warranty.

If the action is assumpsit, a count for money had and received is usually inserted, on which, if the policy has been defeated, the assured may recover back the premium. A count may be added for the same purpose in debt.[4]

Mr. Chitty[5] states it as the opinion of an eminent barrister, that money disbursed on account of general average may be recovered under a count for money paid.

In covenant the plaintiff is under the disadvantage of not being able to recover back the premium in an action on the policy.

A count on an account stated may be added, under which to recover on an adjustment,[6] which, however, may usually be given in evidence under the count on the policy. When the adjustment merely admits the defendant's liability to a certain amount under the policy, it need not be specially declared upon.[7] But if it is conditional, and, being signed by both parties, pro-

[1] The precedent in Saunders does not allege any interest.

[2] Before the averment of the loss, the precedent in Saunders avers, that the ship never arrived at the port of destination, this being the event on which the claim under a wager policy turned.

[3] For forms of different counts in declarations on policies, see 2 Greenl. Ev., tit. Insurance, s. 375, n.

[4] 2 Chit. Pl. 430.

[5] Ibid. 201, n. (k.)

[6] Ibid. 182; Park, Ins. 118.

[7] See infra, chapter on Evidence.

vides something to be done by the assured as a condition, and so introduces new stipulations between the parties, in addition to, or as a substitute for, those in the policy, it ought to be specially declared upon.[1]

2012. *A declaration on a fire*[2] *or a life policy* is, in many respects, similar to one on a marine policy. The parties, the making of the policy, the policy itself, the consideration, the subscription, and the interest of the assured, are set forth in a similar manner. The loss must in either case, of course, be described according to the fact, and the averment of compliance with conditions precedent will depend on the stipulations of the contract, which vary very considerably in this respect; but there are usually more conditions precedent introduced into fire and life, than into marine policies.

2013. *In respect to the description of the parties.*

A question was made in New York, whether a corporation being plaintiffs, must set forth their act of incorporation, and it was held to be unnecessary.[3]

In the same case, the suit was brought by the "President and Directors of the Bank of Utica." It appeared that the plaintiffs were incorporated as the President, Directors, and Company of the Bank of Utica. This was held to be a mere misnomer, and that a misnomer of the plaintiff, even in the case of a corporation, could be taken advantage of only in abatement, and was not a ground of nonsuit on motion; Savage, C. J. dissenting.

Literal precision in the name of a corporation is, in general, not considered to be requisite.[4]

Under the English statute requiring the name of the party interested, or his agent, to be inserted in the policy, it is held by Lord Ellenborough and his associates, that the plaintiff, having alleged either, must prove the one alleged.[5]

[1] Gammon *v.* Beverley, 8 Taunt. 119; S. C., 1 J. B. Moore, 563.

[2] See Ellis, Fire & Loan Ins. 90.

[3] Bank of Utica *v.* Smalley, 2 Cowen, 770.

[4] See Angell & Ames on Corporations, s. 145 to 152.

[5] Bell *v.* Janson, 1 M. & S. 201. See also as to the description of the agent, Dickson *v.* Lodge, 1 Stark. 226.

2014. If the insurance is by a policy under seal, it will appear by the declaration to have been made in writing. If it is not under seal, the general rule, as laid down in the elementary books, is, that if a matter was unknown to the common law, and a statute requires a contract in relation to it to be in writing, the declaration must aver it so to be; but if the matter was known to the common law, and a statute makes the same provision, this is merely introducing a rule of evidence, and the contract need not be averred to be in writing.[1]

Thus a will must be declared, as well as pleaded, to be in writing; but a guaranty need not be so declared, though it must, under the statute of frauds, be proved to be so.[2]

According to this doctrine, a contract of insurance, though it should be required by statute to be in writing, need not be so alleged.[3]

The policy is often copied in the declaration, but it is, however, sufficient to set forth the substance, according to the legal effect, of the material parts of it on which the plaintiff intends to rely.[4]

Stipulations and conditions indorsed upon the policy are a part of it, and must be set forth so far as they are material.[5] If the policy has been altered, it must be set forth according to its altered form.[6]

If the declaration consists of several counts, the policy is not repeated, but reference is made to the first count in the subsequent ones.[7]

The declaration should allege directly or indirectly the payment of the premium, or liability to pay it.[8]

[1] 1 Saund. 276; Gould's Pleading, c. iv, s. 43 and 44.

[2] Anonymous, 2 Salk. 519. See also Case *v.* Barber, T. Raym. 450.

[3] As to oral insurance, see supra, No. 9.

[4] Hughes, Ins. 465; Clarke *v.* Gray, and Marsden *v.* Same Def't, 6 East, 564; Cotterill *v.* Cuff, 4 Taunt. 285; Miles *v.* Sheward, 8 East, 7.

[5] Strong *v.* Harvey, 3 Bing. 304; Strong *v.* Rule, id. 315.

[6] Robinson *v.* Tobin, 1 Stark. R. 336; 2 Chit. 188.

[7] Stiles *v.* Stokes, 7 East, 506; Phillips *v.* Fielding, 2 H. Bl. 131.

[8] 2 Chit. Pl. 180, n. (d.)

2015. In declaring on an assigned policy, it is a sufficient *averment of consideration* to aver that the premium was paid by the original assured.[1]

2016. The *allegation of the subscription* to the policy by the defendant, is supported by proof of subscription by attorney.[2]

2017. *The subject must be* so *described*, as to place and other circumstances, as to bring it, so far as the particulars of the description go, within the terms and conditions of the policy.

The printed part of the policy being on "ship and goods," and the written specification being "goods," Lord Ellenborough ruled that "premises" referred to the latter.[3]

The policy being recited to be on "indigo and bale goods," the allegation, that "divers goods," were on board, and that the policy "was on said goods," was held to be sufficient, since it could not have been upon them, unless they were "indigo and bale goods."[4]

2018. Sir James Mansfield says, that *the plaintiff's interest* must be alleged, since otherwise "the declaration would show no ground of action."[5]

In the cases on the Dutch prizes, it was held that an allegation of interest was not requisite at common law, by which gaming policies were not illegal.[6]

Mr. Hughes considers such an averment not necessary.[7] The precedents in Clift[8] and Vivian[9] purport to be upon an interest, but do not directly aver it. Lord Hardwicke seems to have con-

[1] Granger *v.* Howard Ins. Co., 5 Wend. 200.

[2] Nicholson *v.* Croft, 2 Burr. 1188, where Lord Mansfield advises, however, to allege according to the fact.

[3] Haughton *v.* Ewbank, 4 Camp. 88.

[4] De Symonds *v.* Johnson, 5 B. & P. 77. See De Symonds *v.* Shedden, 2 B. & P. 153, as to describing marks and numbers, and as to omitting, under a policy on goods "from the loading," to specify that they were loaded at the terminus a quo.

[5] Cousins *v.* Nantes, 3 Taunt. 513.

[6] Nantes *v.* Thompson, 2 East, 385. See also Craufurd *v.* Hunter, 8 T. R. 13, and Kellner *v.* Le Messurier, 4 East, 396; Buchanan *v.* Ocean Ins. Co., 6 Cowen, 318. See also, to the same effect, Clendining *v.* Church, 3 Caines's R. 141.

[7] Hughes's Ins. 466, n.

[8] Page 27.

[9] Page 26.

sidered the averment of interest to be necessary unless the declaration showed the policy to be a wager.[1] And Mr. Justice Chambre concurs in this opinion;[2] and Sir James Mansfield,[3] and Tindall, C. J., and his associates.[4]

2019. *Where a wager is not recognized as a legal subject of an action, the allegation of interest is* doubtless *requisite.*

2020. *A general averment of interest is sufficient.*[5]

Mr. Justice Sandford held the allegation, that the insurance was made on account and for the benefit of the plaintiff as a common carrier, to be sufficient.[6]

2021. *The party to whom the interest belongs must be stated,* that is to say, the plaintiff, or others for whom he brings the suit, or the plaintiff for himself and as agent for others.

Abbott, C. J., (afterward Lord Tenterden) and his associates held a declaration of interest in A and "certain persons trading under the firm of B & Co." to be bad.[7]

Under a policy by A "for whom it may concern," A cannot recover on the interest of another assured, on an averment of his own merely.[8]

The interest must be declared in a life or fire policy, no less than in a marine one.[9]

Where a policy is effected by R. for whom it may concern, being intended to cover his own interest and that of two others, and after a loss the others assign to him their interest, in an action on

[1] Saddler's Co. *v.* Babcock, 2 Atk. 554.

[2] Lucena *v.* Craufurd, 5 B. & P. 309, at p. 315.

[3] S. C., pp. 309, 310. See also Routh *v.* Thompson, 13 East, 274; Cohen *v.* Hannam, 5 Taunt. 101.

[4] Sparkes *v.* Marshall, 2 Bing. N. C. 761.

[5] Granger *v.* Howard Ins. Co., 5 Wend. R. 200; Rising *v.* Barnett, Marsh. Ins., 2d ed. 682; De Forest *v.* Fulton Fire Ins. Co., 1 Hall's R. 84; Van Natta *v.* Mutual Security Ins. Co., 2 Sandford's City of New York Sup. Ct. R. 490.

[6] S. C.

[7] Wright *v.* Welbie, 1 Chit. R. 49; and see Dickson *v.* Lodge, 1 Starkie's Cas. 226, as to describing the principal, where the action is in the name of the agent; and Manhattan Ins. Co. *v.* Ledyard, 1 Caines's R. 192.

[8] Charleston Ins. Co. *v.* Corner, 2 Gill's R. 410.

[9] Ellis, Fire Insurance, c. 9, p. 90; Id. Life Insurance, c. 8, p. 161.

the policy, he should, in stating the interest, set forth these facts, and that the action is brought for his own benefit."[1]

Some of the precedents aver the interest to have subsisted from the time of making the policy, but it should be from the time for the commencement of the risk to that of the loss.[2]

Mr. Park[3] and Mr. Hughes[4] agree in the doctrine, that an averment of interest in the plaintiff will not cover a joint interest.

Mr. Justice Chambre remarks: "That he does not see why a tenant in common has not such an interest in the entirety as to entitle him to insure."[5] But this doctrine certainly is not supported.

On the question, whether a partner is so interested in the entirety of the subject as to support an averment of his interest in its whole value, the decisions are different. Lord Chief Justice Lee was of opinion, that such an averment would cover the joint interest.[6] This doctrine is supported by some subsequent cases,[7] especially by one decided by Lord Eldon, and the other judges of the Common Pleas.[8] One reason for this doctrine is, that a partner must account to his copartner for the interest of the latter in what may be recovered, and therefore a recovery by him is, in effect, for the partnership.[9] But the opposite doctrine is supported by grave authority.[10] Where the interest, being joint, was declared to be in one of the parties, the variance was considered to be fatal.[11]

Where the assured owned seven sixteenths of the goods, and had

[1] Rider *v.* Ocean Ins. Co., 20 Pick. 259.

[2] See Rhind *v.* Wilkinson, 2 Taunt. 237; De Symonds *v.* Shedden, 2 B. & P. 153; Lynch *v.* Dalzell, 2 Bro. Parl. Cas., Tomlins's ed. 431; Craufurd *v.* Hunter, 8 T. R. 13; Lucena *v.* Craufurd, 3 B. & P. 75.

[3] Ins. p. 603, n.

[4] Ins. p. 467, n., American ed. 1828.

[5] Page *v.* Frye, 2 B. & P. 240.

[6] Hiscox *v.* Barrett, decided in 1747, cited 16 East, 145.

[7] Perchard *v.* Whitmore, 2 B. & P. 155, n., decided 1786.

[8] Page *v.* Frye, 2 B. & P. 240, decided in 1800; S. C., 3 Esp. R. 185; and see Carruthers *v.* Shedden, 1 Marsh. R. 416; 6 Taunt. 14.

[9] Reed *v.* Cole, 3 Burr. 1512.

[10] Cohen *v.* Hannam, 5 Taunt. 101; Graves *v.* Boston Marine Ins. Co., 2 Cranch, 419; per Thompson, J., in Catlett *v.* Pacific Ins. Co., 1 Wend. 561.

[11] Bell *v.* Ansley, 16 East, 141.

an interest in the remainder on account of advances, as agents and consignees, the interest was averred generally, without specifying the different species of interests; and it was held good.[1]

The plaintiff may aver his interest in the subject to a certain amount, without averring what other persons, not parties to the policy, are interested in the same subject.[2]

The plaintiff may declare the interest to be in himself in one count, and in some one else as his principal in another.[3] Under policies on the Dutch ships seized by the British government, the interest was stated, in some counts, to be in the captors, and in others in the king.[4]

Where a number of persons are insured in the same policy upon a subject, the proportions of their interest need not be stated.[5]

Mr. Chitty says, that in a policy on freight it should be averred that, if the ship had arrived, the freight would have amounted to the sum insured thereon;[6] but this seems to be included in the averment of interest to the amount insured.

It being alleged that the plaintiffs caused a policy to be effected, containing that J. & Co., "in their own names and the names of all other persons to whom," &c., and the interest being averred to be in one S., it was moved in arrest, that it did not appear that the plaintiffs were J. & Co. Lord Ellenborough, C. J.: "The declaration states that the plaintiffs caused the policy to be effected; and alleges the promise of the defendant to have been made to them." Judgment was given on the verdict for the plaintiff.[7]

It being alleged that the vessel sailed after the date of the policy, and was lost on the voyage insured, it appeared that she sailed before the date of the policy. The variance was held immaterial.[8]

[1] Carruthers *v.* Shedden, 6 Taunt. 14; S. C., 1 Marsh. R. 416, n.

[2] Pacific Ins. Co. *v.* Catlett, 4 Wend. R. 75.

[3] Barlow *v.* Leckie, 4 J. B. Moore, 8; Etches *v.* Aldan, 1 M. & R. 157; Wolff *v.* Horncastle, 1 B. & P. 316.

[4] Craufurd *v.* Hunter, 8 T. R. 13; and see Gammon *v.* Beverly, 1 J. B. Moore, 563.

[5] 6 Taunt. 14; 1 Marsh. R. 416, n.; 2 Chit. Pl. 181, n.

[6] 2 Chit. Pl. 74, n. (c.)

[7] Mellish *v.* Bell, 15 East, 4.

[8] Peppin *v.* Solomons, 5 T. R. 496; and see remarks of Gibbs, C. J., and Park, J., in Abitbol *v.* Bristow, 6 Taunt. 464. See also 2 Chit. Pl. 6th London, 5th American ed. 182, n., and cases there cited.

The loss need not be averred to have been after the date of the policy, though some of the precedents are so, since policies are frequently retrospective;[1] but the averment must put the loss within the termini of the risk, whether of time or otherwise.

A loss in harbor before sailing being alleged to have been after the vessel had sailed, the variance was held by Gibbs, C. J., and his associates, to be fatal.[2]

2022. *The loss and the peril by which it was caused must be truly set forth.*[3] The peril is usually set forth in the words of the policy, but equivalent words may be used. The averment that per fraudem ac negligentiam magistri, navis predicta depressa et submersa fuit, was objected to, because it was not alleged that the loss was by barratry; but it was held to be good.[4]

A loss on land, under a policy against barratry and the common risks enumerated in marine policies, was declared to have been "by the fraud and negligence of the carriers." This was held to come within the term barratry.[5]

Lord Kenyon and his associates held, that the loss by a mob could not be recovered under an averment of an arrest, seizure, &c., by "people," as this expression has reference to the regular authority; but they thought it might be averred to be a loss by pirates.[6]

Lord Ellenborough ruled that an averment of loss by "perils of the seas" did not cover a loss by being fired into through mistake, which was, he said, a peril "on the sea;"[7] and his ruling was concurred in.[8] The distinction seems, however, not to have been well taken.[9]

An averment of seizure by persons unknown, being public enemies, is not supported by proof of seizure by officers of the government of an enemy country, for a breach of revenue laws.[10]

[1] Marsh. Ins., 2d ed. 687; Hughes, Ins. 469.

[2] Abitbol *v.* Bristow, 6 Taunt. 464.

[3] Gregson *v.* Gilbert, 3 Doug. 232; Kulen Kemp *v.* Vigne, 1 T. R. 304.

[4] Knight *v.* Cambridge, 2 Ld. Raym. 1349; 1 Str. 581. See also Cullen *v.* Butler, 5 M. & S. 461; Phillips *v.* Barber, 5 B. & A. 161; Toulmin *v.* Anderson, 1 Taunt. 227.

[5] Boehm *v.* Combe, 2 M. & S. 172.

[6] Nesbitt *v.* Lushington, 4 T. R. 783.

[7] Cullen *v.* Butler, 1 Starkie, 138.

[8] S. C., 5 M. & S. 461.

[9] See supra, No. 1099, n.

[10] Matthie *v.* Potts, 3 B. & P. 23.

A ship not heard from within a reasonable period is presumed to be lost [1] and where the policy is against the usual risks, the presumption is, that it was lost by the perils of the seas.[2]

Where a loss is remotely caused by one peril, and directly by another, in case both perils are not covered by the policy, a question arises as to the liability of the underwriter;[3] but the loss must be averred to have been by the peril insured against. Where both perils are insured against, the question has arisen, whether it must be averred to have been caused by the proximate or remote cause, or may be averred either way. The difficulty may be avoided in such case, either by averring the loss by each peril in different counts,[4] or averring it by both in the same count.[5]

The proximate cause only may, however, be alleged.[6]

The loss may be alleged by a particular statement of the facts.[7]

Where the ship was stranded by perils of the sea, and captured by the enemy while it was so stranded, the loss was averred to have been by capture, and it was considered good.[8]

The men sent ashore to cast off a fast being impressed, and the ship being driven ashore by the winds and waves in consequence, the loss was held to be well alleged to be by perils of the seas.[9]

A loss by barratry, where no sea-peril intervened, was held not to be well averred to be by perils of the seas.[10]

In an early case a loss by seizure of the vessel, on account of the master's attempt to evade port dues, was held to be well alleged to be by barratry.[11]

1 Supra, No. 1099.

2 Gordon *v.* Bowne, 2 Johns. R. 150.

3 Supra, c. 13, s. 14.

4 Barney *v.* Maryland Ins. Co., 5 Harris & Johns. 139.

5 Gregson *v.* Gilbert, 3 Doug. 232.

6 Blyth *v.* Shepard, 9 Mees. & Wels. 768.

7 Per Chambre, J., Toulmin *v.* Anderson, 1 Taunt. 227.

8 Green *v.* Elmsley, Peake's R. 212.

9 Hodgson *v.* Malcolm, 5 B. & P. 336.

10 Blyth *v.* Shepard, 9 Mees. & Wels. 768.

11 Knight *v.* Cambridge, 2 Ld. Raym. 1349; 1 Str. 581; 8 Mod. 230, the facts of which, per Ford's note of Stamma *v.* Brown, mentioned 8 East, 135, were as stated in the text. See also Heyman *v.* Parish, 2 Camp. 149; Arcangelo *v.* Thompson, id. 620; also Hagedorn *v.* Whitmore, 1 Starkie's R. 157; and cases supra, c. 13, s. 3.

2023. *A partial loss may be recovered under a declaration for a total loss.*[1]

Under a policy stipulating for a total loss, if the ship should not be permitted by the Russian government to discharge her cargo, the declaration that she was not so allowed, whereby the value of the cargo was reduced and the assured was damnified, was, on demurrer, held by Lord Ellenborough and his associates to be good.[2]

2024. *A total loss and general average may be declared for in the same count.*[3]

2025. *If it appears by the declaration that certain risks are excepted, the loss should be so stated as to appear not to have been caused by those risks.*[4]

2026. *Where the right of action depends upon the assured's complying with some express warranty or condition, such compliance must be averred.*[5]

Fire policies sometimes make the production of a certificate a prerequisite to the right of recovery, and the averment of its production was considered material by the Court of King's Bench.[6] But in Connecticut, where a fire policy provided that the assured

[1] Gorham *v.* Sweeting, 2 Saunders, 207; 2 Chit. Pl. 74, n. (h); 1 T. R. 608; M'Masters *v.* Schoelbred, 1 Esp. 237; Gardiner *v.* Croasdale, 2 Burr. 904; Nickleson *v.* Croft, id. 1188.

[2] Puller *v.* Glover, 12 East, 124. The proper course would have been to abandon and claim for a total loss.

[3] Bryant *v.* Commonwealth Ins. Co., 6 Pick. R. 131.

[4] See Latham *v.* Rutley, 2 B. & C. 20; S. C., 3 D. & R. 211. Also Ferguson *v.* Cappeau, 6 Harris & Johns. 394, and Clarke *v.* Gray, and Marsden *v.* Gray, 6 East, 564. For a learned and able investigation of this subject by Mr. Justice Metcalf, see American Jurist and Law Magazine, No. 16, vol. 8, p. 233. See also 1 Chit. Pl. 5th London, 6th American ed. 347; Gould's Pl. 178; Dalgleish *v.* Brooke, 15 East, 295; Rucker *v.* Greene, id. 288; Louisville Mut. Ins. Co. *v.* Bland, 9 Dana's R. 143; Ellis's, Insurance, 90.

[5] 2 Chit. Pl. 74, n. (e); Everett *v.* Desborough, 5 Bing. 503; Hore *v.* Whitmore, Cowp. 784; 7 T. R. 710; 3 B. & P. 515; Stewart *v.* Wilson, 12 Mees. & Wels. 11; Strong *v.* Rule, 3 Bing. 315; Ellis, Life Insurance, c. 8, p. 161; Illinois Mut. Fire Ins. Co. *v.* Marseilles Manufacturers' Co., 1 Gill's R. 237.

[6] Worsley *v.* Wood, 6 T. R. 710.

should make oath before a magistrate, it was held that it need not be stated in the declaration, that the oath was made.[1]

Where the defendant's liability is limited by a matter properly within his cognizance, and not that of the plaintiff, *the plaintiff need not allege that the defendant is not discharged* under the limitation ; it is for the defendant to allege the ground on which he is discharged.

It being recited in a policy that K. having represented that "he was interested in, or duly authorized as owner, agent, or otherwise, to make, the insurance, "it was agreed that the Sunderland Insurance Company should become insurers to him, and that the capital stock and funds of said company should, according to the provisions of the deed of settlement of said company, be liable to make good losses and damages to the goods, &c., and that the stock and funds should alone be liable, and that no shareholder should be liable beyond the amount of his shares," it was held by Lord Campbell, C. J., and his associates, unnecessary to allege in the declaration for a loss, that the company had funds, and that it is for the defendants to allege the want of funds if they rely upon that defence.[2]

[1] Lounsbury *v.* Protection Ins. Co., 8 Conn. R. 459.

[2] Sunderland Mar. Ins. Co. *v.* Kearney, 6 Eng. Law & Eq. R. (Press of Little, Brown & Co.) 312; S. C., 20 Eng. Law J. R. (N. S.) Q. B. 417.

CHAPTER XXVIII.

PLEADINGS.

2027. *In assumpsit* on a policy, *the general issue is the usual plea.*[1]

2028. *To covenant* the common plea is, that the defendants have performed, &c.[2]

In covenant, the defendants pleaded, — 1. That they had performed, &c.; 2. That the vessel was not seaworthy. Held that a misrepresentation of the age and character of the vessel could not be given in evidence under these pleas.[3]

2029. *A defendant was not permitted to traverse that the policy was caused to be made*, and that the premium had been paid, which would be included in the general issue.[4]

A contract with the public enemy being illegal, the fact that the assured was one of the public enemy at the time of effecting the policy may be given in evidence under the general issue, as it is a perpetual bar.[5]

[1] Marsh. Ins., 2d ed. 701. For precedents of special pleas of misrepresentation, see Rawlins *v.* Desborough, 8 C. & P. 321.

[2] Maryland Ins. Co. *v.* Graham, 3 Har. & Johns. 62; Carrere *v.* Ins. Co., id. 324; Baltimore Ins. Co. *v.* McFadon, 4 id. 31; Bosley *v.* Chesapeake Ins. Co., 3 Gill & Johns. 450; Chesapeake Ins. Co. *v.* Allegre's Adm'rs, 2 id. 164; and see Marsh. Ins., 2d ed. 698; 1 Chit. Pl. 523, n.; Gorham *v.* Sweeting, 2 Saund. R. 207.

[3] Marine Ins. Co. of Alexandria *v.* Hodgson, 6 Cranch's R. 206. Saunders gives an instance of sharp pleading by himself, predicated upon the assumption that the plaintiff could not recover for a partial loss under a declaration for a total loss, which the court overruled (Gorham *v.* Sweeting, 2 Saund. R. 200.) Saunders cited in support of his plea, Tatem *v.* Perient, Yelv. 195, and Sir Francis Lake's case, Dyer, 365. In another case, Saunders himself demurred to a similar plea, and remarks in his report of the case, that his opponent "could not say much to support the plea." Osborne *v.* Rogers, 1 Saund. R. 268.

[4] Sutherland *v.* Pratt, 11 M. & W. 296; S. P. Redmond *v.* Smith, 7 Mann. & Gr. 457.

[5] Brandon *v.* Nesbitt, 6 T. R. 23;

2030. The temporary disability of the plaintiff during a war, by his having become a *public enemy by a war declared after the date of the policy*, must be specially pleaded.[1]

If an enemy subject has a safe-conduct, or resides in the country by permission, he may bring a suit.[2]

A replication to a plea of alien enemy, that the plaintiff is resident in the country under a license, was ruled by Lord Ellenborough not to be supported, for the purpose of maintaining the action, by proof of a license to come to the country while he was an alien friend, where he had become an alien enemy by a subsequent declaration of war.[3]

If the plaintiff becomes an alien enemy after judgment, the court will not, on motion, stay or set aside execution.[4]

2031. *A plea of usage in London is supported by proof of the usage there and in other places.*[5]

2032. A *plea that the vessel became unseaworthy during* the period of *the risk* and before the loss, *without averring* unseaworthiness at the commencement of the risk, or *that the unseaworthiness was by fault of the assured, or that the damage was in consequence* of the unseaworthiness, *was held* by Lord Denman and his associates *to be bad.*[6]

On a *plea* by the underwriters *that the ship was not seaworthy* at the time when the risk was to begin *under a time policy*, and verdict in their favor, and motion for judgment for the assured notwithstanding the verdict, Platt B. and Anderson J., in their

Anthon *v.* Fisher, Doug. 649, n., and 1 Bl. R. 563. Specially pleaded, Casseres *v.* Bell, 8 T. R. 166.

[1] Flindt *v.* Waters, 15 East, 260; and see Harman *v.* Kingston, 3 Camp. 150; Bell *v.* Chapman, 10 Johns. R. 183. The court cites Rastel's Ent., Ejectment, 7; Trespass per Alien, 1; Cornw. Tab. Abatement, 7; Bar in Divers Actions, 89; Wells *v.* Williams, 1 Lutw. 34, 35; West *v.* Sutton, 1 Salk. 2. And see 1 Chit. Pl. 481, 483; 3 Chit. Pl. 910, and 12 East, 204.

[2] Kensington *v.* Inglis, 8 East, 273; Clarke *v.* Morey, 10 Johns. R. 69; Alciator *v.* Smith, 3 Camp. 245; 1 Chit. Pl. 482.

[3] Boulton *v.* Dobree, 2 Camp. 163.

[4] Buckley *v.* Lyttle, 10 Johns. R. 117; Vanbrynen *v.* Wilson, 9 East, 321.

[5] Milward *v.* Hibbert, 3 Ad. & El. N. S. 120.

[6] Hollingworth *v.* Brodrick, 7 Ad. & El. 40.

opinion before the House of Lords, were for judgment for the assured unless it should be held that there was the same warranty of seaworthiness under a time policy as under one for a voyage, which was assuming that the verdict was predicated upon the warranty of seaworthiness being the same in both descriptions of policy. Erle J., was of opinion that if there was an implied condition of any degree of seaworthiness, the judgment should be on the verdict, upon the presumption that the jury had been truly instructed in this respect. Alderson J., was of opinion that if there was a condition for only a qualified seaworthiness, judgment should be in favor of the assured, on the ground that it was for the underwriters to have specified the want of such qualified seaworthiness, that is to say, the pleading of a want of seaworthiness generally, must be construed to mean seaworthiness under a voyage policy, that being its usual construction.[1]

2033. *Plea that the vessel had not* on board *a pilot* licensed by Pennsylvania, was held bad, where one licensed by New Jersey or Delaware was authorized for the same navigation.[2]

2034. Under the clause exonerating the underwriters in case of *other insurance prior in date*, it is held that an insurance at an earlier hour of the same date may be pleaded.[3]

2035. *The rotten clause*, as it is called,[4] *may be pleaded specially*, by setting forth the clause and the survey; for the plea admits the facts alleged in the declaration, and avoids the action by matter which the plaintiff would not be bound to prove in the first instance under the general issue.[5] In pleading this cause, it is not necessary to aver the survey in the words of the policy.[6] Nor is it necessary to set forth the survey in so many words; it is enough to aver a regular survey.[7] The survey is presumed to

[1] Gibson *v.* Small, 1 Eng. Law & Eq. R. 1853, Com. Pl. 363.

[2] Flannigan *v.* Washington Ins. Co., 7 Penn. R. 307.

[3] Brown *v.* Hartford Ins. Co., 3 Day, 58; and see cases cited supra, No. 1253.

[4] Vide supra, No. 849.

[5] Brandagee *v.* National Ins. Co., 20 Johns. R. 328; and see Hussey *v.* Jacob, 1 Lord Raym. 87; Rogers *v.* Niagara Mut. Ins. Co., 2 Hall's R. 86.

[6] Brandagee *v.* National Ins. Co., 20 Johns. R. 328.

[7] Griswold *v.* National Ins. Co., 3 Cowen's R. 96; Rogers *v.* Niagara Mut. Ins. Co., 2 Hall's R. 86.

be in possession of the assured, and the underwriters are presumed not to know the particulars.[1]

This plea was held bad, where the rottenness appeared by the plea not to be the sole cause of the condemnation.[2]

The plea stated a survey at Cadiz, and the replication traversed a survey at Cadiz "or elsewhere," which was demurred to because the traverse sought to put in issue matters not in the plea; and the demurrer was sustained.[3]

It is not necessary to aver the rottenness, but only that the survey declared it.[4]

2036. *Plea of forfeiture of a fire policy, by false swearing, must aver it to have been in the matter to which the clause in the policy against false swearing relates.*[5]

2037. In pleading a *former judgment*, the jurisdiction of the court by which the judgment was rendered must be averred.[6]

In assumpsit a former judgment may be given in evidence under the general issue.[7]

2038. *Goods insured, "lost or not lost,"* were declared to have been shipped on the voyage specified, and the assured was stated to have been interested during the voyage to the amount insured, and the goods were averred to have been damaged and spoiled by being wetted in consequence of tempestuous weather. *A plea that the goods were* so *damaged before the plaintiff had an interest in them, was held bad* on general demurrer, on the ground that he might have bought them subject to the risk of prior damage.[8]

2039. *Under an allegation that the goods were sunk* by the perils insured against, and spoiled, *evidence of the expense of saving them was admitted.*[9]

[1] Griswold *v.* National Ins. Co., ut supra.

[2] Ibid.

[3] Ibid.

[4] Rogers *v.* Niagara Mut. Ins. Co., 2 Hall's R. 86.

[5] Farris *v.* North American Ins. Co., 1 Hill's R. 73.

[6] Dakin *v.* Hudson, 6 Cowen, 221.

[7] Stafford *v.* Clark, 2 Bing. 437; and see, as to pleading former recovery, 1 Chit. Pl., 5th English, 6th American ed. 49, 50, 227, 243, 513, 524, 635; and former Verdict, id. 513, n. (f), 635; 1 Phil. Ev. 243, American ed. 1823; 3 Burr. 1353.

[8] Sutherland *v.* Pratt, 11 Mees. & Wels. 296.

[9] Per Lord Hardwicke, Carey *v.* King, Cas. Temp. Hard. 304.

2040. *An adjustment* and acknowledgment of the amount of the loss by the underwriters *may be proved, though not alleged.*[1]

2041. Where the master barratrously procured the ship to be condemned and sold in a vice-admiralty court, *the statute of limitations* was held to begin to run on the policy in respect to this loss from the time when the captain delivered up the ship, and divested himself of the possession under the sale.[2]

2042. The *bankruptcy of the underwriters*, where it occurs after action brought, is specially pleaded;[3] where it takes place before an action brought, it is either pleaded specially or given in evidence under the general issue.[4]

2043. *A plea of a tender must be supported by proof of a sum tendered to the plaintiff distinctly from others.* Proof of tender of a sum in common to him and other distinct underwriters on the same policy, does not support the plea.[5]

2044. *Set-off may be pleaded as in suits on other contracts.*[6]

The underwriters cannot set off their claim upon the assignor of the policy, accruing after notice of the assignment, against the assignee.[7]

The assignee of a balance due from an insolvent insurance company, assigned after the insolvency, can only set off the dividend due on the balance against the claims of the company against himself.[8]

2045. *A reinsurer may make the same defence that the insurer might have made*, excepting so far as he may be precluded by notice of a former suit and by judgment therein.[9]

[1] Hughes's Ins. 376; Rogers *v.* Maylor, 2 Esp. 489.

[2] Hibbert *v.* Martin, 1 Camp. 538.

[3] Hughes's Ins. 474; 1 Chit. Pl. 513.

[4] 1 Chit. Pl. 514.

[5] Per Best, C. J., and his associates, Strong *v.* Hervey, 3 Bing. 304.

[6] Grove *v.* Dubois, 1 T. R. 112; Graham *v.* Russell, 5 M. & S. 498; S. C., 2 Marsh. R. 561; S. C., 3 Price, 227; Baltimore Ins. Co. *v.* McFadon, 4 Harris & Johns. R. 31; Potter *v.* Washington Ins. Co. of Providence, 4 Mass. 498, stated supra, No. 1349; Wienholt *v.* Roberts, 2 Camp. 586; Peale *v.* Waddington, 7 Taunt. 478; Glennie *v.* Edmunds, 4 id. 775. See also supra, c. 23, s. 5 and 6; also Grant *v.* Royal Exch. Ass. Co., 5 M. & S. 439.

[7] Hackett *v.* Martin, 8 Greenl. R. 77; Frear *v.* Everson, 20 Johns. R. 142; Jordan *v.* Church, 2 Caines's R. 299.

[8] Long *v.* Pennsylvania Ins. Co., 6 Penn. R. 421.

[9] New York State Mar. Ins. Co. *v.* Protection Ins. Co., 1 Story's R. 458.

CHAPTER XXIX.

EVIDENCE.

SECT. 1. What in general must be proved. — The authentication of testimony.
2. Witnesses.
3. Depositions.
4. Admissions, agreements, burden of proof, presumptions, and inferences.
5. Documents. — Books. — Entries. — Statements.
6. Judgments.
7. Foreign laws.
8. Experts. — Opinions.
SECT. 9. Parties.
10. Execution of the policy.
11. Construction of the policy. — Evidence aliunde.
12. Compliance with conditions.
13. Interest.
14. That the subject was within the description of the risks.
15. Loss.
16. The amount of the loss.
17. Notice of the loss.
18. Adjustment.
19. Evidence in defence.

SECTION I. WHAT IN GENERAL MUST BE PROVED. — THE AUTHENTICATION OF TESTIMONY.

2046. IN treating of the declaration, it has been considered what facts must be alleged, and the same must be proved.

2047. *Testimony is authenticated by oath, or by official seal or certificate.*

If the witness cannot be produced in court, the law prescribes the mode of authenticating by oath.

It also regulates the modes of authentication by seal or certificate, according to the common law or by statute.

A party is bound by his agreements or admissions. How an admission or agreement is to be proved, may be a matter of general doctrine or positive enactment.

The judgment of a court is generally considered to be evidence, between the same parties, of whatever, within its jurisdiction, it adjudges to have been proved, or decrees to be done. This is a general doctrine of law, in many respects, however, modified and regulated by statute. The thing to be proved, then, is the judgment, as in the former instance it was the agreement or admis-

sion of the party; and the judgment proves the fact adjudicated upon.

It is a general doctrine, that the record itself is proof of the judgment.

As every court can inspect its own records, it requires no other evidence of the judgment, and so, consequently, of the facts stated or the thing decreed.

But as one court cannot inspect the records of another, they must be proved; and this proof is either by the oath of a witness, who compares a copy, or by the mere seal of the court, or by the certificate of some officer; and where the proof is by exemplification, that is, by a copy attested by seal, or by mere certificate, the court will take notice of the official seal of a court, or public office, or department, or of the signature of a public or judicial officer of the same government,[1] either according to the principles of the common law, or in compliance with the statute regulations on the subject.[2]

2048. It is provided by act of Congress, that the *records and judicial proceedings of the courts of any State* shall be *proved by the attestation of the clerk, and the seal of the court annexed*, if there be a seal, *together with a certificate of the judge*, chief justice, or presiding magistrate, that the attestation is in due form.[3]

A certificate by the clerk of a court, that "a paper purporting to be a record of a court is truly taken from the record of the proceedings" of the court, with the attestation of the chief presiding magistrate that the clerk's attestation is in due form, is within the act of Congress; and the paper is presumed to be a full copy, and is admissible in evidence.[4]

2049. The seal of a court under the same jurisdiction within which it is produced, needs not to be proved.[5]

2050. *A seal of a foreign court must be proved.*

A copy of the record of a foreign vice-admiralty court, certified

[1] Coolidge *v.* Firemen Ins. Co., 14 Johns. R. 308.

[2] Starkie's Evid. 152, American ed. 1828.

[3] Act of Congress, 1790, c. 38.

[4] Ferguson *v.* Harwood, 7 Cranch, 408; and see 9 id. 122; 2 Yeates, 532; 1 Hayward, 359.

[5] Sobry *v.* Terrier de Laistre, 2 Har. & Johns. 193.

under a seal purporting to be that of the court, by a person declaring himself register of the court, accompanied by a certificate of the American consul that the person certifying with such register, was held by Mr. Justice Thompson not to be sufficient evidence of the foreign judgment.[1] But a copy of the record certified by a clerk, and accompanied by an affidavit of his being clerk, is held sufficient.[2]

Authentication of records by seal being familiar to the common law, the courts give much weight to it, and require a mere official authentication of a record, without oath, to be in this form, in order to render the copy admissible in evidence,[3] unless it is distinctly proved that the court has not a seal, and that some other mode of authentication, by flourish with the pen, or mere signature of the officer, &c., without seal, is sanctioned by the law and practice of the place;[4] and Lord Ellenborough ruled, that it was not a sufficient reason for admitting a merely certified copy of a Jamaica judgment without seal, that the seal of the court was proved to be old, the devise being worn out so that it would make no distinct impression.[5]

A paper purporting to be a copy of a judgment of a court of the island of Grenada, was held not to be sufficiently authenticated by proof that the subscription to it was in the handwriting of the judge of the court, without proving the seal affixed to be that of the court.[6]

A paper purporting to be a copy of the record of a judgment of a foreign vice-admiralty, and to be certified by the deputy registrar of the court under its seal, was admitted in evidence in Connecticut.[7]

The great seal of a state, or of a province or colony, whether of the domestic or a foreign government, requires no proof, or, as

[1] Catlett *v.* Pacific Ins. Co. 1 Paine, 594.

[2] Buttrick *v.* Allen, 8 Mass. R. 273.

[3] Appleton *v.* Braybrook, 2 Stark. R. 6; S. C., 6 M. & S. 34; Black *v.* Braybrook, 2 Stark. R. 7; Cavan *v.* Stewart, 1 id. 525.

[4] Alves *v.* Bunbury, 4 Camp. 28; Buchanan *v.* Rucker, 1 id. 63; Talcott *v.* Delaware Ins. Co., 2 Wash. C. C. R. 449.

[5] Cavan *v.* Stewart, 1 Stark. 525.

[6] Henry *v.* Adey, 3 East, 221; S. C., 4 Esp. 228.

[7] Thompson *v.* Stewart, 3 Conn. R. 171.

the expression is, proves itself.[1] A copy of a judgment of a Dutch court, certified under the great seal of Holland, was admitted in the English Court of Chancery without other evidence.[2]

But a certificate by the Portuguese Secretary of State at Lisbon, under the seal of state of Portugal, of the sentence of condemnation of a ship and cargo in the Vice-Admiralty Court in Para, at the time a Portuguese colony, was held in New York not be admissible, since the certificate was not given by a person having charge of the record.[3]

Copies certified under the seal of state, and sworn copies, are the most direct modes of authentication. In the authentication of a foreign record in any other mode, the seal, or the practice of certifying without seal, and the official capacity of the certifying officer, must be proved by the oath of a witness or under the great seal of state,[4] unless a positive statute dispenses with such proof.

2051. The *certificate of a consul* is not an admissible authentication of a fact, unless made so by statute. A foreign law cannot be so proved,[5] nor the sentence of a foreign court,[6] nor the fact that a certain person is registrar of a court,[7] unless made so by statute.

A certificate of an agent appointed by the subscribers at Lloyd's for a foreign port, to "facilitate the settlement of losses," but "not to make or sign any statement of average, general or special, as representative of the underwriters," is not admissible as evidence of a loss, or of its amount, although it is in a case between such subscribers.[8]

[1] Lincoln *v.* Battelle, 6 Wend. 475; and see 4 Dall. 416; 3 East, 222.

[2] Anon. 9 Mod. 66.

[3] Vandervoort *v.* Smith, President of the Columbian Ins. Co., 2 Caines's R. 155.

[4] Church *v.* Hubbart, 2 Cranch, 187; Gardere *v.* Columbian Ins. Co., 7 Johns. R. 514.

[5] Waldron *v.* Coombe, 3 Taunt. 162; Church *v.* Hubbart, 2 Cranch, 187.

[6] Vandervoort *v.* Smith, President of the Columbian Ins. Co., 2 Caines's R. 155.

[7] Catlett *v.* Pacific Ins. Co., 1 Paine, 594.

[8] Drake *v.* Marryat, 1 B. & Cr. 473.

SECTION II. WITNESSES.

2052. *One who would be liable to indemnify a party, or who would be exonerated by a party's prevailing, is not a competent witness for such party.*[1]

One part-owner of a vessel is not a competent witness in favor of another part-owner, in an action by the ship's husband against such other, in which the plaintiff claims the whole premium, the same having been paid by him.[2]

One of the joint defendants in two different suits upon policies on the same risks in one of which it was agreed that it should depend upon the judgment given in the other, proposed to withdraw his joint plea and confess judgment in the other, in order to qualify himself to be a witness in the trial of that action between the plaintiff and his co-defendants, but it was held that he would still not be admissible as a witness on account of his interest.[3]

A bankrupt insurance broker was admitted as a witness in an action by his assignees for premiums, to prove that the premiums were payable to him, and not to the underwriters.[4]

It was formerly held that an underwriter on a policy was not a witness for another underwriter in a suit on the same policy.[5] But this doctrine was qualified, it being held that an underwriter might be called by another who subscribed the policy before him.[6] And so an underwriter who has paid his subscription unconditionally is a witness;[7] but if he has paid upon condition that he shall be placed in the same situation with those who dispute the claim, he is not a witness for them.[8]

[1] 1 Phil. Ev. 42, 58.

[2] French *v.* Backhouse, 5 Burr. 2727.

[3] Hodgson *v.* Marine Ins. Co., 1 Cranch, C. C. R. 460.

[4] Airey, Assignee of Milton, *v.* Bland, Park, Ins. 36. But see 2 Stark. Ev. 212, American ed. of 1828.

[5] Ridout *v.* Johnson, Bull. N. P. 283. See 1 T. R. 193.

[6] Bent *v.* Baker, 3 T. R. 27; 7 T. R. 604.

[7] Bilbie *v.* Lumley, 2 East, 469.

[8] Forrester *v.* Pigou, 3 Campbell, 380.

A director of one life insurance company may be a witness in a suit against another such company, where the witness's company has not issued a policy on the same life.[1]

A person being in effect mortgagee of premises insured, is a competent witness in a suit by another standing in the place of mortgager, and it is no objection to his competency that the plaintiff, if he recovers, may perhaps apply the proceeds of the policy in discharge of the encumbrance.[2]

An agent in effecting a policy is a competent witness for the assured.[3]

A stevedore, though he would be answerable for unskilfully or negligently stowing a cargo, is a witness for the assured to prove that it was properly stowed.[4]

The pilot is a competent witness for the assured, in an action for a loss upon the vessel while he was on board.[5]

The master of the vessel is, to most purposes, a competent witness in suits on policies upon the ship or cargo: as, to prove a loss of a part of the cargo by plunder by a privateer.[6]

But he has been held not to be a witness for either party to testify to his own barratrous acts as the ground of a claim or defence.

Sir James Mansfield ruled, that the master, being also a part-owner, was not a witness for the assured on goods, to prove that there was not a deviation.[7]

[1] Craig *v.* Tennet, representing the Asylum Ins. Co., 1 Car. & Marsh. 43.

[2] Columbia Ins. Co. *v.* Lawrence, 10 Peters's Sup. Ct. R. 507. Story, J., giving the opinion of the court, cites Lynch *v.* Dalzel, 3 Bro. Parl. Cas. 431.

[3] Mackay *v.* Rhinelander, 1 Johns. Cas. 408; Bent *v.* Baker, 3 T. R. 27.

[4] Rankin *v.* American Ins. Co., 1 Hall's R. 619.

[5] Vairin *v.* Canal Ins. Co., 10 Ohio R. 561.

[6] Hicks *v.* Fitzsimmons, 1 Wash. C. C. R. 279; Bird *v.* Thompson, 1 Esp. R. 339; 3 Stark. Ev., American ed. 1828, Part IV. 1184, 730, 768; Howell *v.* Cincinnati Ins. Co., 7 Ohio R. 276; American Ins. Co. *v.* Insley, 7 Penn. R. 223. It has, however, been held in Louisiana, that he is a witness for the assured, though the defence is barratry, on the ground that he was considered to be liable to the underwriters in case the assured should recover. Paradise *v.* Sun Mut. Ins. Co., 6 La. Annual R. 3.

[7] Taylor *v.* M'Vicar, 6 Esp. R. 27.

Goods being insured from London to Embden, the vessel put into the Texel, where she was taken possession of by the Dutch. In an action on the policy, a ground of defence was, that the goods were destined to the Texel, and not to Embden. The captain, who was also a part-owner of the ship, was admitted to "show what was the original destination."[1]

A supercargo who is to have a share of the profits is a competent witness in an action on a policy upon goods, which are insured at their invoice value.[2]

Lord Kenyon ruled, that the owner of the ship is not a competent witness, in an action on a policy upon the cargo, to prove the ship to have been seaworthy.[3]

Mr. Justice Peters ruled, in the Circuit Court of the United States, that the captain was a competent witness for this purpose, on the ground that his interest was too indirect and remote to disqualify him.[4]

One to whom the master is indebted for advances is a witness to prove the master's lien on the freight, and so is a witness to prove the master's insurable interest,[5] the interest of the witness being merely that of a creditor to the party calling him.

2053. *The objection to a witness on the ground that he is interested is not applicable where his interest coincides with that of the opposite party, and not the one calling him.*[6]

Agents are sometimes witnesses of necessity, though their own liability is incidentally involved.[7]

2054. *A party interested may be rendered competent by release,* if he is not a party to the suit.

A policy being made by B for A, or for himself and C, and

And see remarks of the same judge in De Symonds *v.* De la Cour, 5 B. & P. 374.

[1] S. C.

[2] Robertson *v.* French, 4 Esp. R. 246.

[3] Rotheroe *v.* Elton, Peake's Cas. 84. See Morish *v.* Foote, 8 Taunt. 457.

[4] Ruan *v.* Gardner, 1 Wash. C. C. R. 145.

[5] Francis *v.* Ocean Ins. Co., 6 Cowen, 404.

[6] Blackett *v.* Weir, 5 B. & C. 384.

[7] See Fiske *v.* Willard, 13 Mass. 379; Phillips *v.* Bridge, 11 id. 242; Rice *v.* George, 22 Pick. R. 158; Fuller *v.* Wheelock, 10 id. 135.

whomsoever else, &c., A, being released by B, the plaintiff, in an action for a return of premium, was admitted to testify that he had not authorized or adopted the policy.[1]

A release made collusively, or one whereby the interest of the produced witness is not extinguished, will not render him competent.[2]

2055. The assignor of a policy, who is *nominal plaintiff*, or any other nominal plaintiff in a suit at law, *is not competent* to testify, though he may have no interest in the suit.[3]

A case being put to the jury against several underwriters, and verdicts rendered against some of them, it was ruled by Cranch J., that these are not admissible witnesses in further proceedings against the others.[4]

2056. *Though a party cannot introduce testimony for the purpose of discrediting his own witness in general, he may disprove a statement of his witness.*[5]

SECTION III. DEPOSITIONS.

2057. If a commission to take testimony is objected to, it must be made to appear that the party applying for it has ground to expect to prove something material.[6]

Mr. Justice Washington considered that the fact of the deposition of a witness having been already taken in the United States, was no objection to taking his deposition abroad.[7]

Questions being by either party annexed to the commission, without objection by the other, the answers, if pertinent, cannot be objected to.[8] The witnesses must be examined upon all the interrogatories.[9]

1 Steinback *v.* Rhinelander, 3 Johns. Cas. 269.

2 Bell *v.* Smith, 7 D. & Ryl. 646.

3 Hackett *v.* Martin, 8 Greenleaf's R. 77.

4 Patton *v.* Janney, 2 Cranch, C. C. R. 71.

5 Friedlander *v.* London Ass. Co., 4 B. & Ad. 193.

6 Vandervoort *v.* Columbian Ins. Co., 3 Johns. Cas. 137.

7 Winthrop *v.* Union Ins. Co., 2 Wash. C. C. R. 7.

8 Francis *v.* Ocean Ins. Co., 6 Cowen, 404.

9 Winthrop *v.* Union Ins. Co., 2 Wash. C. C. R. 7.

A commission being sent from the Circuit Court of the United States to the Isle of France, to take testimony there, could not be executed by the commissioners named in the commission, as the taking of testimony, according to the laws of the place, strictly belonged to the judicial tribunals. The commission was accordingly executed by a judicial magistrate in presence of the persons named as commissioners. Mr. Justice Washington ruled, that, so far as the mere formality of taking the testimony was concerned, the depositions were admissible.[1]

A similar decision was given in New York.[2]

SECTION IV. ADMISSIONS, AGREEMENTS, BURDEN OF PROOF, PRESUMPTIONS, INFERENCES.

2058. *An agreement by a corporation is not binding, unless it is made by those shown to be authorized* to bind it.[3]

2059. *An action on a policy being in the name of a nominal assured, the admissions of those interested may be proved.*[4]

2060. *In a suit in the name of the nominal assured* for the benefit of the party really in interest, *the court will prevent the defendants from availing themselves of a defence* which would be *inequitable in respect to the party really interested*,[5] though it might be good against the plaintiff if he were the party in interest.

Agreements and admissions by the assignor, after notice to the underwriters of the assignment, do not affect the assignee.[6] And any agreements or admissions made by the assignor after the assignment, and before notice to the underwriters, would probably be held not to affect the assignee, excepting so far as the under-

[1] Winthrop *v.* Union Ins. Co., 2 Wash. C. C. R. 7.

[2] Lincoln *v.* Battelle, 6 Wend. 475.

[3] Dawes *v.* North River Ins. Co., 7 Cowen, 462.

[4] Per Lord Ellenborough, Bell *v.* Ansley, 16 East, 141.

[5] Gibson *v.* Winter, 5 Barn. & Ad. 96. Lord Denman, C. J., cites Legh *v.* Legh, 1 B. & P. 447; Payne *v.* Rogers, Doug. 391; Jones *v.* Herbert, 7 Taunt. 421; Seaife *v.* Johns, 3 B. & C. 422; Craib *v.* D'Æth, 7 T. R. 670, n.

[6] Frear *v.* Evertson, 20 Johns. R. 142; Hackett *v.* Martin, 8 Greenleaf's R. 79.

writers may have made payments, or any right of set-off may have accrued, in the mean time.[1]

2061. The cases in which payments may be made into court, and the admissions implied by *payment of money into court*, are, in general, matters of construction and inference at the discretion of the court, though controlled in some jurisdictions by statutes.

It does not appear why the defendant should be held to have made any admissions whatever by such payments, excepting that the amount paid in is subject to be taken out by the plaintiff in diminution of the amount of the judgment or otherwise, and not to be reclaimed by the defendant in any event. By the payment the defendant is held to have admitted something to be due, and the court does not permit him to contradict himself by pleading or evidence that nothing is due; but it is not apparent that any evil would result from this inconsistency, any more than from inconsistent counts or pleas, or the ordinary fictions of law, which are familiar in practice. The rule stated by Sir Vicary Gibbs, that the court will not be extremely cautious strictly to tie down the parties to the effect of a payment into court, where it is to prevent their trying their right,[2] if fully carried out, would disembarrass the defendant from the disadvantage he is subject to by the prevailing doctrine, and go far towards abrogating it, and restoring the practice to what the same eminent judge says he remembers it to have been, "when paying money into court was not an admission of any thing."[3]

It is held in effect, Ashhurst, J., giving the opinion, that the defendant is not estopped, by the payment of money into court, to deny that he is liable at all to the plaintiff on the policy declared on.[4]

The doctrine ordinarily stated is, that payment of money into court, generally, admits a cause of action in all the counts, so far as such ground is sufficiently set forth in each.[5]

[1] See supra, No. 81. See also Andrews *v.* Beecker, 1 Johns. Cas. 411; Raymond *v.* Squire, 11 Johns. R. 47.

[2] Everth *v.* Bell, 7 Taunt. 450.

[3] Rucker *v.* Palsgrave, 1 Camp. 557. See also Freard *v.* Dawson, Marsh. Ins., 3d ed. 703.

[4] Cox *v.* Parry, 1 T. R. 464.

[5] Stafford *v.* Clark, 2 Bing. 437; Starkie's Ev. 1093.

And payment on any count admits the cause of action to the amount paid in, so far as it is sufficiently set forth.[1]

The operation of the doctrine as stated above is illustrated by the case of an action on a lease, in which two breaches were alleged, one for not keeping the premises in repair, the other for not paying rent, on the latter of which money was paid into court, which was held to be an admission of an agreement to keep the tenements in repair, as alleged in the declaration.[2]

It has been held to admit seaworthiness:[3]

And the making of the policy:[4]

And the plaintiff's interest:[5]

And a loss, if alleged in the count on which payment is made;[6] but the decisions subsequently cited seem to be otherwise.

It does not admit an illegal claim:[7]

Nor that all goods which the policy was intended to cover, were put at risk:[8]

Nor that the loss is a total one, though it is so alleged:[9]

Nor that there was a stranding, as alleged by the plaintiff.[10]

2062. Where the payment of money into court in an action on a policy of insurance upon the declaration generally, and not specifically upon the count for money had and received, is held to admit the contract, *the plaintiff, by filing cross interrogatories* for a deposition proposed to be taken by the defendant to prove the fraud of the plaintiff in effecting the policy, thereby *waives the right to urge that paying in the money was an admission* of the contract.[11]

[1] Stafford *v.* Clark, 2 Bing. 437; Starkie's Ev. 1093; Long *v.* Grenville, 3 B. & C. 10; Ribbans *v.* Crickett, 1 B. & P. 264.

[2] Dyer *v.* Ashton, 1 B. & C. 3. See also, for a similar illustration, Muller *v.* Hartshorn, 3 B. & P. 556, stated infra.

[3] Harrison *v.* Douglas, 5 N. & M. 180.

[4] Andrews *v.* Palsgrave, 9 East, 325.

[5] Bell *v.* Ansley, 16 East, 141.

[6] Ibid.

[7] Ribbans *v.* Crickett, 1 B. & P. 264; Freard *v.* Dawson, Marsh. Ins., 3d ed. 703.

[8] Cox *v.* Parry, 1 T. R. 464; Mellish *v.* Allnutt, 2 M. & S. 106.

[9] Rucker *v.* Palsgrave, 1 Camp. 556; S. C., 1 Taunt. 419.

[10] Everth *v.* Bell, 7 Taunt. 450.

[11] Muller *v.* Hartshorn, 3 B. & P. 556.

It accordingly appears, that courts are disposed to restrain the admissions by payment of money into court, in actions on policies of insurance, within very narrow limits.

2063. *The defendant having, by mistake, paid in money on the declaration generally, was permitted,* on payment of costs, *to correct the mistake,* and apply the payment to a particular count.[1]

2064. *The underwriter's charging the premium to the broker,* who is, by the course of business between them, to be liable therefor if notice of its non-payment is not given to the underwriter within fifteen days, *is not an admission that,* as between the underwriter and *the assured,* the latter *has paid it,* to the broker.[2]

2065. Under the charter of a company forbidding insurance over three fourths of the value, *the assured is precluded from proving the value of a building to be greater than it is stated* to be *in the policy.*[3]

2066. *A settlement with one underwriter* on a policy *is not admissible in evidence in respect to the other* distinct *underwriters* on the same policy.[4]

Nor is the plaintiff bound by a statement of facts for the opinion of the court *in an action on another policy* upon the same subject.[5]

2067. *The declarations of the plaintiff in taking out a register are not conclusively binding* upon him in respect to proving his interest in the vessel.[6]

2068. *An affidavit* of loss *under one policy by an assured, that he had no other insurance* on his half of a vessel, *does not preclude him from claiming* an interest *under another policy* insuring his and the other owner's interest.[7]

2069. *Evidence that the underwriters knew of a noncompli-*

[1] Andrews *v.* Palsgrave, 3 East, 325.

[2] Acey *v.* Fernie, 7 Mees. & Wels. 151.

[3] Holmes *v.* Charlestown Mut. Fire Ins. Co., 10 Metc. R. 211.

[4] Trenholm *v.* Alexander, 2 Brevard's R. 238.

[5] Elting *v.* Scott, 2 Johns. R. 157.

[6] See supra, c. 3, s. 2.

[7] American Ins. Co. *v.* Insley, 7 Penn. R. 223.

ance with an express warranty, is inadmissible as proof of an implied waiver of objection on account of the noncompliance.[1]

2070. *Admissions before arbitrators cannot be retracted in an action upon their award.*[2]

2071. *A party may prove that an admission was made by him through mistake,* though it is said to have been ruled otherwise in one case.[3]

2072. *The burden is on the party for whose benefit an action is brought, on a policy effected by another for whom it may concern, to prove it to have been intended for his benefit.*[4]

2073. *So the plaintiff must prove authority to effect, or his adoption of, and insurance effected by another,* of which he claims the benefit.[5] Though the bringing of a suit upon the policy has been held to be proof of the adoption of it.[6]

2074. *It is held* in Massachusetts, *that the burden is on the underwriters to prove a concealment;*[7] *but* it seems that *proof* by them *that a material fact was known to the assured, which would* evidently *have enhanced the premium* above the rate in the policy, *will shift the burden* to the assured of proving that the fact was communicated.[8]

2075. *The burden as to proof of compliance and noncompliance with conditions will depend upon the character of the conditions.*[9]

2076. *It is a general presumption, that the master has done his duty* in navigating the vessel.[10]

[1] Kennedy *v.* St. Lawrence County Mut. Ins. Co., 10 Barb. R. 285.

[2] Richardson *v.* Suffolk Ins. Co., 3 Metc. R. 573.

[3] Harding *v.* Carter, Park, Ins. 5. See East India Company *v.* Atkyns, Com. R. 348; 1 Str. 168; Mos. 74; South Sea Company *v.* Bumstead, 1 Eq. Cas. Abr. 76; 1 Phil. Ev. 77, ed. 1823, n. (b), and id. 84, 85.

[4] De Bolle *v.* Pennsylvania Ins. Co., 4 Whart. 68; and see supra, Vol. I. c. 4, No. 382, et seq.

[5] Bridges *v.* Niagara Ins. Co., 1 Hall's R. 247. See 2 Duer, Mar. Ins. 94, s. 2. See also supra, No. 388.

[6] See cases cited supra, 389, 390.

[7] Fiske *v.* New England Mar. Ins. Co., 15 Pick. R. 310.

[8] Livingston *v.* Delafield, 3 Caines's R. 49; Elkin *v.* Jansen, 13 Mees. & W. 655. See 2 Duer, Mar. Ins. 684; 1 Arnould, Mar. Ins. 574.

[9] See infra, s. 12.

[10] Per Story, J., Robinson *v.* Commonwealth Ins. Co., 3 Sumner, 221;

2077. *An indorsement* upon the policy, *by a clerk, of* the *assent* of the company *to an assignment* of the subject, *is ground of presumption by the jury of such assent* in conformity to the provisions of the policy, in the absence of any direct proof of his authority to make the indorsement, and proof that he had been in the practice of often making such indorsements, was held to be another ground for the same presumption or rather inference.[1]

2078. *An underwriter at Lloyd's is presumed to have notice of the contents of the lists there posted up.*[2]

2079. *The fact of the vessel springing a leak where no* extraordinary operation of any *peril* insured against *can have occurred* after the risk commenced, *is* one *ground of inference of unseaworthiness* at the beginning of the risk.[3]

Goods being insured from Philadelphia to Havana, were found damaged on examination eight days after arrival there, the voyage having been fifteen days. Proof *that a vessel arriving* there three days after from the same voyage *had* strong northerly winds during all its passage, *and that the working of the rudder tends to* loosen the planks and *cause leaks* near the stern, was held, in Pennsylvania, to be too remote to be *ground of inference* by the jury *that* the *damage* to the goods *was by perils of the seas.*[4]

2080. *Evidence of an exaggerated representation of the value, and of an over-valuation* of the subject, *is* admissible as a *ground of inference of fraud.*[5]

2081. *The refusal of the assured to let the underwriters examine articles* alleged to be *damaged*, so that they may replace them with others, according to a provision of the policy, if they

Am. Ins. Co. *v.* Bryan, 26 Wend. 563.

[1] Conover *v.* Mutual Ins. Co. of Albany, 3 Denio, 254.

[2] Mackintosh *v.* Marshall, 11 Mees. & W. 116.

[3] Paddock *v.* Franklin Ins. Co., 11 Pick. 227; Miller *v.* South Carolina Ins. Co. 2 M'Cord, 336.

[4] Fleming *v.* Ins. Co., 12 Penn. State (2 Jones's) R. 391.

[5] Ocean Ins. Co. *v.* Field, 2 Story's C. C. R. 59, as to evidence that a building was fraudulently burnt by the assured, see Hoffman *v.* Western Fire & Mar. Ins. Co., 1 La. Annual R. 216; Reynier *v.* the same Def'ts, 12 La. R. 336; Thurtell *v.* Beaumont, 8 J. B. Moore, 112; S. C., 1 Bing. 339; infra, No. 215.

so elect, *is ground from which the jury may make an inference as to the claim of loss being fraudulent.*[1]

2082. In a question of prize, *the destruction of papers is ground of presumption of enemy property.*[2]

2083. *A vessel not heard from* for some while *after reasonable time* for intelligence, *is presumed to have been lost by perils of the seas.*[3]

2084. *Where a loss is paid to an assured* on a policy made wholly or partly *upon the interest of another person* in the subject, *such other may recover the amount* so received *without proving that he ordered or has adopted the insurance.*[4]

2085. The general doctrine, that a *demurrer to the evidence is an admission of all that the jury might infer* from it, is applicable in actions on policies.[5]

2086. *The admissions and agreements of an agent within his authority*, as being a part of the res gestæ, *will bind his principal.*

But proof of those only which were made in reference to the particular policy is admissible, not of those in distinct transactions.[6]

2087. *An agent having made insurance which might be applied to the goods of his principal, and acknowledged and agreed to account for the same, is bound by such acknowledgment and promise.*[7]

[1] New York Fire Ins. Co. *v.* Delavan, 8 Paige's Ch. R. 419.

[2] The Pizarro, 2 Wheat. 227. This rule is applied frequently in prize cases.

[3] Dupeyre *v.* Western Fire & Mar. Ins. Co., 2 Rob. (La.) R. 457. See supra, No. 1149; Watson *v.* King, 1 Stark. 121. See Boulay Paty, Droit Com. tom. 4, p. 245, ed. 1823.

[4] Miltenbergher *v.* Beacom, 9 Penn. R. 198.

[5] Cocksedge *v.* Fanshaw, Doug. 114; Smith *v.* Steinback, 2 Caines's Cas. in Error, 158; Patrick *v.* Ludlow, 3 Johns. Cas. 10; Patrick *v.* Hallett, 1 Johns. R. 241; Forbes *v.* Church, 3 Johns. Cas. 159. See also Gould's Plead. 479.

[6] Bentham *v.* Benson, Gow, 45. See Fairlie *v.* Hastings, 10 Ves. 123. Langhorn *v.* Allnutt, 4 Taunt. 511; Kahl *v.* Jansen, and same Plaintiff *v.* Cologan, id. 565; and Reyner *v.* Pearson, id. 662.

[7] Durand *v.* Thouron, 1 Porter's (Ala.) R. 283.

SECTION V. DOCUMENTS. — BOOKS. — ENTRIES. — STATEMENTS.

2088. Questions arise in actions on policies, as to the admission of entries in *books, documents, memoranda, and statements* of persons not parties to the suit or agents of the parties. These descriptions of evidence *are admitted by* actual *inspection,* by authentication on *oath,* or by *certificate, or* are introduced in pursuance of *statutes.* The object is sometimes limited to the proof of the fact of a certain proceeding, as that a protest was made, a notice was given ; in others, it is to introduce entries, memoranda, and statements as evidence of the facts recited.

2089. *A fact being proved, evidence of the circumstances* connected with and explaining it *thereby becomes admissible.*

Thus, if a vessel is insured for a certain voyage, and sails on a route common to that and a different voyage, and the question arises on which she in fact did sail, entries in the log-book, the bills of lading, charter-party, letters or declarations of the master or owners, as, for instance, the instructions to the master,[1] may all go to put a construction upon this act of sailing. The fact proved in this case, namely, the sailing, itself introduces, and makes admissible as evidence, a variety of other testimony which may not of itself be admissible.

The admissibility of the evidence often depends upon its being offered by one or the other party.

2090. *The papers offered by the assured to the underwriters as preliminary proof, are not thereby made evidence on the trial.*

The assured left at the office of the underwriters, as part of his preliminary proof, the decree of condemnation in a foreign court. This did not authorize him to use it in evidence on the trial, on which it would not otherwise have been admissible.[2]

2091. *The certificate of a copy of the register of a ship by the collector, is not admissible.*

[1] Houston *v.* New England Ins. Co., 5 Pick. 89.

[2] Thurston *v.* Murray, 3 Binn. 326; and see also Flindt *v.* Atkins, 3 Camp. 215; and Sexton *v.* Montgomery Ins. Co., 9 Barb. R. 191, infra.

The law gives the collector no authority to certify copies as evidence.[1] The copy must be compared and sworn to,[2] or it must be certified by the register of the Treasury Department, with a certificate under the seal of the Secretary of the Treasury, that the person certifying the copy is register.[3]

2092. *The bill of lading* is not admissible as evidence of the shipment of the goods, unless it is authenticated by oath.[4]

2093. *A license* is primâ facie evidence, that when the ship left her port of outfit she sailed upon the voyage insured.[5]

2094. To rebut the evidence of the plaintiff as to the ship's sailing with convoy, as warranted in the policy, the defendant produced *the log-book of a convoy ship* to prove the time when the convoy sailed, which was admitted by Eyre, C. J.[6]

In another case, the log-book of a convoy ship, and also the captain's official letter at the end of the voyage, were produced in evidence, without objection, to prove that the ship parted company during a storm.[7]

2095. It was held in South Carolina, that *the protest* of the master in relation to the loss was admissible as evidence on the trial upon the policy.[8] But Lord Kenyon held it to be inadmissible in chief, though he thought it might be read to contradict the captain's testimony.[9] And this is the general doctrine.[10]

[1] Story's ed. of Laws of U. S., vol. 1, p. 268, c. 45, s. 2.

[2] Coolidge *v.* N. Y. Firemen Ins. Co., 14 Johns. R. 308. Sed quære, see 1 Dall. 415; and Abbott on Shipping, American ed. 1829, p. 63, n. (1), per Story.

[3] Catlett *v.* Pacific Ins. Co., 1 Paine, 594. The enrolment of the vessel purporting to have been made on oath, is evidence of ownership in an action against the party in whose name it is enrolled. Hucker *v.* Young, 6 N. Hamp. R. 95.

[4] Dickson *v.* Lodge, 1 Stark. R. 226.

[5] Marshall *v.* Parker, 2 Camp. 69.

[6] De Israeli *v.* Jowett, 1 Esp. R. 427.

[7] Watson *v.* King, 4 Camp. 272.

[8] 2 Bay, 239.

[9] Christian *v.* Coombe, 2 Esp. 489.

[10] Senat *v.* Porter, 7 T. R. 158; Marine Ins. Co. *v.* Straas, 1 Munf. 408; Patterson *v.* Maryland Ins. Co., 3 H. & J. 71. See as to the protest as evidence, Ship Betsey, Haggard, 28; and Ruan *v.* Gardner, 1 Wash. C. C. R. 145; American Ins. Co. *v.* Francia, 9 Penn. R. 390. It seems that in Pennsylvania a protest extended within twenty-four hours after the vessel is moored, is admissible evidence of loss for the assured. Fleming *v.* Marine

2096. *A survey* is not admissible as evidence on the part of the assured, unless it is called for by the underwriters.[1]

It was held in Massachusetts, that the assured are not obliged to produce the survey if called for by the underwriters. It was a case in which the vessel was condemned as unseaworthy.[2] But it was held by Mr. Justice Washington, that a survey made under a warrant of a Vice-Admiralty Court in St. Kitts must be produced by the assured in proving the loss.[3]

It being proved that the ship had been repaired after survey, the defendant proposed to read a notarial copy of the survey in evidence, to show that the defect had not been remedied by the repairs. Lord Kenyon ruled it out as to this point, admitting it merely as proof that a condemnation had taken place.[4]

It is held in Massachusetts, that what was said by one of the surveyors, at the time of the survey, and not inserted in the report of the survey, cannot be proved as part of the res gestæ by other witnesses.[5]

The survey, when admitted, is considered to be evidence of much weight as to the facts stated by the surveyors from their personal observation on the spot, but still subject to be rebutted by other evidence.[6]

2097. *Post-office marks*, being verified, are evidence that the letters marked were in the post-office at the date of the mark.[7]

A letter from Trieste ordering the insurance, addressed to a person in England, bearing the English post-mark, was ruled by Lord Ellenborough to be sufficient evidence that he was "the

Ins. Co., 3 Watts & Serg. 144; American Ins. Co. *v.* Francia, 9 Penn. R. 390. And the protest seems to have been admitted in South Carolina as primâ facie evidence of loss. Church *v.* Teasdale, 1 Brevard's R. 255.

[1] Saltus *v.* Commercial Ins. Co., 10 Johns. R. 487.

[2] Mitchell *v.* New England Marine Ins. Co., 6 Pick. 117.

[3] Robinson *v.* Clifford, 2 Wash. C. C. R. 1.

[4] Wright *v.* Barnard, 2 Esp. R. 700.

[5] Orrok *v.* Commonwealth Ins. Co., 21 Pick. 456.

[6] Gordon *v.* Mass. Fire & Mar. Ins. Co., 2 Pick. 249; and see Washington *v.* Ins. Co. of North America, 2 Wash. C. C. R. 152, 480.

[7] Rex *v.* Plumer, Russ. & Ry. 264; Fletcher *v.* Parry, 3 Starkie, R. 64; Rex *v.* Johnson, 7 East, 64; and see Starkie's Ev., Part IV., American ed. 1828, p. 852; Roscoe's Ev. 114.

person in England who received the order for and effected the insurance."[1]

But it has been held in a criminal case,[2] that the post-mark upon a letter is not sufficient evidence of the place where, and time when, it was put into the post-office.[3]

2098. The *entries in the custom-house books* are admissible for some purposes.

In an action against the owner of an East India ship, for not performing a contract to appoint the plaintiff master, the plaintiff, in order to show the damage, produced a book containing a copy of the *official return of the passengers* on board of the ship, made by the master at the custom-house, in pursuance of the above act. Lord Gifford ruled in favor of its admission, on the ground of its being an entry under the act of Parliament.[4]

Proof that goods which could not be exported without a license were entered at the custom-house for exportation, was held to be sufficient proof of license to export them.[5]

An entry of a deceased clerk, that he had forwarded a license, was held to be sufficient proof of the fact, a witness acquainted with his usual mode of business having sworn that this was according to his usual practice; and that he had no doubt of the license having been sent.[6]

2099. *The assured's affidavit respecting a loss, and his statements on examination*, produced in pursuance of a stipulation in the policy, *having been introduced* into the case *without objection, have been held to be evidence* to the jury *of the amount of the loss*,[7] though the same are not otherwise admissible as such evidence.[8]

[1] Arcangelo *v.* Thompson, 2 Camp. 620.

[2] Rex *v.* Watson, 1 Campbell, 215. And see Judge Howe's note, ibid. Also Starkie's Ev., Part IV. p. 852, American ed. 1828; and Roscoe's Ev. 61.

[3] Arcangelo *v.* Thompson, 2 Camp. 620.

[4] Richardson *v.* Mellish, 1 Ryan & Moody, 56.

[5] Van Omeron *v.* Dowick, 2 Camp. 42.

[6] Hagedorn *v.* Reid, 3 Camp. 377; and see Welsh *v.* Barrett, 15 Mass. R. 380; Halliday *v.* Martinett, 20 Johns. R. 168; Union Bank *v.* Knapp, 3 Pick. 96.

[7] Moore *v.* Protection Ins Co., 29 Maine R. 97.

[8] See supra, No. 2090, and infra, No. 2144.

That is to say, the defendants, by not objecting to its admission for any other than a specific purpose, for which only the plaintiff has a right to produce it, thereby impliedly consent to its being used as evidence to any point to which it is applicable. The doctrine seems to be pretty broad, and to deserve consideration.

2100. Underwriters are presumed to have notice of the marine intelligence in newspapers taken at their office,[1] or *lists* of vessels sailing, arriving, or heard from, *posted up in their office.*[2]

A Honolulu gazette was held not to be admissible to prove the condition of a vessel at the time of her sailing from that port.[3] A public gazette published within the jurisdiction of a government is evidence of a proclamation by the government published in it.[4]

2101. *The court uses its discretion as to ordering the production of papers, or admitting copies* instead.

The correspondence relative to the voyage was ordered to be produced in New York.[5]

In Connecticut, in an action for a partial loss by sea-damage, the underwriters having moved for an order to the assured to produce the instructions to the master, the log-book, clearance, and other custom-house documents, their correspondence, and other documents, papers, and exhibits in their possession relevant to the cause; Mr. C. J. Mitchell said, the courts have never gone further in compelling a party to produce evidence against himself, than to suffer a party claiming the benefit of a writing in the possession of his adversary, to give notice that such writing is needed on the trial, and, if not produced after reasonable notice and demand, to permit the contents to be proved by evidence of an inferior nature.[6]

Where the original is in the hands of the opposite party, a copy may be proved, or parol evidence given of the contents, after

[1] Green *v.* Merchants' Ins. Co., 10 Pick. R. 402.

[2] Bain *v.* Case, 3 C. & P. 496; Freeman *v.* Baker, 5 id. 475.

[3] Child *v.* Sun Mutual Ins. Co., 3 Sandford's City of New York Sup. Ct. R. 26.

[4] Van Omeron *v.* Dowick, 2 Camp. 42.

[5] Lawrence *v.* Ocean Ins. Co., 11 Johns. R. 241, and ibid. p. 245, n.

[6] Sage *v.* Middletown Ins. Co., 5 Day, 409. See 1 Phil. Ev. 386.

giving notice to produce the original, provided the original would be admissible if offered by the party giving the notice.[1]

A mere copy of a copy cannot be proved without proof of the first copy.[2]

The assured may prove a letter of abandonment, without giving notice to the defendants to produce it.[3]

2102. *The report of an auditor* appointed by the court is primâ facie evidence of the facts stated in his report to have been admitted or proved.[4]

2103. *A paper being proved to be lost, a copy, or parol proof of its contents, is admissible.*[5]

The rule, that the best procurable evidence must be produced, applies to this case as well as others, and accordingly, if the party can procure a copy, other proof of the contents is not admissible.[6] A witness having testified to the existence of an original document in a foreign court, and giving a general account of its character and contents, was permitted, on a paper purporting to be a copy being shown to him, to say whether it was a copy.[7] The commission of a privateer being lost, it may be proved by parol.[8]

SECTION VI. JUDGMENTS.

2104. *To give any weight to a judgment, it must appear*, independently of the due authentication of the proceedings, *that the*

[1] Roscoe's Ev., American ed. 1831, p. 7; 1 Starkie's Ev., American ed. p. 349; 1 Phil. Ev., American ed. 1823, p. 386; Liebman *v.* Pooley, 2 Stark. R. 167.

[2] 1 Phil. Ev., American ed. 1823, p. 310, n.; Lincoln *v.* Battelle, 6 Wend. 475.

[3] Peyton *v.* Hallett, 1 Caines's R. 363.

[4] Lazarus *v.* Commonwealth Ins. Co., 19 Pick. R. 81.

[5] Francis *v.* Ocean Ins. Co., 6 Cowen, 404, at p. 416; Rhind *v.* Wilkinson, 2 Taunt. 237; Lincoln *v.* Battelle, 6 Wend. R. 475.

[6] Eyre *v.* Palsgrave, 2 Camp. 605.

[7] Steinback *v.* Columbian Ins. Co., 2 Caines's R. 132. See opinions of the judges in the Queen's case, 3 Stark. American ed. of 1828, p. 1742.

[8] The Estrella, 4 Wheat. 298. See also Kensington *v.* Inglis, 8 East, 273; Brewster *v.* Sewall, 3 B. & A. 296; Williams *v.* Younghusband, 1 Stark. R. 139.

subject-matter was within the jurisdiction of the court by which it is given, whether it be a proceeding in rem or in personam.[1]

So far as the question of jurisdiction is of a local character, or arises under the law of nations, the court in which the judgment is offered as evidence will examine it very freely; but so far as it depends upon the laws and municipal regulations of a foreign country, the evidence is construed liberally in favor of the jurisdiction being authorized.[2]

The record produced may show want of jurisdiction.[3]

Due notice to parties is requisite to the validity of the judgment.[4]

2105. *If the court has jurisdiction, and the subject and parties are brought before it, the judgment is conclusive* between the parties to the proceeding, or affected by notice, *until it is altered or annulled* on a revision by the same court, or, on error, appeal, or otherwise, by a superior tribunal, whether the proceeding is at common law,[5] in an ecclesiastical court,[6] or in admi-

[1] Story, Conflict of Laws, pp. 491, 492, s. 586; Rose *v.* Himely, 4 Cranch, 239, where this question is elaborately considered by Marshall, C. J.; The Flad Oyen, 1 Chr. Rob. 135, 139; Smith *v.* Surridge, 4 Esp. Cas. 25; Oddy *v.* Bovill, 2 East, 473; Powling *v.* Wilson, 1 Johns. R. 192; The Christopher, 2 Chr. Rob. 209; The Kierlighett, 3 id. 96; The Comet, 5 id. 285; The Helena, id. 3; Skinner, 493; Beake *v.* Thyrwhit, or Tyrrell, 1 Show. 6; S. C., 3 Mod. 105; S. C., Comb. 120; S. C., Holt, 47; Snell *v.* Faussett, 1 Wash. C. C. R. 271; and cases passim.

[2] Francis *v.* Ocean Ins. Co., 6 Cowen, 404; Cucullu *v.* Louisiana Ins. Co., 5 Martin's R., N. S. 480; the same Plaintiff *v.* Orleans Ins. Co., id. 13; Rose *v.* Himely, 4 Cranch, 239; Hudson *v.* Guestier, id. 293.

[3] Donaldson *v.* Thompson, 1 Camp. 429; The Flad Oyen, 1 Chr. Rob. 135; Wheelwright *v.* Depeyster, 1 Johns. R. 472. Contra, Smith *v.* Surridge, 4 Esp. Cas. 25; 1 Camp. 433, n.

[4] The Mary, 9 Cranch, 126; Buchanan *v.* Rucker, 1 Camp. 63; 9 East, 192; Sawyer *v.* Maine Fire & Marine Ins. Co., 12 Mass. R. 291; Shumway *v.* Stillman, 6 Wend. 447; 2 Erskine's Ins. 995; Phillips *v.* Hunter, 2 H. Bl. 409.

[5] 1 Starkie's Evid., American ed. 1828, p. 207, and cases passim.

[6] Newland *v.* Horsemen, 1 Vernon, 20; Prudham *v.* Phillips, Ambl. 763; Phillips *v.* Crawley, Freeman, 83; Hargrave's Law Tracts, 447; Bunting *v.* Lepingwell, 4 Co. 29, a.; 7 id. 43, b.; Jones *v.* Bow, Carth. 225; Blackham's case, 1 Salk. 290; Clews *v.* Bathurst, Str. 960; Dacosta *v.* Villa Real, id.

ralty,[1] or a revenue court,[2] or a court of record, or not,[3] or is a decision by commissioners of bankruptcy.[4]

But a judgment binding only as between the parties to it, in favor of the underwriters by reason of failure of proof of interest in the plaintiff in a prior suit, is not a bar in a suit on the same policy by another plaintiff; that is, failure by a party not interested is not a bar to one who is so, and is an assured.[5]

2106. The doctrine of the conclusiveness, of judgments is applicable to foreign as well as domestic judgments,[6] and has been so held from an early leading case [7] downward.[8]

The judgment of a foreign tribunal may be pleaded in bar of a suit for the same cause between the same parties, no less than that of a domestic tribunal.[9]

One ground upon which the conclusiveness of foreign judgments has been put is, that of "national comity;"[10] a very unsatisfactory reason where an assured has been deprived of the benefit of his policy fairly made, and the conditions of which he has fully complied with, by the unjust decree of an admiralty court, proceeding, as Lord Kenyon says, "upon a system of plunder."[11] This reason was not applicable in reference to the French tri-

961; 1 Atk. 49; 1 Ves. Sen. 159; Duchess of Kingston's case, 11 Harg. State Trials, p. 198, ed. 1781; S. C., 20 Howell's State Trials, ed. 1816, p. 355; S. C., Hale's Hist. Com. Law, p. 31.

[1] Broom's Case, 1 Salk. 32.

[2] 2 Bl. 977.

[3] Cases supra, in the ecclesiastical and admiralty courts, and Roberts *v.* Fortune, 1 Harg. Law Tracts, 446. The case of Henshaw *v.* Pleasance, 2 Bl. R. 1174, is contra, but is doubted. 1 Stark. Ev. 211, American ed. 1828.

[4] Brown *v.* Bullen, Doug. 392; Doe *v.* Rosser, 3 East, 15; Price *v.* Hollis, 1 M. & S. 105.

[5] Fleming *v.* Ins. Co. 12 Penn. (2 Jones's) R. 391.

[6] 1 Starkie's Ev. 207.

[7] Hughes *v.* Cornelius, 1 Show. 143; 2 id. 232; S. C., T. Raym. 473; S. C. Skin. 59; S. C., 2 Ld. Raym. 893, 935; S. C., 12 Vin. Abr. 86; Ev. A. 5. 13.

[8] Anon., Ld. Raym. 840; Com. Dig. Adm. E.; 1 Atk. 49; Everth *v.* Hannam, 2 Marsh. R. 72; 6 Taunt. 373; and cases cited infra.

[9] Walker *v.* Witter, Douglas, 1. Though it was decided otherwise in an early case in chancery, Gage *v.* Bulkley, Ridgeway's R. 266.

[10] The Mary, 9 Cranch, 126; Rapage *v.* Amory, 2 Dallas's R. 51, 231.

[11] See Livermore's Dissertation, 27, 171.

bunals, in which a similar rule did not prevail,[1] and their decrees were principally in question. It is remarked by Marshall, C. J.,[2] that it is for the government, and not the courts, to retaliate wrong. But this does not appear to be the question; which is, to what extent, and subject to what qualifications and exceptions, and in respect to what parties, foreign judgments are conclusive.

Another reason for the doctrine in respect to the decisions of foreign prize courts is, that all the world are parties to their proceedings.[3] But the judgment of every court having jurisdiction, and proceeding unexceptionably, is conclusive upon the parties to the proceedings, and it does not appear why third persons are any more parties to proceedings in admiralty courts than to those before other courts. Prize courts proceed very much upon what they consider the jus gentium; but this does not make absent persons and foreigners the more parties to their proceedings. To render one a party to a proceeding, he should, as Mr. Chief Justice Marshall remarks, have notice and opportunity to appeal.

2107. *The* plain *reason for respect for* the *judgments* of courts, foreign or domestic, *is that* already given, namely, that *they have jurisdiction;* and this is as applicable to the decisions of one court as another. This reason is satisfied in respect to foreign judgments, by allowing the decree on a matter within the jurisdiction of a court, on due proceedings being had, to be valid and binding on the parties so far as it can be executed within the jurisdiction and under the orders of the court by which it is given.

2108. *The decisions of foreign* admiralty or other *courts in rem must* necessarily *be treated with great respect, so far as they decide upon rights of property,*[4] since a contrary doctrine would lead to conflicting decrees, followed by conflicting executions of them on the same subject-matter, between the same parties.

If a ship or goods come within a foreign jurisdiction, and a question of forfeiture or other question concerning the title comes

[1] Emerigon, tom. 1, c. 12, s. 20.

[2] The Nereide, 9 Cranch, 388.

[3] Bernardi *v.* Motteux, Doug. 554; Lothian *v.* Henderson, 3 B. & P. 499; The Mary, 9 Cranch, 126; Gardner *v.* Collins, 2 Peters's Sup. Ct. R. 89.

[4] Ocean Ins. Co. *v.* Francis, 2 Wend. 64.

up, the decision of the controversy, and order for its execution, necessarily belong to the foreign tribunal; and what has been forfeited and has actually changed hands, or has been actually levied and paid, cannot be reclaimed in a suit under another jurisdiction between the same parties. This seems to be giving a sufficient extent of conclusiveness to foreign judgments, and is more frequently applicable to those of foreign prize courts than other foreign courts, because their decisions are in rem.

2109. Much of the jurisprudence, both of England and the United States, has gone further, and adopted the doctrine, that the foreign decree is conclusive, not only of what is decreed, but of the grounds and reasons and recitals of facts upon which the decree is founded. If a ship or cargo is condemned as enemy property, or contraband of war, or for a violation of blockade, it has, in very many cases, been held, not only to determine the title to the ship or cargo in question, but also to be conclusive of the facts upon which the decree proceeded; and that not only as between the parties before the foreign court, namely, the assured and the captor, but also as between the assured and his underwriter, who is a third party.

This doctrine resulted in such outrageous wrongs to assureds, that a provision was introduced into policies against the conclusiveness of foreign judgments between the parties to the policy;[1] and the judges, who had at first sternly asserted the conclusiveness of the foreign judgments between assureds and underwriters, finally, before the cases arising out of the European wars from 1790 to 1814 had all been disposed of, began to have misgivings about the doctrine, and to take decided steps towards restraining and mitigating its application. Lord Ellenborough, speaking of these judgments, says: "I shall die, like Lord Thurlow, in the belief that they ought never to have been admitted."[2]

The adjudications upon the subject are very numerous, presenting abundance of discrepancies and direct inconsistencies, so as

[1] Maryland Ins. Co. *v.* Woods, 6 Cranch, 29; Calhoun *v.* Ins. Co. of Pennsylvania, 1 Binn. 293.

[2] Donaldson *v.* Thompson, 1 Camp. 429.

mutually to neutralize each other, and free the question from any preponderance of authority to either side, and leave the courts at liberty to establish the jurisprudence upon a better basis whenever future wars shall give rise to similar cases.

It will suffice to refer to the cases generally for the convenience of those who may have occasion to investigate the subject. The result of an investigation will, I think, lead to the conclusion, that, though a domestic judgment is conclusive of its grounds,[1]

A foreign judgment collaterally introduced in a suit on the policy is only evidence of the proceedings and decree, and is not conclusive as between the assured and underwriters, of the grounds or facts alleged, or inferences, or as to the doctrines asserted.[2]

[1] Wright *v.* Butler, 6 Wend. 284.

[2] See the following insurance cases, namely: To the point that only a final judgment is evidence, Zino *v.* Louisiana Ins. Co., 6 Martin, N. S. 62; — that foreign judgments are conclusive of their grounds, Vandenheuvel *v.* United Ins. Co., 2 Johns. Cas. 127; Pollard *v.* Bell, 8 T. R. 434; Garrells *v.* Kensington, id. 230; Vos *v.* United States Ins. Co., 2 Johns. Cas. 180; Baxter *v.* New England Mar. Ins. Co., 6 Mass. R. 277; Penhallow *v.* Doane's Adm'rs, 3 Dall. 54, 116; Dempzey *v.* Ins. Co. of Pennsylvania, 1 Binn. 299, n.; Mayne *v.* Walter, Doug. 79; De Sousa *v.* Ewer, Park, 361; Saloucci *v.* Woodmass, id. 364; Marsh. Ins. 401; Christie *v.* Secretan, 8 T. R. 192; Geyer *v.* Aguilar, 7 id. 681; Bird *v.* Appleton, ibid. 562; Price *v.* Bell, 1 East, 663; Kindersley *v.* Chase, Marsh. Ins., 2d ed. 423; Baring *v.* Claggett, 3 B. & P. 201; Lothian *v.* Henderson, id. 499; Bolton *v.* Gladstone, 5 East, 155; Baring *v.* Royal Exch. Ass. Co., id. 99; Bell *v.* Carstairs, 14 id. 374; Ludlow *v.* Dale, 1 Johns. Cas. 16; 3 Caines's Cas. 348; Williams *v.* Amroyd, 7 Cranch, 424; Marshall *v.* Parker, 2 Camp. 69; Cheriot *v.* Foussat, 3 Binn. 220; Walton *v.* Bethune, 2 Brevard, 453; — that foreign judgments are only primâ facie evidence, or no evidence of their grounds, Johnston *v.* Ludlow, 1 Caines's Cas. xxix.; Kemble *v.* Rhinelander, 3 Johns. Cas. 130; Smith *v.* Williams, Caines's Cas. in Error, 110; De Wolf *v.* N. Y. Firemens' Ins. Co., 20 Johns. R. 214; N. Y. Firemens' Ins. Co. *v.* De Wolf, 2 Cowen, 56; Francis *v.* Ocean Ins. Co., 404; Robinson *v.* Jones, 8 Mass. R. 536; Wright *v.* Barnard, 2 Esp. R. 700; Laing *v.* United Ins. Co., 2 Johns. Cas. 174; — that the grounds of foreign judgments may be presumed or inferred, Saloucci *v.* Woodmass, Marsh. Ins., 2d ed. 401; Gibson *v.* Mair, 1 Marsh. R. 39; Goix *v.* Low, 1 Johns. Cas. 341; S. C., 2 id. 480; Bernardi *v.* Motteux, Doug. 554; Baring *v.* Claggett, 3 B. & P. 201; Dalgleish *v.* Hodgson, 7 Bing. 495; — that the grounds of foreign judgments are not to be presumed or inferred, Fisher *v.* Ogle, 1 Camp. 418; Opinion of De Gray, C. J., in the case of the

SECTION VII. FOREIGN LAWS.

2110. Our own public laws are presumed to be known to the court, and are taken notice of without being proved.

Foreign laws must be proved. The doctrine that the best testimony that can be procured is required, applies to proof of foreign laws. The sanction of an oath, or other authoritative authentication, is requisite.[1]

A written law must be proved by a sworn copy, or by a copy otherwise duly authenticated.[2] An unwritten law may be proved by parol.[3] Parol evidence of a commercial regulation of Russia, being offered by Mr. Law, (afterwards Lord Ellenborough,) Lord Kenyon said: "Can the laws of a foreign country be proved by a person casually picked up in the street? I shall expect it to be made out to me, not by such a loose evidence, but by proof from the country whose laws you propose to give in evidence, properly authenticated."[4]

Duchess of Kingston, 20 Howell's State Trials, 355; Harg. Law Tracts, 456; Calvert *v.* Bovill, 7 T. R. 523; Fitzsimmons *v.* Newport Ins. Co., 4 Cranch, 185; Vasse *v.* Ball, 2 Dall. 270; Maley *v.* Shuttuck, 3 Cranch, 458; Williamson *v.* Tunno, 1 Brevard, 151; Lambert *v.* Smith, 1 Cranch, C. C. R. 361. For a discussion of the construction and effect of foreign judgments, where collaterally introduced in evidence, and the cases on other contracts than insurance, see Story's Conflict of Laws, s. 593.

[1] Church *v.* Hubbart, 2 Cranch, 187; Consequa *v.* Willings, 1 Peters's Sup. Ct. R. 229; Raynham *v.* Canton, 3 Pick. 293; and see Phil. Ev. Part I. c. 8; 2 Stark. Ev. 568, American ed. 1828; and Mr. Day's note to 3 Esp. 60.

[2] Clegg *v.* Levy, 3 Camp. 166, and Judge Howe's note. A law of any one of the United States is authenticated by the seal of the State. Act of Congress, 1790, c. 38, 1 Story's ed. U. S. Laws, 93; United States *v.* Jones, 4 Dall. 412. And the seal is presumed to have been affixed by the authorized officer having the custody of it. United States *v.* Amedy, 11 Wheat. 392.

[3] Robinson *v.* Clifford, per Washington, J., 2 Wash. C. C. R. 1. See 1 Phil. Ev., Part II. c. 8; per Gibbs, C. J., Millar *v.* Heinrick, 4 Camp. 155; per Spencer, J., Kenny *v.* Clarkson, 1 Johns. R. 385, at p. 394; per Walworth, Chancellor, 6 Wend. 483; Livingston *v.* Maryland Ins. Co., 6 Cranch, 274.

[4] Boehtlinck *v.* Schneider, 3 Esp.

It has been held in New York, that the laws of France cannot be proved by the printed code.[1] The Supreme Court of the United States admitted in evidence the printed copy of the Ohio Land Laws.[2] And a copy of the French Code printed at the office for printing the laws of France, upon which the French Vice-consul said he acted in his office, was admitted by Abbott, C. J., as evidence of the French laws as to marriage.[3]

A foreign law may be proved by a decision of a foreign court. Lord Kenyon said, that the solemn decision of a court of competent jurisdiction in Denmark was better proof of the law of Denmark, on the subject of the contribution of respondentia interest to average, than the testimony of witnesses.[4]

2111. *A treaty between two foreign governments must be proved in the same manner as a foreign law.*

A book being produced in an English court, purporting to be a collection of treaties of the United States, and to be published by authority in the United States; and the American Minister at London being offered as a witness to prove that he was governed by the treaties so published, Lord Ellenborough refused to admit it, saying it was necessary to have a copy compared with the original.[5]

SECTION VIII. EXPERTS. — OPINIONS.

2112. In trials on policies, *experts have in some instances been called to give their opinions* as to the construction of facts otherwise proved, or inferences to be made from them.

But a witness is not admissible to testify, and cannot be inquired of specifically which party should prevail, or what is identically

58. See Boetlingk *v.* Inglis, 3 East, 381; and Inglis *v.* Usherwood, 1 id. 515.

[1] Chanome *v.* Fowler, 4 Wend. 173; and see also Packard *v.* Hill, 2 Wend. 411.

[2] Hinde *v.* Vattier, 5 Peters's Sup. Ct. R. 398.

[3] Lacon *v.* Higgins, 3 Starkie's R. 178; Roscoe's Ev. 60.

[4] Walpole *v.* Ewer, Park. Ins. 629, ed. 1817; Marsh. Ins. 2d ed. 762.

[5] Richardson *v.* Anderson, 1 Camp. 65.

equivalent; or, in other words, directly to instruct the jury what verdict they are to give.[1]

Nor is evidence of the opinion of others, whether experts or not so, of the case before the court, admissible, as, for instance, testimony that other underwriters on the same policy had paid their proportion of the loss on account of which the action is brought.[2]

In a case decided in the time of Lord Mansfield, an insurance broker, in giving his testimony, said, if the assured had communicated the contents of two certain letters, the underwriters would not, in his opinion, have taken the risk. Lord Mansfield said, this was not evidence, but opinion merely, and not to be regarded by the jury.[3] Mr. C. J. Gibbs ruled against the admission of underwriters to give opinions on the materiality of rumors as a ground on which the jury should decide the question of concealment.[4]

Mr. Justice Holroyd ruled in such testimony;[5] and it was admitted by Lord Tenterden;[6] but it was subsequently held by Denman, C. J., and his associates to be inadmissible.[7]

The principle upon which the testimony of experts is admitted seems to be, that from their experience, or science, they know that a certain fact results from one or more others, or certain causes are followed by certain consequences. To give occasion for the introduction of such witnesses, the matter inquired about must be aside from ordinary knowledge and experience, and such as cannot be well understood without explanations by persons skilled in respect to it. The cases just cited seem to be questionable occasions for calling for the mere general opinions of the witnesses, since they could state the reasons why the facts in

[1] Jefferson Ins. Co. *v.* Cotheal, 7 Wend. R. 72; Cincinnati Firemen's Ins. Co. *v.* May, 2 Ohio R. (by Lawrence) 211.

[2] Lambert *v.* Smith, 1 Cranch's C. C. R. 361.

[3] Carter *v.* Boehm, 3 Burr. 195.

[4] Durell *v.* Bederly, 1 Holt, 283.

[5] Berthon *v.* Loughman, 2 Stark. R. 258.

[6] Rickards *v.* Murdock, 1 D. & R. 221; S. C., 10 B. & C. 527; and see 10 Bing. 57. See also Starkie's Ev., Part IV. American ed. of 1828, Vol. III. p. 1176, and London ed. of 1833, Vol. II. p. 632, n.

[7] Campbell *v.* Rickards, 5 B. & Ad. 840.

question were or were not material, which reasons would be certain facts in their experience, the statement of which would enable the jury to put a true construction upon the specific facts proved in the case.

Witnesses being called to testify whether the addition of a boiler-house to a steam saw-mill enhanced the risk, were rejected, because they had no science or experience to enable them to form a more satisfactory opinion than the jury could, themselves, form.[1]

So Coltman, J., ruled, that an expert might be asked whether, on a given (that is the proved) state of facts, the defendant could, by proper care, have avoided a collision,[2] though Coleridge, J., ruled differently in a similar case.[3] But the propriety of the answer must surely depend upon the manner in which the question is put and answered, since it is out of the question for jurymen not experienced in nautical affairs to decide upon nautical matters without the assistance of experts; the experts should, however, be required to give reasons for their opinion.

Thus Lord Ellenborough put the examination of experts respecting the seaworthiness of a ship upon the same ground as calling a physician or surgeon in cases belonging to science and experience in their respective professions.[4]

In determining the amount of loss by a vessel's being stranded, and whether it is partial or total, in case of its not being floated, the estimates of experts must necessarily be taken as to the expense of getting it off and making repairs.[5]

Mr. C. J. Savage and his associates rejected testimony of experts, that an account of articles insured against fire, the entries

[1] Jefferson Ins. Co. *v.* Cotheal, 7 Wendell, 72. See remarks of Mr. Smith, in his note in Carter *v.* Boehm, 1 Leading Cases, 270.

[2] Fenwick *v.* Bell, 1 C. & K. 312.

[3] Sills *v.* Brown, 9 C. & P. 60.

[4] Chapman *v.* Walton, 10 Bing. 57; S. C., 10 B. & C. 527. See Crofts *v.* Marshall, 7 P. & C. 597; Hall *v.* Ocean Ins. Co., 21 Pick. R. 472; Beckwith *v.* Sidebotham, 1 Camp. 116; Thornton *v.* Royal Exch. Ass. Co., Peake's Cas. 25; Moses *v.* Delaware Ins. Co., 1 Wash. C. C. R. 385; Marshall *v.* Union Ins. Co., 2 id. 357; M'Lanahan *v.* Universal Ins. Co., 1 Peters's Sup. Ct. R. 170, at p. 188.

[5] Walker *v.* Protection Ins. Co., 29 Maine R. 317.

in which purported to be made at successive dates, was all made at the same time, on the ground that the jury could judge of this as well as any witness.[1]

The Supreme Court of Massachusetts, Putnam, J., giving their opinion, decided against a witness called as an expert being allowed to answer whether a damaged ship could be repaired so as to be as good a ship as it was before the injury, on the ground that the inquiry was too general, loose, and indefinite.[2] And so Lord Denman ruled against inquiring of an expert whether, under a given state of facts, the underwriters were liable for a loss.[3] And evidence that the agent of the underwriters in the place where an insured building was situated would have refused the risk, was held to be inadmissible.[4]

SECTION IX. PARTIES.

2113. A corporation being plaintiffs in assumpsit must, upon general issue pleaded, prove themselves to be a corporation.[5]

In a suit on a policy for whom it may concern, either party may prove for whom the policy was intended.[6]

In an action on a policy for whom it may concern, proof that the nominal assured, at the time of effecting it, charged the premium to the plaintiff, is admissible as evidence of his being a party to it.[7]

Under a policy in the name of one recited therein to be "interested, or authorized as owner, agent, or otherwise to make the insurance," he and others may join in an action and prove their interest in the subject and the policy.[8]

[1] Phœnix Fire Ins. Co. *v.* Philip, 13 Wend. 81.

[2] Orrok *v.* Commonwealth Ins. Co., 21 Pick. 456.

[3] Crofts *v.* Marshall, 7 C. & P. 597.

[4] Lightbody *v.* North American Ins. Co., 23 Wend. R. 18.

[5] Bank of Utica *v.* Smalley, 2 Cowen, 770.

[6] Supra, Vol. I. c. 4.

[7] Fleming *v.* Ins. Co., 12 Penn. State (2 Jones's) R. 391.

[8] Sunderland Mar. Ins. Co. *v.* Kearney, 6 Eng. Law & Eq. R. (Press of Little, Brown & Co.) 312; S. C., 20 English Law Jour. R. (N. S.) Q. B. 417.

The subjects of authority to make a policy for another, and of the adoption of one by the party for whom it has been voluntarily made, have been already treated of.[1]

The declaration stated that the policy was effected for the plaintiff, by M. and P., his agents in that business. The interest was proved to be in the plaintiff, but no evidence was offered that M. and P. were his agents. This was made ground of objection by the defendants, but the objection was overruled by Mr. Justice Taunton.[2]

To make out the defence that the plaintiff is an alien enemy, it must be proved that his domicile was in the enemy country at the time in question.[3] The place of residence is presumed to be that of the domicile until it is shown otherwise.[4] To rebut this defence on the ground of residence, by license, Lord Ellenborough ruled that express license must be proved.[5] But proof of implied license is considered sufficient in New York.[6]

SECTION X. EXECUTION OF THE POLICY.

2114. *The assured must prove that the defendant subscribed the policy himself, or that it was subscribed by an authorized agent.*

Proof that the agent had often subscribed policies in the defendant's name, and that the defendant had held him out to the world as properly authorized for this purpose, has been held sufficient without proof of a written authority.[7] And Lord Ellenborough held this to be sufficient primâ facie evidence, though the witness, who was the agent, stated that he had a written power, but did not produce it.[8] In an affidavit by the agent of the underwriter for delay of the trial, he stated incidentally, that he subscribed the policy in the name of the defendant. Mr. Justice

[1] See supra, No. 1868.

[2] Palmer *v.* Marshall, 8 Bing. 79.

[3] See supra, c. 2. See Harman *v.* Kingston, 3 Camp. 150.

[4] Elbers *v.* United Ins. Co., 16 Johns. R. 128.

[5] Alciator *v.* Smith, 3 Camp, 245.

[6] Clarke *v.* Morey, 10 Johns. R. 69.

[7] Neal *v.* Erving, 1 Esp. 61.

[8] Haughton *v.* Ewbank, 4 Camp. 88.

Chambre ruled, that this was evidence for the plaintiff, that the policy was signed by the defendant.[1] A memorandum altering the voyage, being indorsed and agreed to by a person as agent of the underwriters, proof that the underwriters had paid losses on policies so altered by the same person as agent, was held by Lord Tenterden to be a sufficient proof of the authority of the agent.[2]

2115. What *documents referred to in the policy* or annexed, *as constituting a part of the contract*, are such part, has been already considered.[3]

SECTION XI. CONSTRUCTION OF THE POLICY. — EVIDENCE ALIUNDE.

2116. It has already been stated, that *in a court of law the parties must be bound by the policy as they have made it*, and that any mistake in it can be corrected only in a court of equity.[4]

It is said, that, "although policies are not technically specialties, not being under seal, they have nevertheless ever been deemed instruments of a solemn nature, and subject to most of the rules of evidence which govern in cases of specialties."[5] But policies are often specialties, those, for instance, made by the Royal Exchange and London Assurance Companies, and most of those formerly, and many at present, underwritten by incorporated companies in the United States. It has never been intimated, however, that there is any distinction, as to strictness or liberality in the construction, between policies under seal, and those without seal; nor does it appear that there is any distinction between policies of insurance and other written instruments as to the rules of construction, otherwise than as policies, like all commercial instruments, are said to be subject to a liberal construction, by which is principally, if not only, meant, that it is more frequently necessary and permitted to go out of the instrument for evidence affecting its construction and application. This does not

[1] Johnson *v.* Ward, 6 Esp. R. 47.

[2] Brockelbank *v.* Sugrue, 5 C. & P. 21; S. C., 1 B. & Ad. 81.

[3] Supra, c. 1, s. 8.

[4] Supra, c. 1, s. 9.

[5] Higginson *v.* Dall, 13 Mass. R. 96.

result from any difference in the doctrines of the law as applied to these and other instruments, but from the nature of the subjects to which policies relate.[1]

2117. *The policy often directly refers to other documents*, and sometimes *in such manner as to make them in effect a part of the instrument.*

This is usually the case in the references, in fire policies, to the terms and conditions indorsed upon them. The manner of making the reference, and the object of it, determine how far the indorsement or document referred to is thereby either made a part of the contract, or is evidence in the construction of it.[2]

But though the meaning of the phraseology of policies as of other written instruments, may, in many cases, be settled by evidence aliunde, the plain ascertained meaning cannot be so set aside.[3]

The provisions of a policy are not subject to be contradicted and superseded by evidence of what took place between the parties at the time of making it, or of what facts were known to the agent of the underwriters.[4]

A policy being made upon the goods from Gottenburg, &c., contained the usual printed words of the form in use in England at the time, "beginning the adventure from the loading," &c., and a written memorandum was added, that the policy was "in continuation of five policies," specifying them. It was held that this reference was a ground for the introduction of such policies, to show that the policy was intended to be upon goods previously laden on board.[5]

2118. *Evidence is admissible to show that the objects of the voyage have been accomplished* by the delivery of the cargo at a port short of that of the destination.[6]

[1] See 1 Greenleaf's Ev. c. 15, s. 275, &c., p. 315, &c., ed. 1842.

[2] Supra, c. 1, s. 8.

[3] Barrett *v.* Union Mut. Fire Ins. Co., 7 Cushing's R. 175; and see supra, No. 133.

[4] Glendale Woollen Co. *v.* Protection Ins. Co., 21 Conn. R. 19, at p. 36.

[5] Bell *v.* Hobson, 16 East, 240.

[6] Shapley *v.* Tappan, 9 Mass. R. 20.

2119. *The court* is always *cautious of going out of the policy for evidence as to its construction.*

In a case before Lord Mansfield, on a policy for twelve months at a certain premium per month, on the question as to introducing testimony to show whether, by the usage, the policy was considered to be for one entire risk, or successive distinct risks of a month each, Lord Mansfield said: "This is a mere question of construction on the face of the instrument, and parol evidence should not have been admitted to explain it." [1]

So it has been held in New York, that the implied agreement, in a general bill of lading in the usual form, that the goods are stowed under deck, cannot be superseded by evidence of an oral agreement that the goods might be stowed on deck.[2]

It cannot be proved by parol, in an action at law on a policy, that "27th" was written by mistake for "20th." [3]

Representations of the assured cannot be proved for the purpose of putting a construction upon words and phrases used in the policy.[4]

Parol evidence is admissible to explain an ambiguity, as where a voyage was described in 1810 to be to a port of discharge in Europe, and some of the ports of Europe were interdicted, testimony was admitted to explain the policy by showing what was the real port of destination.[5]

The profession,[6] or national character of the parties contracting,[7] is of consideration in putting a construction upon their contract.

The construction of the policy will not be affected by proof of an unreasonable usage.[8]

The testimony of a single witness to a usage has been consi-

[1] Loraine *v.* Thomlinson, Doug. 564.

[2] Creery *v.* Holley, 14 Wend. 26.

[3] Ewer *v.* Washington Ins. Co., 16 Pick. 502.

[4] Astor *v.* Union Ins. Co., 7 Cowen, 202; N. Y. Gas-light Co. *v.* Mechanics' Fire Ins. Co., 2 Hall's R. 108; Murray *v.* Hatch, 6 Mass. R. 465; Mellen *v.* National Ins. Co., 1 Hall's R. 452; Levy *v.* Merrill, 4 Greenl. R. 180.

[5] Russell *v.* Degrand, 15 Mass. R. 35.

[6] Robertson *v.* Money, R. & M. 75.

[7] Coulon *v.* Bowne, 1 Caines's R. 288.

[8] See supra, No. 186; also Crofts *v.* Marshall, 7 C. & P. 597.

dered to be hardly a sufficient ground for changing the construction of a contract from the more obvious meaning of the phraseology.[1]

The meaning of words and phrases, not of ordinary use in the vernacular language, and technical words and phrases, or those of a local and peculiar signification, may be determined by proof of the usage.[2]

Though a usage cannot be at all contrary to our own laws, one may be proved in a foreign trade in contravention of foreign laws.[3]

2120. *Whether a usage is proved*, so as to affect the construction of a policy, *by* merely *a preponderating weight of evidence?*

It has been intimated that a usage may be proved by the greater weight of testimony for than against it.[4]

In one case it is suggested, that, on testimony for and against a usage by witnesses of equal number and credibility on each side, the weight is on the affirmative side.[5] But the contrary seems to be clearly the case, since it is all but a demonstration that there is not a usage of such notoriety and generality that everybody is bound to take notice of it.

2121. *Where the policy is wholly ambiguous, and the construction must rest entirely on evidence aliunde, it must*, of necessity, *be determined by the weight of testimony; but where a party sets up a usage whereby the primâ facie construction is proposed to be modified*, upon the ground that the opposite party must be presumed to have notice of the usage, and consequently is bound by it, the better doctrine seems to be, that *the usage is not proved, so long as there is reasonable ground for doubt.*

[1] Parrott *v.* Thatcher, 9 Pick. 426; Thomas *v.* Graves, 1 Report Constitutional Court, 308; Wood *v.* Hickok, 2 Wend. 501; Loring *v.* Gurney, 5 Pick. 15.

[2] See No. 144; also Fowler *v.* Ætna Ins. Co., 7 Wend. 270; Consequa *v.* Willings, Peters's C. C. R. 229; Robertson *v.* Mooney, 1 R. & M. 75.

[3] Livingston *v.* Maryland Ins. Co., 7 Cranch, 506.

[4] 2 Johns. Cas. 290; Consequa *v.* Willings, Peters's Circuit Ct. R. 229; M'Gregor *v.* Ins. Co. of Pennsylvania, 1 Wash. C. C. R. 39.

[5] Palmer *v.* Blackburne, 1 Bing. 61.

SECTION XII. COMPLIANCE WITH CONDITIONS.

2122. *The plaintiff must aver a compliance with express warranties and conditions precedent. Proof of such compliance is* accordingly *requisite* in the first instance on the part of the plaintiff, so far as the stipulations are of a nature to admit of it.[1]

A distinction was made by counsel, in New York, between affirmative and negative warranties as being conditions precedent, the former being considered by the council as such, the latter not so.[2] The warranty against illicit trade was instanced as one of the latter description. But the phrases, "warranted free from average," "illicit trade," "capture in port," and the like, are exceptions from the risks insured against. The clauses considered as stipulations are merely that the assured will not claim a loss coming under the exceptions. He does not prove a compliance, because they are merely negative.

Where the stipulation is of a nature not to admit of positive proof in the first instance, or only to admit of very imperfect proof, a mere presumption or very slight proof will be sufficient; though it may be strictly a condition precedent.

Thus, a stipulation that a policy shall be void in case of any prior insurance evidently does not admit of proof in the first instance, otherwise than by the oath of the assured himself, though it is strictly a condition precedent.

So a warranty of neutral property requires that the ownership, documents, and conduct of the voyage shall be neutral, including, accordingly, some things to be positively done, and others to be avoided or not done; and though the whole are equally conditions precedent, yet some things embraced by the warranty are susceptible of positive proof in the first instance, and others not so; and the testimony to be produced by the plaintiff in the first instance will be modified accordingly. It results from the express terms of the policy, that a condition precedent, whether positive

[1] See supra, c. 9; also Craig *v.* United States Ins. Co., Peters's C. C. R. 410.
[2] 6 Cowen, 467.

or negative, must be complied with, and must appear to the court to be complied with, before the plaintiff has a right to recover; and a material question is, how this must appear, whether by strict, or imperfect and slight proof, or by mere presumption until the contrary is shown. The distinction above suggested, between stipulations of a positive and negative character, may have some force and application as to the evidence to be produced in the first instance by the assured.

The plaintiff must prove, in the first instance, a compliance with a warranty to sail with a certain license:[1]

And with the warranty of national or neutral character, so far as ownership is concerned.[2]

But the conduct necessary to the maintenance of the national or neutral character is not of a nature to admit of proof in the first instance, and therefore compliance with a warranty in this respect is presumed until the contrary is shown.

If the plaintiff, in proving his loss, introduces evidence, which primâ facie imports a noncompliance with the warranty of national character, or any other warranty, he must himself rebut such implication.

Thus, where he introduces a record of condemnation on capture for violation of blockade to prove a total loss, such condemnation being stipulated not to be conclusive, he must rebut this primâ facie evidence, by proof, in the first instance, that he did not violate a blockade.[3]

Under the condition that a loss is to be paid only on the production of certain preliminary proofs, evidence is requisite that such were produced.[4]

[1] Craig *v.* United States Ins. Co., Peters's C. C. R. 410.

[2] Ocean Ins. Co. *v.* Francis, 2 Wend. 64; Arcangelo *v.* Thompson, 2 Camp. 620; Pacific Ins. Co. *v.* Catlett, 4 Wend. 75; Catlett *v.* Pacific Ins. Co., 1 id. 561; S. C., 1 Paine's R. 594. And so a noncompliance with a stipulation to insure leased premises at some office in or near London, must be proved in the first instance by the lessor who alleges such noncompliance. Bridger *v.* Whitehead, 8 Ad. & El. 571.

[3] Smidt *v.* Ins. Co., 1 Johns. R. 249.

[4] Fleming *v.* Ins. Co. 2 Penn. State (2 Jones's) R. 391.

The rule as to proof in the first instance of a compliance with express warranties in fire and life policies is the same as in respect to marine policies. Compliance must be proved in the first instance, so far as the warranty or condition is susceptible of such proof.[1]

The condition in a life policy, that the assured shall make true answers to certain inquiries, is presumed to be complied with until the contrary is proved.[2]

The assured, in some cases, necessarily subjects himself to proof in the first instance of compliance with a condition not contained in the policy; as where the legality of the voyage requires the production of a license, and the license produced is a conditional one.[3]

An allegation of compliance with a condition is supported by proof that the underwriters waived it.[4]

The subject of proof of seaworthiness has been already considered.[5]

SECTION XIII. INTEREST.

2123. *The assured must*, except under a gaming policy, *prove his interest* in the subject at a time *when*, and place where, *the policy may*, by its terms, *attach, and* remaining *when the loss occurred;* for if he had then no interest, he cannot prove any loss.[6]

It has been said, that proof of interest at the beginning of the risk is sufficient, notwithstanding an assignment before the loss.[7] But this is against the current of jurisprudence.[8]

Proof of a sale of mortgaged property under a decree in chan-

[1] See supra, c. 9, s. 10, as to warranties in fire policies.

[2] Rawlins *v.* Desborough, 8 C. & P. 321.

[3] Everth *v.* Tunno, 1 B. & Ald. 142; 1 Stark. 508; Camelo *v.* Britten, 4 id. 184.

[4] Pim *v.* Reid, 6 Mann. & Gr. 1.

[5] Supra, s. 12.

[6] Murdock *v.* Chenango County Mut. Ins. Co., 2 Comst. 210.

[7] Sparkes *v.* Marshall, 2 Bing. N. C. 761.

[8] Burgnot *v.* La. State Mar. & Fire Ins. Co., 12 La. R. 326; Gordon *v.* Mass. Fire & Mar. Ins. Co., 2 Pick. 249. See also supra, c. 27, as to the averment of interest.

cery on the application of the mortgagee, and payment of a part of the purchase-money by the purchaser, is held by the Court of Errors in New York, to be evidence of the insurable interest of the mortgager having ceased, and of the interest being in the purchaser and the estate at his risk, although the decree may not have been enrolled, nor a conveyance executed by the master.[1]

It is held by Mr. Justice Woodbury, that the interest of a mortgagee of a vessel is proved by the mortgage, against the claim of the assignees of the insolvent mortgager, although the mortgage is not recorded with the city clerk in pursuance of the state law respecting a mortgage of personal property until after the mortgager has assigned his property to assignees under the state insolvent law.[2]

On proof of interest at the beginning of the risk, its continuance will be presumed, since it would not be easy for the plaintiff to prove that he had not transferred his interest.

The interest of the assured at the time of loss, is as requisite in an action in his name on an assigned policy, as on one not assigned;[3] and accordingly if his interest has ceased, whether before or after the assignment, nothing can be recovered.

It is no objection that others may have acquired a lien on the subject, provided the assured continues to have an interest to which the description in the policy is applicable.[4]

If the interest appears primâ facie not to be legal, the assured must rebut this presumption. If, for instance, the insured goods have been imported from, or exported to, an enemy country, the assured must rebut the presumption of the illegality of the insurance by proving a license.[5]

2124. *Possession and acts of ownership are evidence of interest in a ship.*[6]

[1] M'Laven *v.* Hartford Fire Ins. Co., 1 Selden's R., Court of Appeals, 151.

[2] Leland *v.* Ship Medora, 2 Woodb. & Minot's R. 92.

[3] Ashley *v.* Ashley, 3 Simons, 149, per Shadwell, V. C.

[4] Hibbert *v.* Carter, 1 T. R. 745. See 2 Duer, Ins., Lect. 9, s. 35.

[5] Robinson *v.* Morris, 5 Taunt. 720.

[6] Bas *v.* Steele, 3 Wash. C. C. R. 381; Sharp *v.* United Ins. Co., 14 Johns. R. 201; Lamb *v.* Durant, 12

Proof that one of the three plaintiffs conversed with a broker about stopping the cargo as security for the freight, being offered to show their interest in the ship, the court said it amounted to nothing.[1]

In an action against the defendant as owner, proof that he spoke of damage to "his" ship, or detained "his" ship, was ruled by Mr. C. J. Gibbs to be subject to the explanation that he was speaking as agent.[2]

It being testified by the captain, that he was appointed and employed as such by the plaintiffs, and that the ownership was derived to the plaintiffs by a bill of sale executed by him as attorney to the former owner; this was held not to render it necessary to produce the bill of sale, on the ground that mere possession was sufficient primâ facie evidence.[3]

A notarial copy of a bill of sale of the ship to the plaintiff was held a good substitute for the original for the purpose of proving an interest in the ship, the transfer being made in France before a notary, who, according to the practice there, recorded the sale and gave the parties a copy of his record, so that the original was in fact a record.[4]

Where the assured had made a conveyance of the ship, purporting to be absolute, after the date of the policy, it has been held that he could not be permitted to prove that the conveyance was merely a mortgage, when this would have shown an attempt on his part to conceal his property fraudulently from his creditors.[5]

It has been considered whether the registry act must be complied with in order to confer a legal interest in a registered ship.[6] In respect to proof of ownership, a distinction is to be made as to the party by whom and against whom the register is introduced.

Mass. R. 54; Vinal *v.* Burrill, 16 Pick. R. 401.

[1] Pirie *v.* Anderson, 4 Taunt. 652.

[2] Tullock *v.* Boyd, 1 Holt, 487.

[3] Robertson *v.* French, 4 East, 130; and see Abbott on Shipp. 50; Thomas *v.* Foyle, 5 Esp. Cas. 88; Wendover *v.* Hogeboom, 7 Johns. R. 308.

[4] Woodward *v.* Larking, 3 Esp. R. 286.

[5] Carroll *v.* Boston Mar. Ins. Co., 8 Mass. R. 515.

[6] Supra, No. 264.

It is not evidence of ownership when offered by the party in whose name it stands, it being nothing more than his own act.[1]

Lord Ellenborough held the register sufficient primâ facie evidence to charge parties named in it as owners for repairs or supplies, being in the nature of an admission on their part;[2] but not without some sufficient evidence to connect them with it, and showing that they took it out, or that it was taken out with their consent.[3] So if a register in the name of a party proposed to be charged is proved, and the party is connected with it, still, in order to affect him, the whole evidence must cover the time to which the suit relates.[4] Where the defendant in a suit for repairs stood the registered owner after having sold the ship, he was held not to be liable for repairs made at the request and by the procurement of the vendee acting as owner.[5]

A defendant cannot support a plea in abatement, that others are not joined with him as owners in a suit for supplies, merely by a proof of the ship being registered in his and their names.[6] That is, a party who is a registered owner cannot prove another to be an owner merely by the register, as against a third party.

It is evident, that the taking out of a register as owner, so far as the party acts in it, is of itself an act of ownership, of more or less weight, in any particular case, according to the time and circumstances, and, like other acts of ownership, if it is considered in this light only, it is proof requiring to be rebutted. It is said by Mr. Abbott (afterwards Lord Tenterden,) in his Treatise on

[1] Ligon *v.* Orleans Nav. Co., 7 Martin, N. S. 682; Leonard *v.* Huntington, 15 Johns. R. 298; Colson *v.* Bonzey, 6 Greenl. R. 474; Lord *v.* Ferguson, 9 N. Hamp. R. 380; Weston *v.* Penniman, 1 Mason's R. 306; Ring *v.* Franklin, 2 Hall's R. 1.

[2] Stokes *v.* Carne, 2 Camp. 339; Vinal *v.* Burill, 16 Pick. 401; Colson *v.* Bonzey, 6 Greenl. R. 474; Young *v.* Alexander, 8 East, 10; Hacker *v.* Young, 6 N. H. 95; Bixby *v.* Franklin Ins. Co., 8 Pick. 86; Lord *v.* Ferguson, 9 N. H. 380.

[3] Frazer *v.* Hopkins, 2 Taunt. 5; Smith *v.* Fuge, 3 Camp. 456; Cooper *v.* South, 4 Taunt. 802; Tinkler *v.* Walpole, 14 East, 226.

[4] M'Iver *v.* Humble, 16 East, 169.

[5] Leonard *v* Huntington, 15 Johns. R. 298; Young *v.* Alexander, 8 East, 10.

[6] Flower *v.* Young, 3 Camp. 240.

Shipping,[1] that the register is not evidence of interest in an action on a policy of insurance; but it is material, that, in the case cited, it was not proved that the plaintiff took out the register, or did any other act of ownership.

It is well settled, that the assured on the ship may prove his interest without proving that the ship is registered in his name.[2]

The plaintiff, in an action of trover for the fragments of a wreck, may prove his property without proving a registry in his name; and proof by the defendant that the ship was registered, and that the register was not recited in the bill of sale to the plaintiff, which, under the British registry acts,[3] made the bill of sale void, was held not to defeat the plaintiff's right to recover.[4]

Under the British registry act, admitting that a failure to comply with it would avoid the title, still it was held that where a broker had received of underwriters the amount of a loss under a policy on a registered ship in behalf of partners, he could not object to paying it over to the surviving partner, on the ground that the ship was registered in the name of one only of the partners.[5]

There is a class of cases in the courts of chancery, in the administration of the estates of bankrupts, in which it has been maintained, pretty strictly, that the court will not recognize an ownership in a registered vessel not held in conformity to the registry acts.[6] A doubt has been suggested whether this doctrine extended to an equitable interest, but the inclination of the Court of Chancery in England seems, on the whole, to be not to except

[1] Page 66, cited Pirie *v.* Anderson, 4 Taunt. 652; and see Roscoe's Ev. 178.

[2] Robertson *v.* French, 4 East, 130.

[3] 26 Geo. I. c. 60, s. 17; 6 Geo. IV. c. 110, s. 31.

[4] Sutton *v.* Buck, 2 Taunt. 302. Precisely this question cannot arise under our law, as our registry act is not similar to the British in this respect. Story's Abb., 6th ed. 1829, p. 51, n.; Phillips *v.* Laidley, 1 Wash. C. C. R. 226. But still the provisions are very analogous.

[5] Dixon *v.* Hammond, 2 B. & Ald. 310.

[6] Curtis *v.* Perry, 6 Ves. 739; Mestaer *v.* Gillespie, 11 id. 621; Ex parte Yallop, 15 id. 60, 68; Thompson *v.* Leake, 1 Madd. 39; Battersby *v.* Smith, 3 id. 110; and see Story's Abbott on Shipp., ed. 1820, p. 45, n.

it.[1] Mr. Collyer, however, in his Treatise on Partnership,[2] doubts this doctrine; so also does Mr. Justice Story, in his notes to Abbott on Shipping.[3]

Sir William Scott (afterwards Lord Stowell) decreed possession of a vessel to the party having the bill of sale, against a party claiming under a parol agreement for a purchase, and being in possession of the vessel.[4] The doctrine of the case was, that, in a contest for possession, the court will award it to the party having the legal title.

In a subsequent case, the same eminent judge said, that the register and certificate were conclusive evidence of want of title in those not named therein.[5]

The courts of common law in England have leaned very strongly in favor of considering the title under the registry acts as conclusive.[6]

This doctrine, at least so far as respects any other than an equitable interest, or one conferred by operation of law, has also been adopted by Mr. Justice Story in the Circuit Court of the United States, in respect to our registry act.[7]

The Supreme Court of Massachusetts has considered the registry act of the United States as merely intended to determine the national privileges of vessels, and that it has not the effect of defeating and extinguishing all interest in ships held not in conformity to its provisions; and that the penalties and forfeitures incurred by neglect to comply with it are confined to those expressed in the act itself, and do not extend to the forfeiture of a policy of insurance on any interest in a registered ship, not specified in the register.[8]

[1] Mestaer *v.* Gillespie, 11 Ves. 621; Curtis *v.* Perry, 6 id. 739.

[2] Page 675.

[3] Edition 1829, p. 34; and see Barry *v.* Louisiana Ins. Co., 11 Martin, N. S. 630.

[4] The Sisters, 5 Chr. Rob. 155.

[5] The Frances, 2 Dods. 420.

[6] Marsh *v.* Robinson, 4 Esp. R. 98; Westerdell *v.* Dale, 3 T. R. 306; Rolleston *v.* Hibbert, 3 id. 406; Camden *v.* Anderson, 5 id. 709; Dixon *v.* Hammond, 2 B. & Ald. 310.

[7] Ohl *v.* Eagle Ins. Co., 4 Mason's R. 172.

[8] Bixby *v.* Franklin Ins. Co., 8 Pick. 86; Lazarus *v.* Commonwealth Ins. Co., 5 id. 76. See also Ring *v.* Frank-

2125. *To prove interest in the freight, it is necessary to prove an interest in the vessel,* as owner, charterer, or otherwise, *and that a charter-party was made, goods shipped, or that there was some contract entered into, or act done, whereby an* insurable *interest in the freight accrued.*[1]

Where the interest in freight arises from advances made by the charterer, to be refunded in case of the vessel not arriving, for which he has a lien on the freight, the assured must, in order to recover, prove an actual advance; proof of an agreement to make an advance is not sufficient.[2]

Where two policies were made in the same office, one on freight by the owner of the vessel, the other on "money advanced for sailing charges" by the charterer; in determining the amount of insurable interest under one of the policies, reference was had to the fact, that the other policy had been made; though the policies did not expressly refer to each other.[3]

2126. *Interest in goods is proved by evidence of possession, or of acts of ownership, or a transfer of the title* to the assured by bill of lading or any other document, *or* by evidence of *payment of the price of them.*

Possession is in general a badge of ownership of property, and may, as well as acts of ownership, be given in evidence as primâ facie proof of interest in goods; and the cases on the subject of this species of proof of insurable interest in the ship, apply to proof of interest in goods.[4] The fact that the assured shipped the goods, for instance, is evidence of this description.[5]

The bill of lading is the usual evidence of the ownership of property shipped, and the consignee,[6] or his assignee, is presumed to be the owner, where it is not otherwise expressed in the bill of

lin Ins. Co., 2 Hall's R. 1; Barry *v.* Louisiana Ins. Co., 11 Martin, N. S. 630.

[1] Camden *v.* Anderson, 5 T. R. 709. See supra, c. 3, s. 11.

[2] Robbins *v.* New York Ins. Co., 1 Hall, 325.

[3] Etches *v.* Aldan, 1 M. & R. 157.

[4] Robertson *v.* French, 4 East, 130; Thomas *v.* Foyle, 5 Esp. R. 88; Peyton *v.* Hallett, 1 Caines's R. 363; Amery *v.* Rodgers, 1 Esp. R. 207; Marsh *v.* Robinson, 4 id. 98.

[5] M'Andrew *v.* Bell, 1 Esp. R. 373.

[6] Carruthers *v.* Shedden, 6 Taunt. 14; Bates *v.* Todd, 1 M. & R. 106.

lading.[1] This document being merely an acknowledgment of the master, is not of itself evidence, without authentication;[2] but being authenticated, proof of the delivery and possession of it is proof of a symbolical delivery and possession of the goods.

The taking of a bill of lading by the assured, as being himself the shipper or assignee, is an act of ownership.[3]

It is intimated by Lord Kenyon and Lord Ellenborough, that the assured must prove by other evidence than the bill of lading that the goods were shipped, or that there were somewhere such goods in existence.[4] Upon this doctrine, the bill of lading is proof merely of the interest of the holder in a subject, the existence of which is proved by other evidence.

The bill of lading of the outward cargo was considered by Mr. Justice Washington not to be evidence of an interest in the homeward cargo.[5] That is, it ought to be shown also that the proceeds of the outward cargo were shipped for the homeward voyage.

An obvious mode of proving an interest in goods, is by giving evidence of paying the price of them.[6]

A bill of parcels purporting to be made by a person residing abroad, together with proof of his handwriting, has been considered good proof of interest in goods:[7]

So has the written certificate of a deceased supercargo.[8]

The plaintiff having averred the interest in goods insured to be in A and B, and in "certain persons trading under the firm of W. & J. B. & Co.;" on a motion for a rule to show cause why

[1] Hibbert *v.* Carter, 1 T. R. 745; Caldwell *v.* Ball, id. 205; 6 East, 21; Mason *v.* Lickbarrow, 2 T. R. 63; S. C., 1 H. B. 357; S. C., 2 id. 211.

[2] M'Andrew *v.* Bell, 1 Esp. R. 373; Dickson *v.* Lodge, 1 Stark. R. 226; supra, s. 9.

[3] Peyton *v.* Hallett, 1 Caines's R. 363.

[4] M'Andrew *v.* Bell, 1 Esp. R. 373; Dickson *v.* Lodge, 1 Stark. R. 226; Haddow *v.* Parry, 3 Taunt. 303. See also as to the bill of lading as evidence of interest, Howard *v.* Tucker, 1 B. & Ad. 712; Berkley *v.* Watling, 7 Ad. & El. 29.

[5] Beale *v.* Pettit, 1 Wash. C. C. R. 241.

[6] Davis *v.* Wilkinson, 1 Stark. R. 115.

[7] Russell *v.* Boheme, Str. 1127.

[8] Beale *v.* Pettit, 1 Wash. C. C. R. 241.

judgment should not be arrested because it was not proved who were the members of that firm, this was held to be no variance, and that it was sufficient to prove that there was such a firm, and that they were interested in the goods, without proving the names of all the members.[1]

In a policy on goods on time, the assured's interest in the cargo on any particular passage performed by the ship during that time must be proved in the same manner as if the policy had been on that particular passage only.[2]

2127. *The assured must prove, not only his interest, but also its value,* since the amount of the loss is regulated by that of the interest.

Under a valued policy, the value being agreed, it is sufficient to prove a substantial interest, in a subject corresponding to and satisfying, the description in the policy.[3]

And this rule is no less applicable to a policy on profits than one on a ship or cargo.[4]

Where the whole of the subject valued in the policy is not put at risk, the proportion of the value put at risk must be proved.[5]

Under an open policy, the amount of the value of the subject must be proved.[6] The cost is usually proved where the goods are purchased near to the time of the commencement of the risk;[7] but this is not conclusive.[8]

2128. It was ruled by Tindal, C. J., that *insurance by A and B on a building,* without any specification of the interest, *is sustained by proof of the interest of one as mortgager, and the other as mortgagee.*[9]

[1] Wright *v.* Welbie, 1 Chit. R. 49.

[2] Wolcott *v.* Eagle Ins. Co., 4 Pick. 429.

[3] Lewis *v.* Rucker, 2 Burr. 1167; Grant *v.* Parkinson, Marsh. Ins. 97. See also cases cited, c. 14, s. 1; Alsop *v.* Commercial Ins. Co, 1 Sumner, R. 451.

[4] Alsop *v.* Commercial Ins. Co., 1 Sumner, R. 451.

[5] Chap. 14, s. 1.

[6] Supra, c. 14, s. 2.

[7] Russell *v.* Boheme, 2 Str. 1127; Graham *v.* Pennsylvania Ins. Co., 2 Wash. C. C. R. 113.

[8] Snell *v.* Delaware Ins. Co., 1 Wash. C. C. R. 509.

[9] Pim *v.* Reid, 6 Mann. & Gr. 1.

SECTION XIV. THAT THE SUBJECT WAS WITHIN THE DESCRIPTION OF THE RISKS.

2129. *In order to recover for a loss, the plaintiff must prove that the subject was within the limits of the risk, as to time, place, or other circumstances.*[1]

It must appear that the subject was put at risk within a reasonable time from the making of the policy.[2]

In an action on a policy upon a ship from Portsmouth to Quebec, to prove that she sailed on the voyage, evidence was given that she was seen going out with other ships for Spithead; Lord Ellenborough said: "You must show that she was at Portsmouth on the voyage insured."[3] The same judge considered that evidence of the shipment of the cargo insured, and of the sailing of the vessel under a license for the voyage insured, was evidence that she sailed on that voyage.[4]

To prove that the property insured was shipped, the plaintiff produced a paper made under the direction of a statute, which a clerk in the custom-house stated to be an official paper, containing an account of the cargo which had been examined by the searcher, the original being sent out in the ship. Mr. Justice Chambre ruled, that this was sufficient, being a paper made under authority of an act of Parliament by an officer appointed for the purpose, and lodged as an official document in the custom-house.[5]

SECTION XV. LOSS.

2130. *Fire policies often provide the kind of proof of loss* to be furnished by the assured.[6]

2131. It is not only necessary to prove that the subject was at risk within the terms of the policy, but *it must* also *appear* by

[1] Le Pypre *v.* Parr, 2 Vern. 716.
[2] Mount *v.* Larkins, 8 Bing. 108.
[3] Cohen *v.* Hinkley, 2 Camp. 51.
[4] Marshall *v.* Parker, 2 Camp. 69.
[5] Johnson *v.* Ward, 6 Esp. R. 47.
[6] Routledge *v.* Burrell, 1 H. Bl. 254; Oldman *v.* Bewick, 2 id. 577, n.; Wood *v.* Worsley, id. 574; S. C., Worsley *v.* Wood, 6 T. R. 710.

direct proof, or from sufficient grounds of presumption, *that the loss happened while* it was *within* those *risks.*

Thus, under a policy for a particular voyage, it must appear that the loss happened upon that voyage.[1]

2132. *The plaintiff must not only prove an extraordinary peril, but also that the loss was caused thereby.*[2]

In a suit for a partial loss upon a policy on blankets insured from England to the United States, the defence was that the damage arose from the manufacture or packing, and not from sea-damage. They were spotted in a peculiar manner, resembling the effect of sulphuric acid. Evidence was admitted in defence, that various parcels of blankets from the same manufactory, by other ships the same year, were damaged in a similar manner.[3]

2133. *Under an allegation of loss by the barratry of the master,* it was held by Lord Kenyon and the other judges of the King's Bench, that *the plaintiff is not required to prove that the master was not owner,* though the fact of his not being so is an essential requisite to the plaintiff's recovery, and by alleging barratry it is impliedly alleged that he is not so; that is, the presumption is that the master is not owner, and the defendant must, in the first instance, prove that he is so, if that is the ground of defence.[4] And under such a declaration, it is sufficient to prove the misconduct of a person then acting as master, without further proof that he was so in fact.[5]

2134. *It being proposed in defence, to prove that, by custom, a survey of the cargo* by the officers of the port, *before it was*

[1] Marshall *v.* Parker, 2 Camp. 69.

[2] Coles *v.* Marine Ins. Co., 3 Wash. C. C. R. 159; and see Coffin *v.* Phœnix Ins. Co., 15 Pick. R. 291; Louisville Mar. Ins. Co. *v.* Bland, 9 Dana's R. (Kent.) 143; Fleming *v.* Marine Ins. Co., 4 Whart. 59; S. C., 3 Watts & S. 144; Leftwitch *v.* St. Louis Perpetual Ins. Co., 5 La. Annual R. 706.

[3] Bradford *v.* Boylston Ins. Co., 11 Pick. 162. As to evidence of the winds met with by another vessel which arrived soon after that which carried the insured goods, and the probable effect of working the rudder in causing a leak to damage goods, being proof of damage to goods by perils of the seas, see Fleming *v.* Ins. Co., 12 Penn. (2 Jones's) R. 391; supra, No. 2079.

[4] Ross *v.* Hunter, 4 T. R. 33. See Marsh. Ins., 2d ed. 531.

[5] Ross *v.* Hunter, 4 T. R. 33.

unloaded, was essential to a claim for partial loss by sea-damage, *the evidence was rejected,* since it would be in effect introducing a new condition into the policy.[1]

2135. In case of abandonment, *the assured will be restricted in his evidence to the cause assigned* at the time of making the abandonment.[2]

2136. To establish a claim for a loss by capture, the plaintiff proved *that the ship was captured* by a privateer carrying Spanish colors, and carried into Porto Rico, *and had not been heard from for three years* subsequently. This was held sufficient without proof of condemnation.[3]

2137. The plaintiff in a suit on a policy, having proved a capture, and re-capture, a question was made whether he was bound to produce the proceedings of the Admiralty Court to show the amount of salvage. Sir J. Mansfield, C. J.: "It is true that a capture simply proved establishes a total loss; but *where the plaintiff* in the same breath, *proves a recapture,* there is an end of the capture and total loss, and *the plaintiff is entitled to a partial loss only, which he must make out by evidence.*" [4]

2138. Upon the allegation *that the ship, with the goods* insured on board, *was "arrested," and* the goods "seized, detained, and *confiscated,*" Lord Ellenborough ruled that the said "averment *was sufficiently sustained by proof that the goods were forforcibly taken possession of by the officers of a foreign government.*" [5]

2139. If it is proved *that the vessel* sailed on the voyage insured, and *has not been heard of for so long a time as to afford a presumption of her being lost,* this *will be* sufficient *proof of an averment of a total loss by the perils of the seas.*[6]

It will be sufficient, if she has not been heard from at the port

[1] Rankin *v.* American Ins. Co., 1 Hall, 619. And see Bentaloe *v.* Pratt, Wallace, 60.

[2] Craig *v.* United Ins. Co., 6 Johns. R. 226. See also c. 17, s. 11.

[3] Ruan *v.* Gardner, 1 Wash. C. C. R. 145.

[4] Thullusson *v.* Shedden, 5 B. & P. 228.

[5] Carruthers *v.* Gray, 3 Camp. 142.

[6] Koster *v.* Innes, R. & M. 333; and see cases cited, No. 1496.

of departure.[1] And it is not necessary to prove that she has not been heard from at the port of destination.[2] No particular time is a ground of such presumption; it must depend on the voyage and other circumstances.[3]

An insurance being on time, and the vessel not heard from after the period of the risk, it is a question for the jury, whether, under the circumstances proved, it was lost during that period.[4]

2140. *An averment of loss by any peril insured against, is supported by proof of loss by such peril, occasioned by some other peril insured against*, as by capture in consequence of stranding,[5] or of barratrous conduct of the master.[6]

2141. *The seaworthiness of the ship at the beginning of the voyage, is not a ground of presumption, that* all the *repairs* that became necessary within the period of the risk, or a passage, *were rendered necessary by extraordinary perils;* the burden of proof is still on the assured otherwise to prove the damage to have been the effect of the extraordinary operation of the perils insured against.[7]

2142. *Where a foreign sentence is only primâ facie evidence,* under a policy "against all risks," it has been *held that the sentence of a foreign vice-admiralty court* condemning the vessel *is not conclusive;* or, in other words, a wrong decision is not one of the risks insured against, and so *the proof of condemnation is not evidence of a total loss.*[8]

[1] Twemlow *v.* Oswin, 2 Camp. 85; Newby *v.* Read, 1 Bl. 416; Green *v.* Brown, 2 Str. 1199.

[2] Koster *v.* Reed, 6 B. & C. 19; S. C., 9 D. & R. 2.

[3] Cohen *v.* Hinckley, 2 Camp. 51; Houstman *v.* Thornton, Holt's N. P. Cases, 242. See also supra, No. 1099.

[4] Brown *v.* Neilson, 1 Caines's R. 525. By the French law, the presumption is, that the loss took place immediately after the last intelligence of the vessel. Boulay Paty, Droit Com., tom. 4, p. 245, ed. 1823.

[5] Green *v.* Elmslie, Peake's Cas. 212.

[6] Arcangelo *v.* Thompson, 2 Camp. 620. In Goldsmidt *v.* Whitmore, 3 Taunt. 508, only the barratrous act is specifically alleged; the proximæ causæ, being the consequent seizure and condemnation, are not specified.

[7] Donnell *v.* Commercial Ins. Co., 2 Sumner, 366.

[8] Goix *v.* Knox, 1 Johns. Cas. 337.

2143. *Under a count for a total loss, the plaintiff may prove a partial loss.*[1]

SECTION XVI. THE AMOUNT OF THE LOSS.

2144. *The assured must not only prove that there has been a loss, but he must also prove its amount.*

If he proves a total loss, the amount is shown by the proof of the amount of his interest. So if a part of the goods are utterly destroyed, their value in the policy will show the amount of the loss.

A partial loss may be proved under a declaration for a total loss.[2]

In a partial loss on the vessel, proof of the amount of repairs and expenses determines that of the loss.[3]

It being proved that a vessel ran upon rocks, but no evidence being given of the amount of damage, Abbott, C. J., (afterwards Lord Tenterden,) ruled for nominal damage.[4]

A partial loss on goods under a marine policy is proved by showing the ratio of the damage and expenses to the value of the goods.[5]

Under the clause providing that the assured's neglecting to repair damage authorizes the underwriters to take possession and make repairs;[6] or under the construction of the ordinary form of policy without any such clause, to the same effect, possession rightfully so taken by them and repairs made accordingly, will render proof of the loss on the part of the assured unnecessary, unless he alleges the insufficiency of the repairs, or claims for a total loss, notwithstanding.

[1] Page *v.* Rogers, Marsh. Ins. 731; Watson *v.* Ins. Co. of North America, 1 Binn. 47. See cases supra, c. 27.

[2] See supra, s. 15.

[3] See supra, c. 16, s. 2.

[4] Tanner *v.* Bennett, 1 R. & M. 182; S. C., 1 Dow, 207. But in such case, under a policy with the usual exception of losses under three or five per cent. unless general, the damage, if any were given, should not be less than the rate of exception.

[5] See supra, c. 16, s. 4.

[6] Cincinnati and Firemen's Ins. Co. *v.* May, 20 Ohio R. 211, and see cases supra, No. 1559.

The manner of settling a partial loss under fire policies of the different forms has already been stated,[1] and the loss must be proved according to such manner of settling.[2]

The amount of loss on a stock of goods is proved by testimony of clerks, invoices, bills of purchase, accounts of stock before and after the fire, and amount of sales after an account of stock and before the fire, and books of account.[3]

Under the English rule as to interest in profits, namely, that it must be shown that there would have been a profit, it seems to follow that the assured must, under an open policy, or in case of a partial loss, prove what the amount of the profit would have been;[4] but where the better rule prevails of estimating the profits in proportion to the value of the goods, the proof of loss will be similar to that of the loss on the goods.[5]

The amount awarded to the assured for the value of a building destroyed by order of the municipal authorities, to stop the spreading of a fire, is not evidence of its value as between the assured and underwriters.[6]

The preliminary proofs do not go in proof of the amount of loss.[7]

The assured's affidavit and statements on examination concerning the loss, in pursuance of stipulations in the policy, having been introduced without objection, have been held to be evidence to the jury of the amount of the loss.[8]

It has been held in a Pennsylvania case, that, *under a declaration for a total loss by capture*, without abandonment, *the jury may estimate the spes recuperandi*, and deduct it from the amount insured.[9] It has been objected to the estimate of

[1] Supra, c. 16, s. 6.

[2] See also Hoffman *v.* Western Mar. & Fire Ins. Co., 1 La. Annual R. 216; Marchesseau *v.* Merchants' Ins. Co., 1 Rob. (La.) R. 438.

[3] See Case *v.* Hartford Fire Ins. Co., 13 Illinois R. 676.

[4] See supra, No. 317.

[5] See supra, No. 317.

[6] Pentz *v.* Ætna Fire Ins. Co., 9 Paige's Ch. R. 569.

[7] Sexton *v.* Montgomery Ins. Co., 9 Barb. 191.

[8] Moore *v.* Protection Ins. Co., 29 Maine R. 97.

[9] Watson *v.* Ins. Co. of North America, 1 Binney, 47. See Barber *v.* French, Doug. 281.

the spes recuperandi, that it must necessarily be too vague and loose.[1]

2145. *In reinsurance, the damage will include the expense of defending* against the claim of the original assured, provided the original underwriter was justified in contesting the claim.[2]

2146. *In double insurance*, the assured may recover against either set of underwriters the whole amount insured by them.[3] But *if a part has been recovered against one set, only the excess can be recovered against the others.*[4]

2147. In England the courts have refused, in many cases, to allow interest.[5]

In a case decided in 1823, upon a life policy, the amount insured was payable at the expiration of six months after proof. On the question whether interest could be recovered after the six months, the claim for the allowance of it was rejected by Abbott, C. J., and his associates.[6] But in a more recent case, the same judge intimated that, under some circumstances, interest might be recovered. It was the case of a loss on the western coast of South America, in 1822. The trial in the suit on the policy in England was in 1828. Lord Tenterden said to the jury: "The assured cannot recover interest (which it is in many cases desirable that he should,) unless he has made application to the insurer to pay the amount of the loss, and has notified to him the ground of such his application."[7]

Though it was laid down in one New York case, that the allowance of interest is a matter wholly within the discretion of the jury,[8] yet the doctrine stated by Lord Tenterden is substantially that which has prevailed for a long time in the United States. *The practice is to allow interest from thirty or sixty days after*

[1] See supra, No. 1507.

[2] Hastie *v.* De Peyster, 3 Caines's R. 190; N. Y. State Mut. Ins. Co. *v.* Protection Ins. Co., 1 Story's R. 458.

[3] Newley *v.* Reed, 1 W. Bl. 416; Rogers *v.* Davis, 2 Park, Ins., 423; Davis *v.* Gildart, id. 424; Lucus *v.* Jefferson Ins. Co., 6 Cowen, 635.

[4] Lucas *v.* Jefferson Ins. Co., 6 Cowen, 635.

[5] Kingston *v.* M'Intosh, 1 Camp. 518.

[6] Higgins *v.* Sargent, 2 B. & C. 348.

[7] Bain *v.* Case, 3 C. & P. 496.

[8] Neilson *v.* Columbian Ins. Co., 1 Johns. R. 301.

the abandonment with the exhibition of *preliminary proof* in case of total loss, or exhibition of proof in a partial loss; demand of the loss in either case being implied by the exhibition of the proof, if the assured calls for and is ready to receive payment at the end of the thirty or sixty days.[1]

The interest is allowed on the ground of a demand having been made, and that the assured has been ready to receive payment of the loss; for the interest is due, not in virtue of an agreement to pay it, but on account of the detention of the amount when it ought to have been paid.[2]

Accordingly, where the underwriters were prevented from making payment of a loss by being cited by a creditor of the assured to answer as garnishees, it was held that they were not liable for interest during the time of being so prevented.[3]

So where the assured demanded a total loss, and the underwriters were ready to pay a partial loss, which only was due, interest was not allowed.[4]

And a mere adjustment of a loss by the underwriter at a certain rate per cent. has been considered as not of itself entitling the assured to interest.[5]

2148. *In Pennsylvania, interest* was *allowed on money advanced* for purposes of general average, from the time of making the advance.[6]

2149. In respect to *interest on a loan on bottomry*, since, by the successful termination of the voyage, the marine interest as well as the sum lent becomes due, the whole forms an aggregate

[1] Jumel *v.* Marine Ins. Co., 7 Johns. R. 412; and see Newell *v.* Griswold, 6 id. 45; Catlett *v.* Pacific Ins. Co., 1 Wend. 561; 1 Paine, 619; Pacific Ins. Co. *v.* Catlett, 4 Wend. 75; 1 Hall's R. 261, n.

[2] Depeau *v.* Russel, 1 Brevard's R. 441; Oriental Bank *v.* Tremont Ins. Co., 4 Metc. R. 1; Webb *v.* Protection Ins. Co., 6 Ohio R. 456; and M'Laughlin *v.* Washington County Mut. Ins. Co., 23 Wend. R. 525; and Hallett *v.* Phœnix Ins. Co., 2 Wash. C. C. R. 279; and Osacar *v.* Louisiana Ins. Co., 5 Martin's N. S. (La.) R. 586.

[3] Oriental Bank *v.* Tremont Ins. Co., 4 Metc. R. 1.

[4] Depeau *v.* Russel, 1 Brevard's R. 441.

[5] Hubbard *v.* Jackson, Marsh. Ins., 3d ed. 647.

[6] Sims *v.* Willing, 8 S. & R. 103.

debt; interest at the ordinary rate should be allowed after the bond is due, on the amount of the sum lent and the bottomry interest.[1]

SECTION XVII. NOTICE OF THE LOSS.

2150. Under the stipulation that the loss shall be paid in thirty, sixty, or ninety days after notice and adjustment, the assured must, besides proof of the loss, give evidence of notice, and also of the exhibition of the preliminary proof.[2]

SECTION XVIII. ADJUSTMENT.

2151. The adjustment of a loss by the underwriter is an acknowledgment of it, which binds him, unless it is made under a mistake.

Proof of an adjustment is primâ facie evidence of the loss; and sufficient until it is rebutted by proving that it was made under a mistake of fact;[3] and it may be given in evidence under the count on the policy, or one on an account stated.[4]

It being verbally agreed between the assured and one of the underwriters, that the latter should pay a certain sum for a loss, and, if it should be settled with the other underwriters at a less amount, the surplus should be repaid, and an indorsement was made upon the policy, "Settled a particular average loss of £54 10*s.* and 11*d.* per cent." The loss being settled at a less rate with the other underwriters, it was held by Dallas, C. J., and his associates, in an action by the underwriter to recover back the

[1] Per Story, J., Ship Packet, Barker, Master, 3 Mason, 255.

[2] 1 Johns. Cas. 408, n.; 1 Wash. C. C. R. 145.

[3] Supra, No. 1815.

[4] Herbert *v.* Champion, 1 Camp. 276, n.; Sheriff *v.* Potts, 5 Esp. R. 96; Rogers *v.* Maylor, 1 Esp. R. 489; 2 Chit. Pl., 6th American 5th London ed., 182, and authorities there cited. Hughes on Insurance, 472. Lord Kenyon is reported to have said, that an adjustment was defeated by proof that it was made under a mistake of law; but this appears to be erroneous, at least as a general doctrine. See supra, No. 1818.

surplus, that evidence of the verbal agreement was admissible in support of the claim notwithstanding the indorsement, on the ground that it was a distinct agreement;[1] but this construction is plainly inconsistent with the indorsement. Mr. Arnould suggests a practice to pay a certain sum on account, and settle the amount subsequently, when the deficiency is to be paid or the excess refunded. But this seems not to be a sufficient vindication of the decision, which appears not to be consistent with acknowledged principles, if the indorsement was so made as to be the written agreement of the underwriter, as the case assumes it to have been.[2]

SECTION XIX. EVIDENCE IN DEFENCE.

2152. *It does not appear distinctly whether the vessel is presumed to be seaworthy* until evidence to the contrary is offered by the underwriters, *or the assured must, in the first place, prove the seaworthiness.*

Mr. Justice Story says, the burden of proof rests on the assured; for the existence of seaworthiness at the commencement of the voyage is a condition precedent, implied by law, to the attaching of the policy.[3]

It being objected at the trial, that the assured had given no evidence that the ship was seaworthy, Mr. Justice Washington left it to the jury whether the vessel was seaworthy, "there being no evidence to the contrary."[4] This was, in effect, adopting the presumption of seaworthiness.

The doctrine laid down by the Supreme Court of Massachusetts is, that, in case of objection to the payment of a loss on the ground of unseaworthiness, the presumption is in favor of seaworthiness, and the burden on the underwriter to prove unseaworthi-

[1] Russell *v.* Dunskey, 6 J. B. Moore, 233.

[2] See supra, No. 1815, and cases there cited.

[3] Tidmarsh *v.* Washington Fire & Mar. Ins. Co., 4 Mason, 439.

[4] Popleston *v.* Kitchen, 3 Wash. C. C. R. 138. See also Talcot *v.* Commercial Ins. Co., 2 Johns. R. 124; and see supra, c. 8, s. 2.

ness; so if the assured claims a return of premium on the ground of unseaworthiness, the presumption is in favor of seaworthiness.[1]

The question is of little practical importance, since, if the burden is on the assured in the first place, very general evidence of seaworthiness at the commencement of the risk will be sufficient to throw the burden of proving the unseaworthiness upon the underwriter, if this is the ground of defence.

In a New York case, it appeared that the vessel was out of fuel and lights before the termination of the voyage; the court said that this threw the burden upon the assured, of proving that the vessel was sufficiently fitted out in these respects;[2] which supposes that, if the burden was on the assured in the first place, it was, at the most, only that of giving general and slight evidence.

The seaworthiness or unseaworthiness of the ship at the beginning of the voyage may be inferred from subsequent events. "If," says Mr. Justice Washington, "a vessel, after she commences her voyage, becomes unfit to prosecute it, and has been exposed to no extraordinary perils of the sea, this may raise a strong presumption of her having been unseaworthy, so as to call upon the assured to give strong evidence to repel the presumption."[3]

A vessel, being found to be decayed after a passage from New York to Bermuda, this was considered to be evidence of her having been unseaworthy before sailing.[4]

It being proved that the vessel was seaworthy at the beginning of the risk, it will be presumed to continue so until proof to the contrary.[5]

The underwriters are primâ facie to be considered liable for the boat as an appurtenance to the ship, and if they object that it was

[1] Paddock *v.* Franklin Ins. Co., 11 Pick. 227.

[2] Fontaine *v.* Phœnix Ins. Co., 10 Johns. R. 58.

[3] Court *v.* Delaware Ins. Co., 2 Wash. C. C. R. 480. See also Watson *v.* Ins. Co. of North America, 2 Wash. C. C. R. 480; Talcot *v.* Commercial Ins. Co., 2 Johns. R. 124; Munro *v.* Vandam, 1 Park, Ins. 133; Patrick *v.* Hallett, 3 Johns. Cas. 76; Emerigon, Vol. I. p. 190.

[4] Warren *v.* United Ins. Co., 2 Johns. Cas. 231.

[5] Martin *v.* Fishing Ins. Co., 20 Pick. 389.

improperly slung at the stern, the burden is on them to establish this by evidence.[1]

2153. The defence being that the assured did not comply with the implied *warranty to sail with convoy* under the British convoy act, the burden of proof is on the defendant.[2] In an action on a policy upon a vessel, the defence was that she illegally sailed from Jamaica without convoy. The defendants produced parol testimony, that Admiral B., on that station, was the proper officer for appointing convoy, and that he gave license to sail without convoy; this was held not to be sufficient, without producing evidence of the admiral's authority.[3]

2154. *If the defence is an alleged forfeiture of the insurance by a violation of law, the burden is on the underwriters to prove the violation.*[4]

Thus, insurance being to a port within a certain extent of territory, in which some of the ports were hostile, and others neutral, the presumption was that the vessel was destined to a neutral port.[5] The defence against a claim for a loss by fire being that the assured himself fraudulently set fire to the building, it was ruled by Park, J., that the facts must be as fully proved, as under an indictment therefor.[6] It was, however, held in Louisiana that a less decisive evidence that the assured fraudulently burnt his insured vessel would be requisite in order to defeat his claim on the policy for the loss, than to convict him of the crime in an indictment.[7]

2155. It has been held, that proof of a *parol waiver* by the underwriters of forfeiture by noncompliance with a law, is inadmissible.[8]

2156. When the underwriters resist a claim for a loss by the

[1] Hall *v.* Ocean Ins. Co., 21 Pick. 472.

[2] Thornton *v.* Lance, 4 Camp. 231.

[3] De Aguilar *v.* Tobin, Holt's N. P. Cas. 185.

[4] Thornton *v.* Lance, 4 Camp. 231.

[5] Anon. 1 Chit. R. 49.

[6] Thurtell *v.* Beaumont, 8 Moore, 612; 1 Bing. 339.

[7] Hoffman *v.* Western Mar. & Fire Ins. Co., 1 Rob. (La.) R. 216; Reyner *v.* the same Def'ts, 12 La. R. 336.

[8] Furnell *v.* Thomas, 5 Bing. 188.

barratry of the master, on the ground of his being an owner, the burden is on them to prove his ownership.[1]

2157. *In case of defence by the underwriters on the ground of negligent navigation or deviation, the burden of proof is on them.*[2]

Where the defendants proved delay, for purposes of trade, at the West India ports where the vessel touched, to rebut which the plaintiff proved that it was customary to delay on similar voyages for that purpose, and the question arose whether the delay in the particular case was unreasonable, it was held, that the burden was on the defendants to prove that the delay was unreasonable.[3]

2158. It should seem, from the nature of the case, that *it is incumbent on the assured to prove the disclosure of material facts* after it appears that there were such, since the underwriters may well be supposed not to have the means to prove that he did not disclose them.[4]

But it has been held in Massachusetts, that the burden was on the underwriters to prove that the fact of the vessel's being a missing one was not disclosed, or that any material fact was concealed.

2159. *It has been ruled* in England, *that the assured cannot allege a high premium as* a ground of *presumption that facts enhancing the risk were taken into consideration* by the parties in making the contract.[5] But this may well be doubted.[6]

Under defence on the ground of concealment, unless the facts concealed are obviously material, the underwriters must prove them to be so.[7]

Proof that insurance was made at the same rate of premium,

[1] Ross *v.* Hunter, 4 T. R. 33; Marsh. Ins. 531.

[2] Tidmarsh *v.* Washington Fire & Mar. Ins. Co., 4 Mason, 439.

[3] Columbian Ins. Co. *v.* Catlett, 12 Wheat. 383.

[4] Livingston *v.* Delafield, 3 Caines's R. 49. Accordingly, the assured should be careful to preserve evidence of such disclosures.

[5] Von Lindenau *v.* Desborough, 3 C. & P. 353.

[6] Fiske *v.* New England Mar. Ins. Co., 15 Pick. 310.

[7] Ruggles *v.* General Interest Ins. Co., 4 Mason's R. 74.

by underwriters with a knowledge of the fact in question, and by others without such knowledge, has been introduced without objection, to show that the fact was not material.[1]

News of the loss having reached the place where the assured resided, and being known to his clerk before the policy was made, the loss was presumed to be known to the assured.[2]

Upon the question, whether, if news of the loss had arrived at the place of residence of the assured before the policy was effected, it must be presumed to be known to him, the authority of Roccus[3] and Emerigon[4] was cited to the affirmative; but it was replied, that their statements were merely positive regulations on the subject, for which Pothier[5] was cited.[6]

It does not appear upon what ground any general presumption can be made; it seems to be a question for the jury in the particular case.

2160. Where the suit at law is in the name of the nominal assured, for the benefit of the party in interest, *a court* of law *will*, on motion, interfere, upon equitable grounds, to *prevent the defendants from availing themselves of a release* or other defence, which would have been good against the nominal plaintiff, but *which is not* an *equitable* one *as against the party interested.*[7]

2161. *A loss being* alleged, by the assignee of the policy on freight, to be *by barratry* of the master and crew in fraudulently going off with the vessel, it was *held* by the Supreme Court of Louisiana, *that assent to the barratry by the person to whom the vessel had been transferred, and who was on board, was not to be presumed.*[8]

2162. *Where*, after a judgment against the underwriters for a total loss, *the assured* cancels the bill of lading and *relinquishes his*

[1] Fiske *v.* New England Ins. Co., 15 Pick. R. 310.

[2] Stewart *v.* Dunlop, Park, 7th ed. 320; Marsh. Ins., 2d ed. 467.

[3] Note 78.

[4] Vol. II. pp. 124, 125, 130, 133.

[5] Assurance, 21.

[6] 3 Caines's R. 51.

[7] Gibson *v.* Winter, 5 Barn. & Ad. 96. Lord Denman, C. J., cites Legh *v.* Legh, 1 B. & P. 447; Payne *v.* Rogers, Doug. 391; Jones *v.* Herbert, 7 Taunt. 421; Scaife *v.* Johnson, 3 B. & C. 422; Craib *v.* D'Æth, 7 T. R. 670, n.

[8] Millaudon *v.* New Orleans Ins. Co., 11 Martin, N. S. 602.

remedy against the owners of the vessel for the loss, and disables himself from subrogating the underwriters in his place, in respect to such claim, it is held by Mr. Chancellor Walworth, that *the underwriters are entitled to a deduction of the value of such claim or remedy* from the amount of the total loss.[1]

2163. *Where the* whole *loss by collision of two vessels has been paid by the underwriters on one* of them, and *the owners* of that one sue those *of the other*, on account of the collision, the latter *have no right, in determining the damage, to deduct the amount so paid by the insurers.*[2]

2164. *A life policy* subject to forfeiture for false statements *is not conclusively forfeited by* the *death of the party by a disease with which he was afflicted at the time of the policy being taken out*, under the statement that he was not afflicted with any disease tending to shorten life.[3]

2165. In an action on a fire policy by the assignees, the provision, that the policy "was accepted upon the representation of the said assured," refers to the representation made by the original assured.[4]

2166. The assured's accepting the vessel when repaired by the underwriters, is not a good defence to an action on account of the deficiency of the repairs.[5]

2167. *Under the exception of* loss by *riot, the underwriters are not required to prove the conviction of the rioters.*[6]

2168. The defendant's production of the policy, with *an adjustment indorsed, and the underwriter's name erased*, has been ruled not to be conclusive evidence of payment.[7]

2169. Proof of *settlement* of a loss *by writing off premiums* due from the broker to the underwriter, is not a defence against

[1] Atlantic Ins. Co. *v.* Storrow, 5 Paige, 285.

[2] Yeates *v.* White, 4 Bing. N. C. 272; S. C., 1 Arnold's R. 85; 5 Scott, 640.

[3] Watson *v.* Mainwaring, 4 Taunt. 763.

[4] Clark *v.* Manuf. Ins. Co., 8 Howard's R. 235.

[5] Reynold's *v.* Ocean Ins. Co., 22 Pick. 191.

[6] Dupin *v.* Mutual Ins. Co., 5 La. Annual R. 482.

[7] Adams *v.* Saunders, 6 C. & P. 25.

a claim of the assured for the loss,[1] unless such set-off has been authorized or ratified by the assured.[2]

2170. The *defence of set-off* in an action for a loss extends only to the claims of the underwriters against the parties for whose benefit the insurance is made and the action on the policy is brought.[3]

2171. *It is a good defence that the action was not brought within the time stipulated.*

As in case of the condition that no action should be sustained upon the policy, unless the same should be brought within twelve months next after the cause of action should have occurred.[4]

2172. *Agents* who become liable for loss as insurers *may make the same defence which the underwriters might have made*, had the order for insurance been duly executed.[5]

2173. *And reinsurers may make the same defence against the original underwriters which the latter might have made.*[6]

SUNDRY QUESTIONS OF PRACTICE have arisen in insurance cases, which it may be useful to mention cursorily.

The plaintiff may have a verdict for a return of the premium under the count for money had and received, where the defendant prevails in resisting a claim for a loss on the ground that the risk never commenced, though no demand for a repayment of the premium has been made; and costs on that count will be for the plaintiff, no money having been paid into court, and on the others costs will be for the defendant. (Penson *v.* Lee, 2 B. & P. 330.)

An amendment is allowed by striking out the names of some of the plaintiffs. (Finney *v.* Bedford Com. Ins. Co., 8 Metc. 348.)

[1] See supra, No. 1883, and cases there cited.

[2] Gibson *v.* Winter, 5 B. & Ad. 96; Stewart *v.* Aberdein, 4 Mees. & W. 288.

[3] Supra, No. 413, and cases there cited; and supra, No. 1883, and cases there cited. Also No. 2044, as to plea of set-off. See also, as to set-off against an assignee, Hackett *v.* Martin, 8 Greenleaf, 77, and cases cited supra, c. 28.

[4] Craig *v.* The Hartford Fire Ins. Co., Blatchford's C. C. R. 280.

[5] Supra, No. 1892, 1894.

[6] N. Y. State Mut. Ins. Co. *v.* Protection Ins. Co., 1 Story's R. 458.

In case of divers actions by different plaintiffs against the same defendant, involving the same questions, depending on the same evidence, and managed by the same counsel, the court will use its discretion as to ordering them on trial at the same term, notwithstanding the objection of a party. (Witherlee *v.* Ocean Ins. Co., 24 Pick. 68.)

The court will set aside a verdict on account of the insufficiency of the evidence. (Trenholm *v.* Alexander, 2 Brevard's R. 238.)

After repeated verdicts in favor of the plaintiff on the question of seaworthiness, the court will not set one aside on this ground. (Coffin *v.* Phœnix Ins. Co., 15 Pick. R. 291.)

A new trial will not be granted for want of proof of the authority of an agent, where facts transpired before the trial to put the underwriters on inquiry. (Lightbody *v.* North American Ins. Co., 23 Wend. R. 18.)

If an assessor of damage, appointed by the court in an insurance case, doubts respecting the admission of testimony, application is to be made to the court for instruction. (Bridge *v.* Niagara Ins. Co., 1 Hall, 423.)

The omission to aver demand, or the expiration of thirty days after proof of loss, cannot be taken advantage of after judgment. (American Ins. Co. *v.* Francia, 9 Penn. 390.)

A party cannot ask a witness whether the accident could have happened if the vessel had had "a competent sober pilot, if awake, without criminal neglect or fraud." (Cincinnati Firemen's Mut. Ins. Co. *v.* May, 20 Ohio R. [by Lawrence,] 211.)

It is error to instruct the jury that the right to recover is established by compliance with two requisites, when it depends on compliance with three. (Franklin Ins. Co. *v.* Hamill, 6 Gill's R. Maryland Court of Appeals, 87.)

Upon demurrer to a declaration on a contract as being joint, which is adjudged not to be so, the defendants are entitled to judgment, although the declaration shows a limited or several liability. (Hallett *v.* Dowdall, 9 Eng. Law & Eq. R. [Press of Little, Brown & Co.] 347; S. C., 21 Eng. Law Jour. R. (N. S.) 93.)

A new trial is granted where the amount of the verdict shows that it included loss on an article on which there was no evidence of loss. (Merchant's Mut. Ins. Co. *v.* Wilson, Maryland R. Court of Appeals for 1852, p. 217.)

A witness of the assured in a suit on a fire policy dated 1846, having given testimony tending to show that ashes had been deposited in an iron vessel, in compliance with a condition of the policy, being asked on cross-examination if he had not known the ashes to be deposited in wooden vessels between 1838 and 1846, prior to the date of the policy, answered that he had not. The Supreme Court of Massachusetts held, that the defendants could not thereupon introduce witnesses to discredit the assured's witness by contradicting the immaterial fact stated by him, and proving that ashes had been deposited in wooden vessels in 1844. (Underhill *v.* Agawam Mut. Ins. Co., 6 Cushing's R. 440.)

INDEX.

The references are to the numbers of the subsections.

ABANDONMENT.

defined 1490, 1688
general doctrine of . . . . . 1490 et seq.
when necessary 1491, 1495
object of 1492
what interest is necessary to . . 1516 et seq., 1507
of the ship . . . . . 1519 et seq.
stipulation against 1507
must be justified by the state of facts at the time . . 1520
on account of the voyage being broken up . 1521 et seq., 1572
not permitted for temporary retardation . . . 1525
in case of stranding or shipwreck 1526
in case of submersion 1527
where the ship cannot be restored 1528
of a ship encumbered with liens for salvage and repairs, &c. 1529, 1554, 1594, 1596
for capture . . . . . 1530 et seq.
after arrival at the port of destination . . . 1532
not permitted for damage, if a prudent uninsured owner would repair 1533
English rule as to 1534
American rule as to . . . . . 1535 et seq.
for loss over half of the value 1536 et seq., 1543, 1545, 1548 to 1555, 1560, 1612 et seq.
whether this rule refers to the value in the policy . . 1539
not permitted after full repairs are begun . . . 1540
notwithstanding temporary repairs 1541
notwithstanding repairs by volunteers 1542

ABANDONMENT, *continued.*
whether a third for new is deducted in estimating half of the value 1543, 1544
for damage that is the subject of contribution . . 1545
for damage to decayed parts of the vessel . . . 1546
notwithstanding the enhancement of the loss by negligence and mistakes of the master and crew 1547
after arrival at the port of destination . . . 1555
as to right of, in case the underwriters offer to repair . 1556, 1557
in case of offer or refusal by underwriters to discharge a lien 1557, 1558
in case of the underwriters taking possession to repair, the owner objecting 1559
on bottomry or sale of the vessel by the master 1561 to 1571, 1577 to 1580
effect of the sale of the ship, as to 1561, 1571 to 1582, 1584, 1586 to 1592
where the ship is not heard from 1595
of cargo . . . . . 1598 et seq.
where the ship is insured to divers ports . . . 1604
in case part of the goods have arrived 1611
where insurance is free from average . . . 1614
in case of jettison 1616
in case of embargo or arrest 1620
of freight 1499
of freight for detention 1630
of freight on total loss of the ship 1631
or on the ship becoming damaged or unnavigable 1632, 1633, 1638
or where freight pro ratâ has been earned . . . 1634
or where the charterer is insured 1640
or the underwriter is deprived of salvage of subsequent freight 1649
or where the freight is payable on a future event . . 1652
or where the valuation of freight is high . . . 1653
whether the assured can, by abandoning the ship, affect the rights of insurers upon freight 1649
of both ship and freight 1649, 1650
of profits and commissions . . 1503, 1504, 1654, 1658
of cargo does not preclude abandonment of profits . . 1657
where different subjects or kinds of goods are insured in the same policy 1659, 1660, 1687
whether it may be separately made of an article separately valued 1661
must be according to the facts existing at the time . . 1662
upon what intelligence it may be made . . 1664, 1665, 1667
cannot be made upon mere conjecture 1666

ABANDONMENT, *continued.*
without prejudice 1667
at what time it must be made . . 1667, 1668, 1671 et seq.
after capture and condemnation 1670
suspended by agreement 1676
form of 1678, 1679, 1685
implied 1680
grounds of, must be stated 1681, 1684
whether demand for a total loss is 1682
by receiving payment of total loss 1683
prospective and continuing 1686
acceptance of . . . . . 1689 et seq.
revocation and waiver of . . . . 1698 et seq.
not defeated by subsequent events . . . 1704 et seq.
effect of, as to rights and liabilities . 1707 et seq., 1730, 2010
assigns the right to claim for damage by collision . . 1711
by mortgagee, what it transfers 1712
of cargo, the effect as to freight 1718
underwriters liable for seamen's wages after . . . 1720
of the same subject to different underwriters . . 1722
effect as to the liability of insurers for the expense of salvage . 1726
whether the underwriter on goods is liable on abandonment for freight paid by the assured exceeding their value . . 1727
by a mortgagee, equitably assigns the debt . . . 1728
effect of, as to conduct of agents 1731
of ship, effect of, as to freight . . . 1737, 1740
amount recoverable upon . . . . 1742 et seq.
is not made by borrower in hypothecation . . . 1755a
by an agent 1902, 1903
of the voyage 966
principle of, applicable to a life policy in favor of a creditor . 1514
See *Admiralty*, *Master*, *Mistake.*

ACCEPTANCE.
of an application for insurance 18, 21
of an offer to write a policy 21
of abandonment . . . . . 1689 et seq.

ACKNOWLEDGMENT.
in the policy, of the receipt of premium . . 23, 512

ACTION.
in the name of an assignee 83
on policies, form of . . . . 1954 to 1956, 1959
form, and by whom brought, on policy for whom it may concern 1958, 1965
where divers persons are insured in the same policy . . 1960
in case of double insurance 1961

ACTION, *continued.*
on a policy in the names of two, the interest being in one . 1968
by one of several assureds 1969
where one party refuses to prosecute 1970
by a party to whom the loss is payable 1971
cannot be split 1972
when it may be brought by an assignee in his own name 1973 et seq.
who to be made defendants 1981
on a policy subscribed by distinct underwriters . . 1989
whether it may be brought without an offer of arbitration . 1990
on an agreement for a policy 1991
of trover for a policy 1992
for the premium 1993
for a return of premium 1994
to recover back loss paid through mistake or fraud 1997, 1998
in double insurance 2000
for the benefit of the insurer in the name of the assured 2003, 2009
See *Arbitration*, *Adjustment*.
ADJUSTMENT.
of loss on profits 1242
of a total loss . . . . . 1742 et seq.
under fire policies 1749
set-off and deductions in . . . . . 1796 et seq.
by cancelling or surrendering the policy . . 1814, 1815
with knowledge of circumstances, is binding . 1815, 2151
action upon 1815
induced by fraud of one party does not bind the other . 1816
through mistake of facts 1817
through mistake of law 1818
of amount of the loss may be proved, though not alleged . 2040
indorsed on the policy, is not conclusive proof of payment of a loss 2168
by the underwriters' making, or offering to make, repairs 1556, 1557, 2166
See *Average*, *Particular*, on goods.
ADMIRALTY.
decisions of courts of, not satisfactory 46
will adjust a general average if the subjects are before the court 1352
decree of sale on application of the master . . . 1587
sale of cargo under proceedings in, and purchase by the master 1629
jurisdiction of, in cases of bottomry and respondentia contracts 1940
as to jurisdiction of, on marine policies 1940
ADMISSIONS.
oral, not admissible in contradiction of the policy . . 66, 2069
before arbitrators 2070

ADMISSIONS, *continued.*
through mistake 2071
by demurrer 2085
by an agent 2086
of parties really in interest admissible 2059
by payment of money into court . . . 2061 et seq.
by charging premium to a broker 2064
by a settlement with one of divers underwriters . . 2066
in taking out a register 2068
See *Evidence.*
AFFIDAVIT.
of the assured as to its being evidence 2099
AGENT.
authority of 20, 26, 1878
duties and liabilities of . . . 1885 et seq., 1995, 2172
delivery of policy by 26
cannot purchase the subject for himself . . . 192
for prizes, his insurable interest 320
to effect insurance is such to sign the premium note . 518
representation or concealment by 562
as to imputing his knowledge of a fact to the insurers . 667
responsibility of the assured to 1054
of the underwriters on an abandonment . . 1732, 1735
responsibility of, continues after condemnation of the subject . 1736
must keep his principal advised 1900
when bound to produce the policy 1901
must render accounts 1901
abandonment by 1902, 1903
del credere, entitled to salvage 1904
del credere, his action on the policy 1905
on assignment becomes agent of the assignee . 1731, 1907
his liability for moneys received on account of a void insurance 1908
his lien and right of set-off 413, 1909, 1910, 1915, 1923, 1925, 1926
waiver and loss of his lien 1917, 1919
of both parties 1927
See *Insurance Agent, Master, Consignee.*
AGREEMENT.
for insurance, its consummation and construction . . 13 to 17
by letter 17
by an agent 20
illegal in a material part, is void 219
an action upon 1991
by a corporation 2058
ALIENATION.
as to a mortgage being such 93

ALIEN ENEMY.
contract with, unlawful 147
privileges of 151
as to a citizen, being abroad, becoming such . . . 159
ALTERATION OF THE POLICY.
how to be made, to be valid . . . 109 to 112
a material one made by the assured, avoids the policy . . 113
an immaterial one does not avoid the policy . . 114
by a third party without consent of the assured . . 115
AMOUNT OF INSURABLE INTEREST.
in valued policies . . . . . 1176 to 1217
in open policies . . . . . 1218 to 1249
in the ship includes tackle and boat 1223
of a charterer 1225
in goods . . . . 1226 to 1228, 1231 to 1236, 1241
in freight 1239
in profits 1242
of consignee 1243
of a mortgager and of a mortgagee 1244
under a fire policy 1245
under a life policy 1247
in reinsurance 1248
in bottomry and respondentia 1249
AMOUNT INSURED.
limited by charter and otherwise 1795a
in a life policy 1484a
ANCHORING ON A LEE SHORE.
damage by, whether contributed for . . 1105, 1296
ANCHORS.
as to deducting a third for new upon 50
contributed for 1296, 1297
sacrificed to keep with convoy or escape from an enemy 1308, 1309
ANIMALS.
freight of, not covered as "freight" 479
if live, it must be disclosed 591
APPAREL.
of persons on board not covered as goods . . . 434
does not contribute to general average . . . 1394
APPORTIONMENT.
of freight 1502, 1741
of loss to the divers underwriters . . . 1482a
ARBITRATION.
clause for submission to 58, 890, 1941
whether an action is maintainable without offer to refer . 1990

ARREST.
loss by 1008, 2138
ASSIGNEE.
rights of 82
rights of, proceeded in a court of law . . . 85
may insure his interest without specifying it . . . 420
of a policy, takes it subject to an agent's lien . . 1921
when he may sue on the policy in his own name . 1973 et seq.
ASSIGNMENT.
of a policy without consent of the underwriter . . 47, 107
rights of assignee after . . . 76, 81, 82, 84, 410
is subject to exceptions of risk . . . . 91 note
constructive 91
general, of the property of the assured . . . 92, 107, 287
what a sufficient assent to 97
second 99
reserving right of set-off 106
provision in the policy respecting . . . 107, 108
after a loss 108
of bill of lading as affecting the insurable interest of the assignor 286 et seq.
provision against, in fire policies, ... 879
to underwriters, of the debt due to a mortgagee . . 1511
release by assignor after 2160
of the assured's demand on the insured life, to the insurers 1515
of a loss, is not such of return premium . . 84, 1847 a
assent to by a clerk 2077
ASSIGNOR.
rights of 82
as to release by, after assignment 2160
ASSUMPSIT.
is the usual action on a policy 1954
for the premium 1993
to recover back a loss paid through mistake . . 1997
ASSURED.
who may be 146
description of . . . . . 379 et seq.
not always named in the policy 28
must make no misrepresentation 39
must disclose material facts 39
may labor, travel, &c. 43
persons of different national character insured in the same policy 234
his responsibility for his agent . . . 667, 1046, 1054
never obliged to abandon 1493
duty of, in case of abandonment 1533

AT.
construction of insurance "at" 982
AT AND FROM.
distinction of risk "at" and "from" . 618, 928, 938 et seq. 945
ATTACHING OF THE POLICY.
requisites to the . . . . . 918 et seq.
AUDITOR.
report of, is primâ facie evidence 2102
AUTHENTICATION.
of testimony . . . . . 2046 et seq.
AVERAGE.
as to, on bottomry 1169
general and particular distinguished . . . 1269
petty . . . . . 1269, note
AVERAGE, GENERAL.
defined and explained 1269, 1270, 1271
damage by collision is not 1272
where only a part of the interests are in danger . . 1273
contribution in nature of 1274
in what case underwriters are liable for . . . 1275
stipulated against 1275
under fire policies 1277
for expense of raising funds 1290
does not cover duties on goods sold 1291
not allowed for saving another vessel . . . 1292
for jettison from a captured ship 1293
expected profits do not contribute, and are not contributed for 1294
for cables, anchors, sails, spars . . . 1295 to 1298, 1308
for articles applied to an unusual purpose . . . 1299
for temporary repairs 1300
for freight of jettisoned goods 1301
for freight lost by voluntary stranding 1302
does not cover wages of sailors hired instead of deserters . 1303
does not cover gratuities to seamen 1304
when it covers damage by extinguishing fire . . 1305
does not cover loss by the sale of goods to liberate the master . 1306
may cover expense of convoy 1307
covers cable and anchor slipped to keep with convoy . . 1308
for boat abandoned to deceive an enemy . . . 1309
for damage to the ship by fighting 1310
damage by sacrificing the property of others . . 1311
for expense of floating a ship 1312, 1313
for voluntary stranding 1314, 1315, 1316
for putting into port to refit 1320, 1321
for delay in order to repair 1322, 1324

AVERAGE, GENERAL, *continued.*
does not include expense of delay at quarantine . . 1323
subjects to be contributed for in case of making a port of necessity 1325
includes wages and provisions during delay for repairs . 1328
also wages of crew employed in repairs that are general average 1329
does not include wages paid by mistake . . . 1330
for expense of claiming and recovering property . 1331, 1332, 1333
for salvage 1334
includes compromise with pirates 1335
does not include compromise with the enemy . . . 1336
or the expense of forwarding the cargo of a wrecked vessel 1341
includes the expense of prosecuting wrongdoers . . 1342
for expense by an embargo 1346, 1347
proportion of assured's expense recoverable against underwriters 1350
neglect to adjust, at a foreign port, may discharge insurers . 1351
adjusted in admiralty 1352
for expenses though the subjects are lost . . . 1355
for funds raised by hypothecation 1356
includes the expense of raising funds . . . 1357, 1359
either party may claim for the excess paid by him for expenses 1358
when it includes interest 1360
when it includes the premium of insurance . . 1362
for funds raised by sale of cargo . . 1361, 1363, 1364
when adjusted on the value at the port of departure . 1365
leakage and breakage allowed for 1366
for perishable goods 1367
contribution for freight sacrificed 1368
for damage to the ship, a third for new deducted . . 1369
for expense of recovering jettisoned goods . . . 1370
for valuable goods not known to be so . . . 1372
stipulated against 1408
how far insurers are liable for 1409
expenses in the nature of general average on a single subject at risk 1412
adjusted according to the law of place having jurisdiction 1413, 1414
not excepted by the memorandum . . . 1757, 1763
See *Collision*, *Compromise*, *Contributory Value*, *Jettison*, *Jewels*.
AVERAGE, PARTICULAR.
defined 1422
on the ship, what is usually included in . . 1424, 1425
deduction of a third for new 1432, 1433
as to deducting the proceeds of the old materials . . 1434
proportion of, for which the underwriter is liable . . 1435

AVERAGE, PARTICULAR, *continued.*
damage paid another ship for collision is not . 1436, 1437
on freight, by loss of the ship 1438
———— by loss of cargo 1439
———— when only freight pro ratâ is earned . . 1440
———— how computed . . . 1441 to 1444, 1454
———— not allowed if the goods arrive in specie . . 1445
———— not allowed where the goods, which are sold on account of damage, might have arrived 1446, 1448, 1449
———— allowed for goods sold for safety of the ship and crew 1446 to 1449
———— not allowed for loss by neglect to demand it 1450 to 1454
———— valued above the value at which it is contributed for 1455
on goods, not affected by the state of the market . . 1457
on goods, how adjusted . . . 1450, 1459, 1460, 1464
may be estimated on divers values under divers policies . 1459
on goods, by paying full freight on damage . 1461, 1462, 1463
on goods, includes expense of sale at auction for fixing the value 1465
should be adjusted on different species of goods separately . 1466
adjusted at an intermediate port on goods . . . 1467
leakage and breakage allowed for 1468
includes expenses directly upon consequent perils insured against 1469
for expense on goods, is apportioned among the different articles 1470
is estimated on the goods at risk at the time . . 1471
a survey of damaged goods is not absolutely necessary . . 1472
on profits, how estimated . . . . 1473 to 1475
what amount is to be paid by the insurers . . 1476 to 1479
under a fire policy, is usually for the whole damage, sometimes pro ratâ . . . . . 1481 to 1483
under a fire policy is without any deduction of a third . . 1484
exception of, how construed 1776
See *New for Old*, *Salvage Loss.*
AVERMENT. See *Declaration.*
BAGGAGE.
as to its contribution to general average . . . 1394
BANK NOTES.
description of, as a subject of insurance . . . 432
are covered as "property" 455
BANKRUPTCY.
of the underwriters must be specially pleaded . . 2042
BAR.
damage to goods put into lighters to lighten the ship to pass over, is general average 1289
BARRATRY.
defined 1062

BARRATRY, *continued.*
fraud in respect to either owner is enough . . . 398
may be committed on land 1064
may be insured against 1065
insurance against must be in writing . . . 9
by deviation or delay 1066
by violation of law 1067
by trading with the enemy 1068
other illustrations of . . . . . 1068, et seq.
cruising illegally 1069
theft and embezzlement 1071
attempt to smuggle 1072
gross violation of trust by the master 1074
liability of the underwriter for, is not affected by warranty of lawful trade 1075
underwriter not liable for, if the assured is in fault . . 1076
underwriter not liable when committed with consent of the assured 1077
can be committed by the master only in his capacity as such 1079
where the ship is navigated by the charterer at his own risk . 1079
by mariners 1081
cannot be committed by the master if he is an owner . . 1082
action ex delicto against the master for . . . 2004
BARTER.
insurable value of goods bought by . . . 1230, 1231
BEANS.
included under exception of corn 1764
BELIEF. See *Representation.*
BELLIGERENT.
rights of a belligerent 271
neutral goods documented as 275
produce, when landed in a neutral country is neutral . . 817
cruisers' right of visit and search 820
BILGING.
what is 1760
BILLS OF EXCHANGE.
construction of a policy upon 459
BILLS OF LADING.
assignment of 286
recital in, may be explained 759
construction of 2006
are not evidence without authentication . . . 2092
BLOCKADE.
how constituted 826
declaration of 828

BLOCKADE, *continued.*
neutral nations not affected by, until notice . . . 829
violation of . . . . . 832 et seq.
detention by 1114
of port of destination, how it affects the risk . . 1115
exception of risk of 1159
BOAT.
is included as part of the ship . . . 464, 1105, 1223
jettison of 1283
jettison from 1289
sacrificed to deceive an enemy, is general average . . 1309
BOOKS.
when evidence 2088
BOTTOMRY.
defined 298
does not change the national character of the ship . . 262
bond, high rate of interest of 304
may be good in part and bad in part 306
insurable interest of borrower in 307
must be specified in the policy — quere of this doctrine . . 427
premium in . . . . . 523 a
borrower on, affected by doctrine of deviation . . . 988
risks in . . . . . 1165, 1169, 1484 a
whether a lender is indemnified against the same losses as owner 1273
amount of insurable interest in 1249
underwriters not bound to discharge 1558
remedy of lender on 1985
BOUNTY.
whether to be deducted in estimating insurable interest . 1235
BREAKAGE.
liability of underwriter for 1091
allowed for in the adjustment of an average . . 1366, 1468
BROKER. See *Agent, Insurance Agent.*
BULLION AND COIN.
are covered as "property," &c. 432
BURDEN OF PROOF.
is on a neutral to show neutrality 808
is on the plaintiff to prove a policy to have been for him 2072, 2073
of concealment 2074
of compliance with a warranty 2075
See *Insurance Agent.*
CABLE.
new chain, as to deduction of a third upon . . . 50
cut or slipped, is general average for the cable and anchor 1105, 1295, 1308, 1309

CANAL NAVIGATION.
form of policy on 61, 62
CANCELLATION.
of words in a policy 112
CAPTAIN. See *Master*.
CAPTORS.
insurable interest of 320
interest of, to be specified in the policy . . . 428
loss by compromise with 1613
CAPTURE.
illegal 198
loss by 1108
is a total loss until release or acquittal . . . 1530, 1622
delay of abandonment in case of 1675
proof of loss by 2136
CARGO.
what is 144, 430, 452
national character of 239
must be accompanied with proofs of national character . 808
when safely landed 970
loss on, by selling to defray expenses of repairs . . 1139
total loss of, is not a constructive total loss of the ship . 1141
diminution of value by sea-damage 1140
sale of, from necessity 1623, 1825
when forwarded in another ship 1739
contributes for expenses at all events . . . 1393
only what arrives contributes for jettison . . . 1394
on deck contributes 1396
total loss and abandonment of . . . . 1598 et seq.
submersion of 1607
hypothecation of 1626
See *Goods*.
CARRIERS.
may insure 378
need not specify their interest 424
common, responsibility of 2006
CARTEL.
for exchange of prisoners 254
"CATCHINGS."
construction of in fishing voyages 460
CAUSA PROXIMA NON REMOTA SPECTATUR . . 1132
CERTIFICATE.
of loss under a fire policy . . . . 1807 et seq.
of consuls 2051
of a collector not evidence 2091

CHANGE OF RISK.
in a fire policy 1032
in a life policy 1039
See *Deviation*.
CHARGES.
are a part of the insurable value 1232
of ascertaining a loss, upon whom the same fall . . 1791
CHARTERER.
the insurable interest of, in freight . . 325, 337, 338, 483
may insure without specifying his interest . . . 419
whether his interest is covered as "freight" . . 480
advances by, how to be covered 482
his insurable interest in the ship 1225
CHARTER-PARTY.
when an insurable interest under begins . . 334, 335
CLEARANCES.
as to not disclosing a false clearance . . . 598
CLERK.
assent of, to an assignment 2077
See *Presumption*.
CLOTHES.
of persons on board, not covered as "goods, wares," &c. . 434
CODE.
published by authority, is evidence of a foreign law . . 2110
COFFEE-HOUSE.
ruled not to come under the description "inn" . . . 636
See *Lloyd's*.
COIN.
is covered as "property," &c. 432
COLLISION.
as to liability of insurers on a foreign adjustment of damage by 1416
damage by, is a peril of the seas 1417
damage by, through the fault of the master and crew, is covered 1049, 1418
as to liability of insurers to third parties for damage by 1419, 1437
damage by, is not general average 1424a
damage by, through fault of both vessels . . . 1420
where it does not appear which party is in fault . . 1421
claim for damage by, is salvage 1711
Continental practice in adjusting damage by . . 1781
adjustment of loss by 1781, 2163
COMITY OF NATIONS.
as ground for the conclusiveness of foreign judgments . 2106
COMMISSIONS.
of the master are insurable 213

COMMISSIONS, *continued.*
not charged by the assured on his disbursements . . 1423
abandonment under a policy upon 1504
COMPANIES. See *Corporations and Insurance Companies.*
COMPASS.
attraction of needle of, as to seaworthiness . . . 726
COMPROMISE.
with pirates, is general average 1335
with an enemy, is not general average . . . 1336
between neutrals and belligerents, how far a subject for contribution 1337
by master being part owner, may be binding . . . 1338
how contributed for 1339
of a claim for a loss 1713
CONCEALMENT.
defined 531
effect of 537
waiver of objection on account of 667
See *Representation.*
CONCURRENCE OF PERILS AND LOSSES. . 1128 et seq.
CONDEMNATION.
by an incompetent tribunal, does not change the title 199, 2104, 2105
CONDITION.
of seaworthiness 699
in fire policies . . . . . 866 et seq.
that the policy shall become void upon transfer of the subject . 880
forfeiture of, in a life policy 2164
See *Implied Warranty, Seaworthiness.*
CONSEQUENTIAL DAMAGE.
as to its being covered . . . . 1129 et seq.
CONSIGNEE.
of the cargo, represents the assured more fully than master . 1059
his interest is the amount of his lien . . . 1243
who has made advances may abandon 1518
whether liable for contribution to general average . . 1999
insurable interest of 310
may insure his lien without distinctly specifying it . . 423
See *Insurance Agents.*
CONSOLIDATION OF ACTIONS 1989
CONSTRUCTION.
of policies, difficulty of 6
of representations . . . . . 505 et seq.
of words and phrases, when for the court and when for the jury 1943
CONSTRUCTIVE TOTAL LOSS. . . . 1608 et seq.

CONSUL.
national character of 168
judicial jurisdiction of 200
privileges of 236
certificate of, is not an authentication of a fact . . 2051
CONSULAR COURTS.
as to jurisdiction of 200
CONSULTATION WITH THE CREW.
as to, in case of jettison 1279
CONTRABAND GOODS.
what are 272, 279
are "lawful goods" 446
as to disclosure respecting 628
warranty respecting 847
CONTRABAND TRADE.
not punished by the sovereign of the party engaged in it . 282
subjects to forfeiture by the law of nations . . 284
is not illegal 909
risk of . . . . . 1117 et seq.
exception of risk of 1152
CONTRACT.
by letter 17
See *Agreement*, *Assignment*, *Insurance*.
CONTRIBUTION.
is made only in case of extraordinary sacrifice or expense . 1281
not made for goods on deck except by custom . . 1282
the subjects to be contributed for 1325
may be claimed of the underwriters in the first instance . 1348
the assured cannot recover of insurers on goods, what he must refund as owner of the vessel 1349
neglect to demand may discharge the underwriters . . 1351
insurers liable for, only on account of the risks insured against 1353
is to be made by the part of a thing that is saved . . 1354
is not made by any subject for expense incurred after it has ceased to be at risk 1407
the several parties are not jointly liable for . . . 1411
when to be included in estimate as a constructive total loss by loss over fifty per cent. 1550
right of, for jettison, passes to underwriters upon abandonment of the article thrown overboard 1709
See *Average, General; Collision*.
CONTRIBUTORY VALUE.
estimation of amount of . . . . . 1373 to 1378
of the ship 1380, 1381
of the ship, includes provisions 1382, 1383

CONTRIBUTORY VALUE, *continued.*
includes the subject contributed for . . . 1384
of freight, is that of the pending freight . . . 1385
of freight, where only freight pro ratâ is earned . 1386, 1388
of freight, where the ship is chartered for successive passages . 1387
of freight, is not of net freight 1389
of freight, is usually a certain proportion of the gross freight . 1392
is estimated by deducting subsequent contributions and expenses 1391
of subject, is the value to the owner at the time to which the contribution relates 1401
of goods, whether freight deducted in estimating . 1403, 1404
whether the premium is included in . . 1405, 1406
is not the same amount as insurable interest . . . 1410
See *Goods.*
CONVOY.
compliance with warranty of . . . . 780 to 782
the vessel represented to sail with 2005
proof of sailing with 2153
CONVOYING PRIZES.
as to its being a deviation 1030
COPPER SHEATHING.
as to the deduction of a third for new, for repairs of . . 1431
CORN.
construction of the term 144
exception of, includes malt, pease, and beans . . . 1764
CORPORATIONS.
for effecting insurance 11
act only through their agents 11
may contract without seal 11
national character of 167
COURTS, JURISDICTION OF. See *Jurisdiction.*
COURT AND JURY.
provinces of, in actions on policies 604, 1149, 1586, 1942 et seq.
COVENANT.
on policies 1956
CREDITOR.
has not an insurable interest in the property of his debtor generally 201
has an insurable interest in property on which he has a lien 292
CREW.
a competent, is requisite to seaworthiness . . . 709
must generally be shipped for the whole voyage . . 710
CRUISING.
without leave, is a deviation 1030

CURRENCY.
valuation of foreign 1202
DAMAGE.
arising from the qualities of the subject, not covered . 1089, 1095 a
occasioned by perils insured against, where the ship goes out of her course to repair 1103
underwriters liable only for extraordinary 1105
to the ship, which is particular average . . 1424, 1425
in fire policies, how estimated 1509
of over fifty per cent. is a constructive total loss . . 1539
deduction of a third for new in estimating . . 1431 to 1435, 1543
DANGERS OF THE SEAS. See *Perils, Risks.*
DATE OF THE POLICY.
not conclusive 29, 127
loss prior to, how covered 925
DEBTOR.
interest in the life of 353
retains insurable interest in property assigned to pay his debts 287
policy on the life of, in the name and favor of his creditor . 397
DECAY.
damage by, is not covered 1089, 1105
DECK LOAD.
not usually covered by a general description . . . 460
jettison of, not usually contributed for . . . 1282
DECLARATION.
of war, power of making and modifying . . . 243
on a marine policy . . . . . 2010 et seq.
on a fire policy 2012
on a life policy 2012
on an assigned policy 2015
as to averring of interest in 2018
must make a true statement of the loss . . . 2022
for a total loss and general average in the same count . . 2024
as to certain risks excepted 2025
as to an averment of compliance with warranties . . 2026
DEFENCE.
by fighting, whether general average 1310
evidence in, against a claim for loss . . 2152 et seq.
DELAY.
to begin the voyage, its effect 923, 995
unreasonable, in landing goods, is equivalent to a deviation . 998
unnecessary, on the voyage, is a deviation . . . 1002
to succor the distressed, is not a deviation . . . 1028
merely to save property, is a deviation . . . 1028
to repair and refit, is general average . . 1320 to 1322, 1324

DELAY, *continued.*
by the vessel's being frozen up in a port of necessity, is general average 1324
See *Abandonment, Detention, Deviation.*
DELIVERY OF POLICY.
though subsequent to the date, gives its effect from the date . 922
DEMAND.
of a total loss, is a constructive abandonment . . 1682
DEMURRAGE.
allowance for, considered to be salvage on freight . . 1651
DEMURRER.
admissions by 2085
DEPOSITIONS 2057
DESCRIPTION.
of the risk 37
of the voyage 119
of the assured . . . . . 379 et seq., 411
of the subject . . . . . 415 to 430
of goods as being shipped between two dates . . 445
general, does not cover a deck load 460
of the subject of a fire policy . . . 485 et seq.
of the subject in fishing voyages 496
of the subject in reinsurance 498
of the subject in the declaration 2017
DETENTION.
for repairs and to refit . . . . 1103, 1320 et seq.
by an embargo 1111
by a blockade 1114
by capture 1530
by capture having ceased, right to abandon is gone . . 1531
DETERIORATION.
merely by reason of the quality of the subject, is not insured against 1089, 1092
DEVIATION.
general doctrine of . . . . . 977 et seq.
is not limited to cases of enhancement of the risk . . 982
how tested 980, 982
depends on voluntary acts 984
by stowing goods on deck 985
doctrine of, affects borrower on bottomry . . . 988
doctrine of, is applicable to river and lake navigation . 987
by substituting a different voyage 990
while in port 996
mere intention to make, is not 1001
from the usual course, when excused . . 1018 et seq.

DEVIATION, *continued.*
it is not such to go out of usual course to avoid a peril insured against 1024
mere taking a letter of marque is not equivalent to a deviation 1029
by cruising 1030
by acts of strangers is not imputable to the assured . . 1031
provinces of court and jury respecting . . . 1950
forfeiture incurred by 989, 1040
DIMINUTION OF INTEREST.
does not invariably reduce the amount of the insurance . 1265
DISGUISING BELLIGERENT PROPERTY.
forfeiture by 1123
DISPUTES.
agreement to refer . 58 and note, 890, 1482 a, 1941, 1990
DOCUMENTS.
referred to in the policy, or annexed, construction as to 70 to 72, 671, 2115
DOMICILE.
national character depends on 153
how determined 154
foreign 161
intention to change 162
DOUBLE INSURANCE.
insurable interest in . . . . 359 et seq.
is legal 1250
form of the clause as to 1251
the clause as to, relates to the date or time of subscribing 1252, 1253
the amount recoverable in 1747
action upon 1961, 2000
proof of amount of loss in 2146
See *Return of Premium.*
DRAWBACK.
is not deducted in estimating the insurable interest . 1235
DUELLING.
condition against, in life policies 64
EAST INDIA COMPANY.
usage of, to reserve the right of an intermediate voyage . 144
EMBARGO.
policy on a voyage in violation of, is void . . . 210
detention by, is an arrest or restraint 1111
expense by, how contributed for 1346
wages and provisions during, are not general average . . 1347
a temporary, does not give a right to abandon . . 1620
EMBEZZLEMENT.
is a barratrous act 1071

ENEMY, PUBLIC.
contract with, and trade with, are illegal . . 223 et seq.
compromise with, is not general average . . . 1336
neutral country when occupied by troops of, is enemy . 238
license to trade with 242
transfer of property in transitu at sea, does not change its national character 255
enemy property does not change its national character on account of a lien in favor of a neutral 263
ENGAGEMENT.
damage in, when general average 1310
EQUITY.
jurisdiction of 117, 1935, 1939
may compel performance of an agreement to make or renew a policy 1936
has power to reform a policy 1937
will require the assured to surrender a policy which has been fraudulently obtained 1938
ERASURE.
of the insurer's name, is not conclusive proof of the payment of a loss 2168
EVIDENCE.
not admissible to supersede the policy . . . 122
extrinsic, when admissible 126
of a judgment 2047
of the acceptance of an abandonment, payment of fifty per cent. of the amount insured is not such . . . 1695
whether the underwriter's offer or the result of his attempt to repair is evidence as to the loss being total . . 1556
seal of a foreign court, how proved 2048
foreign vice-admiralty decree for the sale of a ship by the master is not proof of its necessity 1587
report of surveyors, that ship is not considered worth repairing, is not conclusive 1589
how authenticated 2047
burden of, as to barratry 2156
burden of, as to negligence 2157
burden of, as to the disclosure of facts 2158
in general, see Chap. XXIX.
EXCEPTED LOSSES.
in English and American policies 1757
by clause "free from average, except general" . . 1766
by insurance "against total loss only" 1766
exceptions have reference only to the amount at risk at the time of the loss 1774

EXCEPTED LOSSES, *continued.*
whether general and particular average can be added together to make an amount exceeding the excepted rate . . 1779
whether separate losses may be added together to make an amount exceeding the excepted rate . . . 1780
amount of, how estimated 1782
by the act of Louisiana of 1834 1792
by suicide, in life policies 64, 1794
See *Exception of Average, Memorandum, Memorandum Articles, Stranding.*
EXCEPTED RISK.
of contraband trade 1152
of seizure 1158
of blockade 1159
in port 1160
when preceded by a technical total loss . . . 1161
of prohibition of entry 1162
of damage to sheathing 1162
instances of 1162
underwriters are not liable for the direct consequences of 1793
in case of, how the loss is to be declared for . . . 2025
EXCEPTION OF AVERAGE.
excludes constructive total loss by damage . . 1767
how applied in case of transshipment of a cargo in different vessels 1775
how applied in case of successive losses on the ship . 1780
what number or quantity of articles it is applicable to . . 1784
application of, where different articles are at risk subject to the same exception 1785
where different articles are at risk, subject to different rates of exception 1786
the form of, varies 1787
differently applied, where the valuation is separate . . 1788
whether the premium is included in applying this exception 1790
whether expense of surveys, &c. is included in applying the exception 1791
that would not have accrued on specie . . . 1789
EXCHANGE.
rate of, included in adjusting an average . . . 1359
is to be taken into account in an invoice made at a foreign port 1230
EXPECTATION.
is an insurable interest, if coupled with an actual present interest or right 183
EXPENDITURE.
to avoid loss by fire, whether covered . . . 1098

EXPENDITURE, *continued.*
for raising funds, is covered . . . 1426, 1427
incurred to avert an impending total loss of memorandum articles 1777
for surveys, protests, and certificates, whether included in applying the exception of average 1791
See *Average, General* and *Particular.*
EXPERTS.
as witnesses 2112
EXPRESS WARRANTY.
defined 754
general doctrine of . . . . . 754 et seq.
no formal expression requisite to 760
compliance with . . . . . 762 et seq.
language of, how construed 766
not constituted by mere recital or description . . . 768
compliance with, when dispensed with . . . 770
when a condition precedent 771
of the time of sailing . . . . 772 et seq.
to sail on or before a certain day 774
"to depart," construction of 777
of convoy 780
of neutrality, general doctrine of . . . 783 et seq.
of neutrality, the forfeiture of, as to part of the property . 798
of neutral property requires neutral trade, employment, and conduct . . . . . 814 et seq.
of neutrality of goods, not broken by being transported in an unarmed belligerent ship 824
that goods are "lawful" 846
that the vessel shall have no contraband goods on board . 847
that the ship "was well" on a certain day . . . 848
against loss by rottenness 849
in fire policies . . . . . 866 et seq.
in life policies . . . . . 891 et seq.
See *Condition, Stipulation, Warranty.*
FACTOR. See *Agent.*
FEAR OF PERIL.
whether it must be disclosed 590
the case of vessel burnt for fear of contagious disease . 1094
the maxim of *quia timet*, remarks upon . . . 1115
FIGHTING.
damage by, when general average 1310
FIRE.
loss by . . . . . 1094 et seq.
whether insurers are liable for expenses to save property from 1098
See *Fire Insurance.*

FIRE INSURANCE.
general principles applicable to 63
provisions of 63
when the policy is assignable 77, 78
description of the subject in . . . . 485 et seq.
"open" or "running" 504
warranties and conditions in . . . 866 to 890
termination of the risk in 952
condition of avoidance in case of assignment . . 879
voluntary enhancement of the risk defeats the policy . . 1032
as to damage by lightning or by heat, the subject not being burnt 1097
as to damage to, and expense in saving property, being covered 1098
is usually by an open policy 1211
underwriters in, are bound by the value stated by their committee 1214
over-insurance in 1215
insurable value of the subject . . . 1214, 1245, 1246
condition for notice of other insurance . . . 1255, 1256
notice and claim for loss under 1508
adjustment of a total loss under 1749
the indemnity paid by the municipality is deducted in adjusting a loss 1750
right of insurers to rebuild 1754
on renewal to an assignee the same conditions subsist, and the representations of the original assured are binding . 875, 2165
See *Declaration*, *Fire*, *Preliminary Proof*, *Representation*.
FISH.
construction of an exception of loss on . . . 1764
FISHING VOYAGES.
provisions of policies in 59
insurable interest in . . . . 182, 343 to 345
description of the subject in 496
FLAG.
invests the vessel with its national character . . 229, 804
FLAX.
average on, is usually excepted . . . . 54 n.
FLAXSEED.
is usually a memorandum article . . . . 54 n.
FOREIGN ADJUSTMENT.
is binding 1414
the insurers are liable for their proportion of an item excluded in 1415
of damage by collision, as to liability of insurers thereupon 1416

FOREIGN CURRENCY.
invoice in, how to be estimated 1230
FOREIGN JUDGMENT. See *Judgment.*
FOREIGN LAWS.
insurers are liable for loss by infringement of, without fault imputable to the assured 1118
insurance expressly against risk by contravention of, is valid 1119
FORFEITURE.
of the policy 10
mere liability to forfeiture of the subject does not defeat the policy 190
effect of, upon the insurable interest 195
liability to, for contraband trade, how long it continues . 281
waiver of 668, 904, 1040
of warranty of neutrality as to part of the property . 798
of a life policy by suicide 895
when the underwriter is precluded from alleging . . 1144
effect of seizure for, during the risk 1147
FOR WHOM IT MAY CONCERN.
construction of the phrase in a policy . . 383, 387, 966
FOUL LOSSES.
payment of, may be recovered back. 1998
FRAUD.
as to over-valuation being evidence of . . . 2080
refusal to let underwriters examine damaged goods is admissible as evidence of 37, 2081
See *Recovery back; Representation and Concealment; Risks covered.*
FREIGHT.
defined 327
insurable interest in . . . . . 327 et seq.
when the insurable interest begins 332, 333
advanced, insurable interest in 340, 1234
of a part of the voyage may be insured . . . 341
is usually insured *eo nomine* . . . . 469 et seq.
assignee of, may insure *eo nomine* 477
commencement of risk on 943
liability of an insurer for excess of, on transshipment . 1138
loss on, may be by loss of ship or of cargo . . . 1142
valuation of, is of a full cargo 1204
may be valued over its actual amount . . . 1205, 1207
"net," construction of 1206
whether a valuation applies to each or all of successive passages 1208
insurable interest in, is the same for a part as for the whole of a passage 1239
insurable interest for a passage 1240

FREIGHT, *continued.*
of jettisoned goods is contributed for . . . 1287, 1301
loss of, by voluntary stranding is contributed for . . 1302
contributes at its net amount 1368
abandonment of . . . . . 1499, 1630 et seq.
apportionment of, on abandonment . . . 1502, 1741
the effect of an abandonment of the ship in respect to the pending freight, in England and in the United States . 1838 to 1841
it is not a total loss of, if the cargo, though damaged, is delivered in specie 1643
when due 1643
salvage on 1649
who is entitled to, after abandonment . . . 1650
due on goods after abandonment, by whom payable . . 1718
underwriters have the benefit of that earned by the vessel, by taking another cargo on the same voyage, after a loss of the original cargo 1725
whether the underwriter on goods is liable for, when it exceeds the value of the abandoned goods . . . 1727
pro ratâ, where part only of the voyage is performed . . 1988
See *Average, General; Average, Particular; Contributory Value.*
"FROM."
construction of 921
See *At and From.*
FRUIT.
is insured free of average . . . . . 54 n.
FURNITURE.
what is included under 144
preliminary proof of loss of 1811
FURS.
what considered to be such 144, 457
whether included under the exception of "skins" . . 1764
GAMING POLICIES.
distinguished from insurance 4
GARNISHMENT.
the liability of the underwriters as garnishees, after a total loss with salvage 1980
GAZETTE.
contents of, when presumed to be known to underwriters . 606, 2100
GOLD AND SILVER.
covered as merchandise 432
contribute in general average 1397
GOODS.
"held in trust," construction of such description . . 490
national character of, how affected by transfer while in transitu 791

GOODS, *continued.*
national character of, if shipped by a neutral to a belligerent, in contemplation of war 792
the national character of, being shipped by a belligerent to a neutral 794
neutral, may be carried in a belligerent vessel . . . 824
insurable value of . . . . . 1226 to 1230
insurable value of, includes prior transportation . . 1232
future freight is not part of the insurable interest in . 1233
freight of, advanced, may be part of insurable interest in . 1234
in estimating the insurable interest of, drawback is not deducted 1235
insurable interest in the proceeds of outward cargo includes profit 1241
contribute on their value, though of small bulk . . 1400
contribute on the value finally saved . . . 1402
identity of, is a question for the jury 1946
See *Cargo.*
GOODS, WARES, MERCHANDISE, PROPERTY.
what subjects are included by these descriptions . 431 et seq.
GOVERNMENT.
hostility and neutrality determined by . . . 224
de facto regarded 225
goods of, contribute to general average . . 1345, 1398
indemnity made by, is salvage 1724
GRATUITIES.
to seamen, are not general average 1304
GUNS.
included as being a part of the ship . . . 1223
HAZARDOUS GOODS.
condition in fire policies not to store . . . 63, 883
HAZARDOUS TRADES.
condition in fire policies not to carry on . . . 63, 882
HIDES.
what is included under exception of average on . . 1764
HUNDRED.
remedy against the 2001
HUSBAND, SHIP'S. See *Agent.*
HYPOTHECATION.
defined 298
of the cargo 1627
when the master may hypothecate . . . 1561, 1566, 1985
should be of that subject on account of which funds are needed 1562
the party advancing funds on, must inform himself of the necessity for the advance 1564
See *Bottomry, Respondentia.*

ICE.
contribution for jettison of a whole cargo of . . 1365
ILLEGALITY.
renders a contract void 210, 691
of a usage, renders it of no force 134
of a contract with an alien enemy 144
does not affect the policy, if only collateral to, and distinct or remote from, the stipulations 221, 736
partial, of a voyage 231
partial of the subject 232
in the conduct of the adventure, how it affects the insurance . 736
alleged by the underwriter, must be proved by him . 2154
See *Return of Premium, Illicit Trade.*
ILLICIT TRADE.
construction of the exception of 1157
the exception of seizure for 1158
IMPLIED WARRANTY.
defined 686
what warranties are usually implied . . . 687 to 694
of seaworthiness . . . . . 695 to 735
of legal conduct 736
respecting belligerent risks . . . . 742 et seq.
that the vessel shall sail with convoy 749
abrogation of 752
the subjects of, need not be represented . . . 601
See *Seaworthiness.*
INDEMNITY.
by insurance explained 3, 4, 1220
to be favored in the construction of the policy . . 122
none against violations of law 691
none against the unjustifiable acts or neglects of the assured 692
to the shipper against the frauds of the ship-owner . . 1085
from a foreign government, is salvage . . . 1724
whether underwriters are liable to greater than the amount of the value of the subject 1743
INLAND NAVIGATION.
provisions of policies in 61, 62
INQUIRIES.
when the underwriter is bound to make . . 585, 664
the assured must make true answers to . . . 586
respecting answers to, in life insurance . 644 et seq., 892
written answers to, when referred to in the policy, become part of it 871
the usual ones in life policies 894

INSURABLE INTEREST.
defined 2
dispensing with proof of 7
in case of a donation *inter vivos* 176
what is sufficient 173
must be a direct interest 175
conditional 176
future 179
by an executory contract for the purchase of the subject 178, 180
must be subsisting at the time of loss 185
may subsist after sale of, or agreement to sell, the subject 188, 189
of a bailee 191
not destroyed by an attachment on mesne process . . 193
not devested by illegal capture 194
not extinguished by mere liability to forfeiture . . . 190
when devested in case of forfeiture 195
change of, in an enemy's ship 199
in a ship for advances for repairs 202
of a creditor in the proceeds of a ship made payable to him . 203
in liens and securities 204
in the solvency of underwriters 205, 206
of partners respectively 208
legality of 209, 210
of the vendor, in the price of goods sold with a knowledge of an intention to smuggle them 269
of a creditor, in goods, the proceeds of which are payable to him 291, 551
of the vendor on a conditional sale 294
of a lender in bottomry . . . . . 298 et seq.
of a consignee, factor, agent, or carrier . . . 309 et seq.
of a neutral master who ships goods as trustee for a belligerent 313
of mechanics having liens for repairs 314
in profits . . . . . 315 et seq.
of captors 320, 428
of a charterer 325, 1225
in freight generally . . . . . 327 et seq.
in fishing voyages . . . . . 343 et seq.
of tenant for life 349
of a remainderman 349
in lives . . . . . 352 et seq.
in double insurance . . . . . 359 et seq.
in reinsurance . . . . . 374 et seq.
sole owner, is not covered by a joint insurance . . 381
of partners and part-owners 391
change of, pending the risk 394
of a judgment creditor having a lien on real estate . . 400

INSURABLE INTEREST, *continued.*
of a depositor in a policy effected for his benefit by a depositary 401
when it need not to be particularly specified 419 to 425, 588, 640
what is covered by the term "freight" 469
the particular nature of, need not in general be disclosed . . 588
in insurance against fire, need not be specially stated . . . 640
in a life 1216, 1217, 1247
in marine insurance, refers to beginning of the risk . . . 1219
includes the premium 1221
in a ship 1222, 1224
the amount of, referred to in adjusting a loss . . . 1224
in goods 1226, 1241
a contingent interest not subject to estimate is not insurable in an open policy 1236
of a consignee 1243
is of different amount in a policy and in contribution to average 1237, 1410
in freight, is the same amount for a part, as for the whole of a passage 1239
in freight for a passage 1240
of mortgager or mortgagee, how much is covered . . . 1244
in a fire policy, is the value in the market 1245
in bottomry and respondentia 1249
of mortgagee 1511
allegation of, in a declaration . . . 2018 et seq.
amount of, in bottomry 2149
when diminished by discharging a part of the cargo 1260, 1261
must be proved 2123, 2127, 2128
proof of, in ship, freight, and goods . . . 2124 to 2126

INSURANCE.
defined and explained . . . . . 1 to 5
is a contract for pecuniary indemnity . . 3 to 5, 172, 174
the form of the contract of 6
the contract of, necessarily complicated . . . 6
differs from wagering 6
may be made orally 8, 9
an agreement for . . . . . 13 et seq.
contract of, when completed 22, 24
requisites to its validity, when effected by an agent . . 26
provisions of policies on canal trade and flat-boats . . 61, 62
provisions of fire policies 63
provisions of life policies 64
renewal of 74
negotiations for, by letter 118
leading principles of construction of . . . 118 to 145

INSURANCE, *continued.*
refers to usage . . . . . 132 to 145
retrospective 184
against certain risks 207
prohibition of 209
void for illegality . . . . . 210 to 212, 214, 223, 269
when presumed to be legal 217
not vitiated by mere intent to do an illegal act not stipulated for 220
in contravention of foreign laws, legal . . 269, 908, 1119
parties to a policy of . . . . . 379 to 414
to what interest applied 380
joint, not applicable to a sole interest . . . 381
may be adopted by a party for whom it is voluntarily made 388, 390
by a party having an interest in different capacities, how applied 392
effected by one as agent 408
on a subject generally in which the assured has a partial interest 416
on "returns" 441
on goods for a certain period on a certain voyage . . 443
on "all lawful goods," applies to contraband goods . . 446
on goods from the time of loading 447
on goods laden for a certain voyage 448
on goods from a certain port 449
on freight for successive passages, or for a certain period . 470
business of marine, differently conducted in England and the United States 509
against fire, as to representation respecting . 635 et seq.
on lives, as to representation respecting . . 643 et seq.
against the administration of the law of nations by a foreign tribunal, valid 910
does not indemnify against the fraudulent acts of the assured himself 911
against arrest and detention by the assured's own government 913
in a belligerent country, protects a neutral against arrest by officers of such country 916
on goods, when the policy attaches . . . 938 et seq.
"to a market" 960, 1014
proof for whom made 2087
insurance upon honor 8
wagering insurance 5

See *Average, General; Average, Particular; Double Insurance; Fire Insurance; Insurable Interest; Life Insurance; Policy, Risks.*

INSURANCE AGENTS.
how appointed 1848
is debtor for the premium in England . . . 1849
may act for both parties 1850

INSURANCE AGENTS, *continued.*
authority of one of divers parties interested jointly or in common to effect insurance for all . . . 1851, 1852
may become a party by guaranty 1853
the ship's husband is not agent to insure . . . 1854
nor is the master 1855
nor is usually the supercargo 1856
or an agent for procuring consignments . . 1857, 1860
where a consignee may insure 1858
a prize agent may insure 1859
when a general agent may insure 1861
a voluntary, how answerable . . 1862, 1863, 1867, 1868
authority of a trustee or depositary to insure . . . 1864
gratuitous, the duty and liability of . . . 1866
cannot transfer his responsibility to a sub-agent . . 1869
a sub-agent may be adopted by the principal . . 1870
revocation of the authority of 1871
of underwriters 1872
whether an agent to subscribe a policy is such to settle a loss 1873, 1874
an agent to communicate commercial intelligence, is not an insurance agent 1875
authority of, to receive notice of other insurance . . 1876
bankruptcy revokes the authority of . . . 1877
objects of an agency 1878
authority of, how determined . . . 1879, 1880
authority by possession of the policy . 1865, 1881, 1882, 1891
credit of loss by, is not payment in respect to the assured . 1883
qualifications, duties, and liabilities of 1862, 1863, 1866 to 1868, 1884 to 1897
diligence required of 1885
must follow instructions 1886, 1897
when bound to advance the premium 1887
when bound to insure 1888
liable for neglect to insure . . . 1892, 1893, 1898
liability for defect of the policy 1894
must select solvent underwriters 1895
must make true representations 1896
must effect a policy with the usual stipulations . . 1897
admissions by 2086, 2087
INSURANCE BROKER. See *Insurance Agent.*
INSURANCE COMPANIES.
constitution of 523
mutual 523
their rules affect the policy 24, 637
may be liable to some assureds in preference . . 1795

INSURANCE COMPANIES, *continued.*
limit of liability of . . . . . 1795 a
See *Corporations.*
INSURED. See *Assured.*
INSURER. See *Underwriter.*
proceeding against an individual member of a company . 1939
INTELLIGENCE.
must be communicated to underwriters . . 538, 608 to 614
See *Abandonment.*
INTENTION.
determines who are parties to a policy for whom it may concern 382 to 390
to enter a blockaded port, is not a breach of blockade until some act is done in pursuance of the intention . . . 831
to deviate does not discharge the underwriters 936, 966, 993, 1001
INTEREST.
of a lessee in a policy made by the lessor . . . 402
of a party to whom a loss is payable . . . 403
the original assured has none in a reinsurance . . . 404
as to specifying that in bottomry in the policy . . 427
marine, paid by the assured, is included in the adjustment of a loss 1560
as to allowance of, on a loss 2147, 2148
See *Insurable Interest.*
INTERLOPING TRADE.
insurance upon, is valid 1118, 1119
INTERMEDIATE PORT.
implied warranty of seaworthiness at . . . 731 et seq.
may be omitted 1010, 1013
visiting through necessity is not a deviation . 1023 et seq.
as to freight *pro ratâ*, where the voyage is broken up at . 1988
INTERMEDIATE VOYAGE.
liberty to make 725, 1009
INTERPLEADER 1978
INVOICE PRICE.
is usually the amount of the insurable value in an open policy 1227, 1229
JETTISON.
defined 1278
must be contributed for 1279
should be made by the master 1280
of the deck load 1282
of the boat, masts, spars, rigging . . . 1283 to 1285
includes loss on freight 1287
by exposing goods in the boats 1288

JETTISON, *continued.*
incidental damage by 1286
from a boat, is contributed for 1289
from a vessel in possession of captors is contributed for . 1293
contribution is made though the peril is not avoided, if something is saved 1318
may be claimed for, against underwriters in the first instance 1348
there is no distinction as to its being before half of the voyage is performed 1371
of valuable goods which are not known to be so . . 1372
of goods subject to damage, how contributed for . . 1367
abandonment, in case of 1616
JEWELS.
used as ornaments by persons on board, are not covered as "goods," "wares," &c. 435
when part of the cargo, contribute to general average, according to their value 1397
JOINT ASSUREDS.
application of a policy by 1115, 1127
JUDGMENT.
as evidence . . . . . 2104 et seq.
how proved 2047
JURISDICTION.
of consuls, how it must be derived 200
of courts of law upon policies of insurance . . 1932, 1933
of courts of equity 1935
of equity to compel the specific performance of an agreement to make or renew a policy 1936
of remedy against an individual member of a company . 1939
LABEL.
or "slip" for a policy 13
LADING.
risk on goods begins from 447, 938, 939
in boats, when the risk begins from . . . 941
a policy "from the lading," how applied . . . 444
LADING, PORT OF.
risk to begin from 929, 931, 942
LAND CARRIAGE.
risk of fraud in, is covered under barratry . . . 1064
LANDING.
a risk "till safely landed" terminates on landing at the usual place 971
See *Lazaretto.*
LAW OF NATIONS.
duties of neutral nations under 270
may be controlled by treaty 813

LAWFUL GOODS.
include contraband of war 446
the contraband character of goods should be disclosed, if known implied by the policy 748
LAWFUL TRADE.
insurance on, against barratry, covers loss by reason of barratrous smuggling 770
means that for which the owner gives orders . . . 1076
LAWS.
contravention of foreign laws of trade may be insured against 268
foreign, how proved 2110
LAZARETTO.
the risk on goods till safely landed, ends on their being landed at the lazaretto, at Leghorn 971
See *Landing*.
LEAK.
as to its being a ground of presumption of unseaworthiness 725
LEAKAGE.
ordinary, insurers not liable for 1090
is allowed for, in adjusting a general or particular average 1366, 1468
LEE-SHORE.
as to loss of anchor or sails in endeavoring to keep off, being general average 1296, 1297
LENDER.
the interest of, on bottomry and respondentia, must be specified in the policy — quere of this doctrine . . . 427
LETTERS.
contract by, for insurance 17
construction of, a representation made by . . . 566
LETTERS OF MARQUE.
as to the necessity of disclosing 584
as to the taking and using of, being a deviation . 1029 et seq.
LIBERTY.
of the globe, construction of 144
to touch, to what ports, and purposes, and delays, it extends 1005 to 1008
to sail backwards and forwards 1009
LICENSE.
to an enemy, its construction 151
to trade with the public enemy, by whom it must be given, and how it is construed . . . . 242 to 253
is evidence on what voyage a vessel sailed . . . 2093
LIEN.
of the depositary of the policy 98
a mere depositary of a policy cannot give a lien on it . 101

LIEN, *continued.*
gives an insurable interest 204, 261
of a neutral ship-owner, on belligerent goods, is a neutral interest 261
for contribution due on account of a jettison . . 1343 to 1345
of the master, where he has used his own funds to repair the ship 1563
on the ship for repairs 1594
of an agent 1909, 1912, 1914
of a sub-agent 1916
of an agent, how lost 1917
of seamen, for wages 1719
revival of an agent's lien 1920
as to the assignment of, by an agent 1921
LIFE INSURANCE.
provisions of 64
when assignable 79
application of the proceeds of, when pledged as collateral security 397
warranties, conditions, and stipulations in . . 891 et seq.
termination of the risk in 952
change of risk in 1039
the amount of the insurable interest under . 1216, 1217, 1247
amount covered in . . . . . 1484 b
notice and claim of loss under 1513
the effect of payment of loss under 1729
salvage in 1755
forfeiture of a condition in 2164
LIGHTENING THE SHIP.
jettison or sacrifice for, is general average . . 1278, 1288
LIGHTERS.
when the risk continues on goods in . . . 970
insurers are liable for loss of goods in 1094
loss by exposure of goods in, to float a vessel or pass a bar, is general average 1288
stranding of, does not cancel the memorandum . . 1759
See *Boat.*
LIGHTNING.
damage by, the subject being burnt by, is covered . . 1094
as to underwriters being liable for the damage to a building shattered by lightning, but not burnt . . . 1097
LIMITATION.
of action by the statute of limitations, plea of . . . 2041
of right of action by stipulation in the policy . 1983, 2171
LINEN.
what covered as such in a fire policy . . . 489
LIQUORS.
as to compliance with the condition in a fire policy not in store 883

LLOYD'S LIST.
is presumed to be known to the subscribers there . . 2078
LOG-BOOK.
of convoy, is ruled to be evidence of the time of sailing, and of sailing with convoy 2094
LOSS.
incurred by the fault of the assured, is not covered . . 41
exceeding half of the value of the ship is constructively total 48, 1539 et seq., 1608 et seq.
so also of the cargo . . . . . 1608 et seq.
this rule is not applicable to either ship or cargo after arrival at the port of destination 1555, 1612
by dampness 56, 1778
when payable 57
before seizure for forfeiture, whether recoverable after forfeiture 196
consequent upon unseaworthiness, is distinguishable from one otherwise arising 735
prior to the date of the policy, may be covered . . 925
by fire . . . . . 1094 to 1098
by qualities of the subject . . . . . 1095 a
as to, by fire, though the subject is not actually burned . 1097
by dampness, excepted 1129
the underwriters on goods are not liable for loss by selling goods to raise funds to make repairs 1139
of freight 1142
what losses are within the period of the risk . . 1146 et seq.
after the period of the policy has expired, from a cause existing previously 1148
on bottomry interest 1169, 1173
exceeding total 1268
claim of, under fire policies 1508
claim of, under life policies 1513
enhancement of, by negligence of the master and mariners 1547
claim of, by the assured, whether discharged by the underwriters' repairing the ship 1557
on salvage of freight by an abandonment of the ship . . 1610
by compromise with captors, liability of insurers for . 1613
on profits 1655
payment of, entitles the underwriters to salvage . 1723, 1729
when total, under a policy "against total loss only" . . 1767
by reason of change of flavor, excepted . . . 1778
in the nature of general average, is recoverable as such, though but one interest is at risk 1783
preliminary proof of marine policies . . . 1800 et seq.
notice of 1806, 2150

LOSS, *continued.*
certificate of, in fire policies . . . . 1807 et seq.
paid by broker in ignorance of the insolvency of the insurer, is not reimbursible 1922
provinces of the court and jury respecting . . . 1951
when payable to the executor, and when to the heir . . 1977
must be truly set forth in the declaration . . . 2022
a partial, may be recovered under a declaration for a total 2023, 2143
proof of, by condemnation 2142
the amount of, must be proved 2144
proof of, in reinsurance 2145
proof of, in double insurance 2146
deduction of salvage from 2162
by rioters, proof of 2167
is not paid in respect to the assured, by merely being credited in the broker's account with the underwriter . . 2169
must be proved to have been within the period of the risk, and extraordinary 2132, 2141
must be proved as alleged 2135, 2140
by capture, proof of 2136, 2137
by arrest, proof of 2138
stipulations for proof of, in fire policies . . . 2130
proved by evidence that the vessel had not been heard from 2139
See *Risk*, *Excepted Losses*, *Memorandum.*
LOSSES, EXCEPTED.
remote and consequential, not covered . . 1128 et seq.
See *Excepted Losses.*
"LOST OR NOT LOST."
the construction of this provision 925
MACKEREL VOYAGES.
insurable interests in 345
MARINE INTELLIGENCE.
when presumed to be known to underwriters . . 606, 2100
MARINE INTEREST.
is a part of the loss 1560
abatement of . . . . . 1847 b
MARINE RAILWAY.
risk on the ship upon, while repairing . . . 1099
MARINERS.
national character of 169
See *Seamen.*
MARKET.
insurance to, covers passages backwards and forwards . 1014
MAST.
jettison of 1105, 1284, 1285

MASTER.
purchase by 192
wages, commissions, and privilege of, are insurable . . 213
authority of, to hypothecate and sell the ship 302, 303, 1537, 1561, 1566, 1569, 1583
insurable interest of, as trustee 313
a competent, is requisite to seaworthiness . . . 707
acts of, imputable to the assured, with reference to non-compliance with express warranties 763
the neutrality of the ship is forfeited by his covering belligerent goods 810
and mariners, how far agents for the owner, . . 1056
barratry of 1066
enhancement of loss by the negligence of . . . 1547
lien of, where he has used his own funds to repair the ship . 1563
duty of, to communicate with his owners . . . 1565
in case of incapacity of, the mate succeeds to the command . 1582
acts of, must be within the limits of his authority in order to affect underwriters 1584
stress is put upon the fact of his acting fairly . . 1585
his duty to transship . . 1602, 1624, 1625, 1635, 1736
on abandonment the underwriters are entitled to the benefit of his purchase of the subject 1734, 1736
liability of, to shippers, for damage in consequence of culpable mismanagement by the mate and mariners . . 2004
MATE.
the wages of, are not insurable 212
may act as master on the death or insanity of the master . 1582
MATERIALS.
proceeds of the old, how deducted 1434
MAURITIUS.
is in a commercial sense, an Indian island . . . 144, 979
MECHANICS.
may insure their liens for repairs 314
MEMORANDUM, THE.
the different forms of 54, 1756, 1757
construction of . . . . . 1758 et seq.
See *Excepted Losses.*
MEMORANDUM ARTICLES.
enumeration of . . . . . 54 and note.
rule as to abandonment of . . . 1615, 1767 et seq.
articles perishable in their own nature 1765
See *Exception of Average*, *Excepted Losses.*
MISCONDUCT.
of agents, insurance against, must be in writing . . 9

MISCONDUCT, *continued.*
loss by misconduct of agents not covered . . 911, 1046
MISREPRESENTATION.
defined 529
effect of 537
See *Representation.*
MISSING SHIP.
presumed to be lost 1496, 2139
MISTAKE.
in the policy, may be corrected in equity . . 116, 1937
in the description of the subject, does not defeat a policy that contains criteria to identify it 430
in declaring the subject, may be corrected . . . 440
of the master in respect to his authority to sell the vessel, is at the risk of the assured 1583
of law or of fact, see *Adjustment.*
MOB.
loss by, ruled to be by "pirates," not by "people" 1106, 1110
MONEY.
payment of, into court, admissions implied thereby 2061 et seq.
"MOORED IN SAFETY."
construction of 968
MORTALITY.
insurance "free from," how construed 1163
MORTGAGE.
insurable interest in . . . . . 289 et seq.
the debt is salvage on abandonment . . 1511, 1712
MORTGAGEE.
insurable interest of . . . 289 et seq., 1244, 1511
interest of, in a ship distinguished by the British registry act 289
interest of, in the policy, is conditional . . . 295
as such, has no interest in an insurance by the mortgager 405, 1962
may insure without specifying his interest . . . 421
the interest of, whether covered by insurance declared to be on bottomry 467
abandonment by 1712
MORTGAGER.
still has an insurable interest to the full amount of the subject 286 et seq., 399
may insure without specifying his interest . . . 426
MULES. See *Animals.*
MUTINY.
loss by, is covered 1062, 1081, 1106
MUTUAL INSURANCE COMPANIES.
in the United States, usually have a lien for premium upon insured real estate 511

MUTUAL INSURANCE COMPANIES, *continued.*
constitution and forms of 523
rules of, are not warranties unless by stipulation . . 761
insurance by, may cover loss by collision of vessels belonging to members 912
NATIONAL CHARACTER.
depends mainly upon domicile 153
of colonies and factories 165
of corporations 167
of consuls 168
of mariners 169
the native, continues till another is acquired, and easily reverts 170, 171
is presumed to continue 224
the same policy on the distinct interests of assureds of divers nationalities indiscriminately, may be valid for some, though not so for others 234
of ships 239
of goods, is that of the vendor after they are stopped in transitu 264
must be truly represented 589
representation with regard to . . . . 624 et seq.
when the statement of, constitutes a warranty . . 757
is indicated by the flag 804
NAVIGATION LAWS.
insurance in contravention of those of the country where the policy is made, is void 210
NECESSITY, PORT OF.
expense of making, is general average . . . 1320 et seq.
NEGLIGENCE.
loss by peril insured against, in consequence of the negligence of the master or mariners, or of domestics, is covered 867, 1096
NEUTRAL.
may be insured by one belligerent against capture by another 152
country occupied by an enemy treated as neutral . . 163
country, removal to by a belligerent, pending a war, as affecting his national character 166
goods of, when treated as belligerent 276
privilege of 258
the disguising of belligerent property by . . . 819
obligation of, to submit to search 821
conveyance of despatches by a neutral ship . . . 825
is not affected by a blockade until he has notice . . 829
NEUTRALITY.
express warranty of . . . . . 783 et seq.
warranty of, is applicable only to the interest insured . 789

NEUTRALITY, *continued.*
compliance with warranty of . . . . 783 et seq.
burden of proof is upon a neutral to show neutral ownership 808
"NEW FOR OLD."
deduction of a third for . . 50, 1369, 1431, 1433, 1543
no deduction is made for, under a fire policy . . . 1484
NEWSPAPERS.
when marine intelligence in, is presumed to be known to underwriters 606, 2100
NOTARIAL COPY.
of a bill of sale of a ship recorded by a notary under the French law, is admissible as proof of interest . . . 2124
NOTICE.
of an assignment of a marine policy, binds the underwriters 81, 95
of loss under fire policies 1508
of loss under life policies 1513
of loss, is distinguished from the proofs of loss . . 1806
OATH.
requisite in the authentication of testimony . . . 2047
OIL.
construction of warranty against storing . . . 883
OLD MATERIALS.
deduction of the proceeds of 1434
"OPEN POLICY."
its different meanings 1178
OPENING OF THE POLICY.
is not a setting aside of the valuation 1203
OPINION.
the statement of, is not a representation . . . 551
when admissible as evidence 2112
ORDER.
to insure, revocation of 560
OUTFITS.
distinguished from cargo 436
"and catchings," construction of, in fishing voyages . 460
OVER-INSURANCE. See *Double Insurance; Return of Premium.*
OVER-VALUATION.
fairly made, is valid 7
may be evidence of fraud 2080
OWNERS.
construction of the term 387
liability of, to shippers 1056
insurable interest of, on account of advances for wages . 342
insurance "on account of owners" applied for those for whom it is intended 386

OWNERS, *continued.*
belligerent, of part of the property, defeats the policy as to the whole 788
in respect to barratry 1083
limitation of the liability of 2006
claim of, for damages against captors for an unlawful capture . 2008
PAPERS.
false, defeat the insurance 744
concealment of, is a breach of warranty of neutrality . . 809
spoliation of, is a ground of presumption against a party . 2082
as to ordering the production of 2101
copies of lost, are admissible 2103
PAROL EVIDENCE.
of delivery of the policy on another day than the date, is admissible 29
is admissible to explain the term "owners" and other terms 143, 386, 2119, 2120
PAROL INSURANCE.
as to its validity 9
PARTIAL LOSS. See *Average.*
PARTICULAR AVERAGE. See *Average Particular.*
PARTIES.
to the contract of insurance, who are . 379 et seq., 391, 1853, 1967
to the policy, neither can discharge himself without the consent of the other . . . . . 110, 413 a
divers, in same policy, where they have distinct remedies . 396
where different, are respectively answerable for different perils 1137
when jointly interested, must sue jointly . . . 1964
cestui que trust is a party in interest to a policy effected by his trustee 1976
joinder of, in a bill of discovery 1979
to a suit, who to be made defendants . . . 1981
description of, in the declaration 2013
to policies, proof of 2113
the interest of, in the policy, must be averred . . . 2021
PARTNERS.
insurable interest of 208
how the policy must be made to be applicable to their interest 391
the interest of a neutral, in a belligerent house, is belligerent 814
PART-OWNERS.
insurance by 391, 1967
PASSENGERS' BAGGAGE. See *Average.*
PASSPORT.
as to, in reference to warranty of national character . . 805

PAYMENT.
by insurers to a mortgagee, when it is in satisfaction of the debt 297
of premium, what is ground for claim of return . . 1347
under demand of total loss, as to its being proof of an acceptance of an abandonment 1695
of a loss by underwriters, entitles them to salvage . 1723, 1729
of loss, as to recovering it back from an agent . . 1929
credit of a loss by the agent is not payment in respect to the assured 1883
of a loss, is not conclusively proved by the erasure of the insurer's name 2168
of a loss to the assured, is not made by writing off premiums in the broker's account with the underwriter . . 2169
of money into court, admissions by 2061
PEASE.
are included under the exception of "corn" . . 1764
PEOPLE.
construction of the term in the policy . . . 1106, 1110
PERIL.
loss by fear of 590, 1094, 1115
PERILS.
defined 2
insured against, must be specified 35
only the extraordinary operation and effect of, is covered by the policy . . . . . 1086 to 1088, 1105
of the seas, what are . . . 1099 et seq. 1125, 1417
of the rivers and lakes . . . . 61, 62, 1099, n.
concurrence of different perils . . . 1128 et seq.
by which the loss is caused, must be stated in the declaration . 2022
See *Risk*, *Risks*.
PETTY AVERAGE . . . . . 1269, n.
PILOT.
effect of not taking 266
competent, is requisite to seaworthiness . . . 712
public, not absolutely requisite 713
taking a person falsely pretending to be . . . 714
must be aboard going out of port 715
not appearing on signal, the master may proceed without . 716
leave to the master to stand pilot 718
the underwriter liable for loss by, as by a peril of the seas, in consequence of the pilot's mistake 1058
remedy against 2007
PILOTAGE LAW.
as to the effect of contravention of 717

PIRATES.
a loss by, when covered 1106
a compromise with, is general average 1335
PLEA.
of temporary disability 2030
of usage 2031
of prior insurance 2034
of forfeiture of a fire policy 2036
of former judgment 2037
of bankruptcy 2042
of tender 2043
of set-off 2044
PLEADING . . . . . 2027 et seq.
POLICY.
defined 2
on interest or gaming 4, 6, 7
is not revived by an oral waiver of a forfeiture . . 10
form of 12
execution of 22
delivered after date to take effect from date . . 25, 127
may be proved to have been executed on another day than its date 128
presumed to take effect from its date 127
delivery of, by an agent after notice of intent to revoke his authority 26, 127
an open, defined and explained . . 27, 439, 918, 1178
valued, defined 27
for whom it may be made 28
the subject of, must be expressed 31
for a certain period 37
marine, implied conditions of 38, 39
provisions of, in case of partial loss 48
form of, on canal transportation 61
form of, on cargoes of flat-boats 62
what comprehended as part of 65
other writings made part of, by reference . 70, 71, 2115, 2117
assignment of 47, 76, 77, 80, 94
lien of a depositary upon 98
as to its surviving to the heir or executor . . . 104
clause that it shall become void on assignment . . . 107
alteration of, by agreement 109
subscribed by different underwriters 113
mistake in, may be corrected in equity . . 116, 117, 1937
leading principles of construction of . . . 118 et seq.
is construed according to the laws of the place where it is made 121
the written part prevails over the printed . . . 125

POLICY, *continued.*
the construction of, is affected by evidence aliunde . 119, 2119
the construction of, is affected especially by usage 132 et seq., 2120, 2121
construction, as to filling a blank in . . . 145
is not defeated by the assured becoming mortgagee instead of absolute owner 187, 394
effected by mortgager, does not enure to the benefit of mortgagee, unless assigned 296
description of the assured in . . . . 379 et seq.
adoption of 389
apportionment of, upon the divers interests of the assured . 395
as to its being the subject of but one joint action or divers distinct actions by the assureds 396
where divers parties answer the description of the assured, how applied 411
"for ———" is equivalent to "for whom it may concern" . 407
in the alternative upon one or both of two subjects . . 429
on "proceeds" 441
as to its attaching to articles carried on deck . . . 460
on the ship 463
effected according to the fraudulent communication or concealment of intelligence by a master or agent . . 549, 564
as to its attaching on ship, cargo, and freight, at different times 723
on a ship, usually valued 1185
on a cargo oftener open 1186
open, requires the amount of interest to be proved . 1218
the same, may be open and valued 1179
fire, usually open 1211
marine, amount recoverable under 1742
form of action on . . . . . 1954 et seq.
in the name of a part-owner, is applicable only to his interest . 1967
proof of subscription to 2114
See *Action*, *Amount Insured*, *Declaration*, *Fire Policy*, *Prior Policy*, *Valuation*, *Value*.

PORT.
meaning of the term 144
of London, its extent 776
"warranted in," refers to the port where the risk is to begin . 778
risk to "port or ports of lading," construction of . . 144
risk "to the port of discharge," construction of . 963, 965
of necessity, average for putting into . . . 1320
of necessity, delay in by ice, is general average . . 1324
of destination as to constructive total loss after arrival at 1555, 1612

PORTS.
the order in which they must be visited . . 1010
POST-MARKS.
when evidence 2097
PRACTICE.
sundry questions of . . . . . 2173, n.
PRECIOUS METALS.
as to their being covered by the description in the policy . 432
PRECIOUS STONES.
as to their being covered by the policy . . . 435
contribute to general average 1397
PRELIMINARY PROOF.
waiver of 889, 1803
provision in a marine policy as to 1800
in fire policies . . . . . 1805 et seq.
waiver of a formal defect in 1813
is regulated by the usage of the place . . . 1983
papers given in as, are not thereby made evidence on the trial 2090
PREMIUM.
defined 2
in bottomry and respondentia . . . 523 a, 1847 b
is always specified in the policy . . . 34, 400
not due unless the subject is put at risk . . . 38
return of . . . . . 53, 1819, et seq.
whether to be included in computing a loss of fifty per cent. 252
as to the apportionment of 502, 1833
is due from the broker in England 507
is due from the assured in United States . . . 508
construction of the acknowledgment of the receipt of, in the policy . . . . . 512 et seq.
is part of the insurable interest 1221
is not a part of the contributory value . . 1405, 1406
whether to be included in the value in applying the exception of average 1790
action for 1993
as to presumption from the rate of 2159
See *Return of Premium.*
PREMIUM NOTE.
the policy may take effect before it is given . . . 24
the clause for setting off 51
for an illegal insurance, is not recoverable . . . 519
PRESUMPTION.
is in favor of the legality of the risk . . . 217
that facts known by an officer of a company are known to the company 556, 560

PRESUMPTION, *continued.*
that facts known at a party's place of business are known to him 605
from the rate of premium, as to the risk intended . . 659, 2159
as to unseaworthiness 725, 2079
that a loss was occasioned by a peril of the seas . . 1053
as to a loss being occasioned by a peril insured against . 1163
that the master has done his duty 2076
that a clerk had authority to assent to an assignment . . 2077
that a subscriber at Lloyd's has notice of the marine list posted up there 2078
from refusal to let underwriters examine damaged goods . 2081
from spoliation of papers 2082
that a missing vessel is lost 2083
that the nominal assured ordered the policy on which a loss is paid to the agent 2084
PRINCIPAL. See *Agent.*
PRIOR POLICY.
clause as to 1251
means prior in date or time of subscription . 1252, 1253
how the amount of the prior policy is computed . 1257 to 1259
clause as to, how applied in reinsurance . . . 1264
PRIVATEER.
fitting out of, by neutrals 283
PRIZES.
as to insurance of, by commissioners . . . 324
court of, as to condemnation and sale of ship by decree of 46, 1736
PROCEEDS.
of a policy, how applied in case of mortgage and assignment 105, 414
what included under proceeds of a cargo . . . 144
of illegal trade, as to their being legal . . . 222
of a life policy, how applied 397
policy on, how applied 441
PROFITS.
insurable interest in 181, 315
description of, in the policy 461
are usually valued 1209
on outward cargo are part of insurable interest in the homeward 1241
loss on, should be adjusted as on goods . . . 1252
expected, do not contribute, and are not contributed for in general average 1294
salvage on, no abandonment of 1503
as to construction, total loss of 1656
See *Return of Premium.*
PROMISSORY REPRESENTATION . . . 553, 684

PROPERTY.
what is covered under a policy upon . . . 455
PRO RATA FREIGHT. See *Average, Particular.*
PROTEST.
when evidence 2095
PROVENDER.
as to its contribution to general average . . . 1399
PROVISIONS.
are a part of the ship 1223
during delay for repairs, are general average . . 1328
when they contribute to general average . . . 1399
PURCHASE.
of the subject by the master may be assumed by the owner or underwriter 1580, 1590, 1591
QUARANTINE.
delay at, is not general average 1323
RATIFICATION.
of a policy previously made, is equivalent to an order to effect it 389, 390, 1867
RECORDS.
how proved 2048, 2050
RECOVERY BACK.
as to a broker's recovering back a loss paid by him, not knowing of the underwriter's insolvency 1922
of money paid through mistake or fraud, or on an illegal contract 1929, 1997
of a loss paid conditionally 1996
REFERENCE. See *Arbitration.*
REGISTER.
requirements of the law pertaining to 265
not necessary to insurable interest in the ship . . 265
as a certificate of national character 800
laws pertaining to, of one country, cannot be alleged against the owner in another 267
collector's certificate is not proof of copy of . . 2091
REINSURANCE.
defined 374
does not compel the assured to look to the reinsurer . 78 a
insurable interest in . . . . . 375 et seq.
the original assured has no interest in . . . 404
whether it must be expressed to be such . . . 498
the amount of insurable interest in 1248
there is no necessity of abandonment in . . . 1506
liability of the underwriter in, does not exceed that of the original underwriter 1751

REINSURANCE, *continued.*
the amount of loss in, is not reduced on account of the insolvency of the original underwriter 1752
total loss in, under a policy 1753
proof of the amount of loss in 2145
defence under 2173
RELEASE.
as to, by a nominal assured 81, 2160
REMOTE AND CONSEQUENTIAL LOSSES.
doctrine as to . . . . . 1128 to 1145
RENEWAL OF THE INSURANCE.
how made 74, 75
provision for 953
REPAIRS.
departure from the usual course to procure . . . 1018
what kind of, is requisite 1428
what, are particular average 1424, 1425
expense of, how estimated 1545, 1548
as to the expense of replacing decayed parts . . . 1547
made or offered to be made by insurers 1556, 1557, 1559, 2166
See *Abandonment, Average Particular, Average General, Loss, Waiver.*
REPORTS. See *Representation.*
REPRESENTATION.
and concealment defined . . . . . 524 et seq.
in bottomry and respondentia . . . . . 487 a
as to an immaterial misrepresentation or concealment . . 539
of a lien, whether necessary 592
when a representation must be in writing or may be oral 586 a, 587 a
inquiries by the underwriter must be truly answered . 439
concealment or misrepresentation of material facts defeats the policy . . . . . 540, 675 to 685
the effect of misrepresentation and concealment in answer to specific inquiries 539, 541
substantial compliance with, is sufficient . 544, 547, 669 to 674
as to fraudulent concealments of facts from, or communications to the assured, by the master or agent . . 549, 564
the statement of an expectation, opinion, or belief . 551
a promissory, how far binding, construction of, the effect of non-compliance with 553, 684, 685
whether subsequent underwriters may avail themselves of one made to a prior underwriter 554
affects only the policy made thereupon 555
in life insurance, by third persons 654
to what time it refers 557
by an agent, in effecting the policy, binds the principal . 562

REPRESENTATION, *continued.*
the construction of, includes what is implied . 565, et seq. 580, 642
ambiguous, how construed 568
of reports and rumors, how construed . . . 563, 569
what facts must be disclosed . . . 571 et seq.
the nature of the interest need not be particularly disclosed 588 to 591
usages of the trade need not be disclosed . . . 593
as to an intended contravention of foreign commercial regulations . . . . . 595 et seq.
matters of express stipulation need not be disclosed . 600
as to representation of facts relative to implied warranties 601, 602
what intelligence must be communicated . . 603 et seq.
the time of sailing or being spoken must be communicated, if material . . . . . 615 to 623
in respect of national character and belligerent risks 624 et seq.
in insurance against fire . . . . . 635 et seq.
in life insurance . . . . . 643 et seq.
provinces of court and jury respecting 1948
presumption respecting, from rate of premium . . 659
withdrawing of, or waiver of objection . . 660 et seq. 667, 668
when equivalent to a warranty 765
referred to in an assigned fire policy, is that of the original assured 2165
RESPONDENTIA.
defined 298
insurable interest in 307, 308, 1249
remedy of lender on 1985
See *Bottomry, Hypothecation.*
RETURN OF PREMIUM.
stipulation for 1839, 1841
in case of the contract failing by misdescription of the subject 1822
where there is no risk . . . 1819 to 1821, 1826, 1832
on account of prior insurance 1823
for want of interest 1824
when the policy is made through mistake . . 1825, 1828
whether made in case of an agent's mistaking his authority 1826
on account of short interest . . 1829, 1830, 1834 to 1836
on profits for short interest 1831, 1833
in over and double insurance . . . 1836 to 1838
for safe arrival 1840
in case of no act of war 1842
if the vessel should be laid up for six months . . . 1843
in case of fraud by the insurer 1845
is not made on account of the illegality of the insurance . 1846

RETURN OF PREMIUM, *continued.*
what payment is ground for claim of . . . 1847
action for recovery of 1994
REVENUE LAWS.
insurance against the violation of foreign, is legal 1117 to 1119
RHODIAN LAW CONCERNING JETTISON . . 1279 n.
RICE.
not included under the exception of corn . . 144, 1764
RIGGING.
as to damage to, being average 1105
jettison of 1285
RISK.
the usual description of the termini . . . 37
the assured may choose whether to put the subject at risk . 520
the subject must be put at risk within a reasonable time . 49
when it begins at some intermediate stage of the voyage . 728
when suspended in case of temporary unseaworthiness and other causes 734, 975
continuance of, as to some losses, and its ceasing as to others 735
"on" or "from" a certain day, as to the time of its attaching 921
postponement of 924
"at," "at and from," and "from" a place, as to the time of its attaching . . . . . 927 to 938, 945
"from loading," when it begins 939, 940, 942
commencement of, on freight 943, 944
termination of, on two divers subjects . . . 948 et seq.
termination of, by noncompliance with a warranty . . 952
provision for continuance and renewal of 953
termination of, by arrival . 954, 955, 957 to 959, 961, 962, 965
"to a market," when it terminates 960
to the "final port of discharge," when it terminates . 963 to 965
terminated by the voyage being given over . . 966
until "moored in safety," when it terminates . . . 968
when it continues in lighters 970
on goods "until safely landed," ends on landing at the usual place 971
may terminate at different times on different parcels of the cargo 972
provision for its continuance or renewal . . . 953
liberty to vary . . . . . 1004 et seq.
change of, under a fire policy 1032
change of, under a life policy 1039
enhancement of, without the fault of the assured . 1093
of loss from the qualities of the subject . . 1089, 1095
of contraband trade . . . . . 1117 et seq.

RISK, *continued.*
of indefinite straining of the ship, not covered . . . 1143
as to a loss being within the period of . . 1146 et seq.
of loss after the period of the policy, in consequence of an act or event during the period . . . 1147, 1148
See *Deviation*, *Excepted Risks*, *Perils of the Seas*, *Risks.*
RISKS.
construed in reference to the voyage 36
in bottomry and respondentia 308, 1165
defined 905
what may be insured against . . . 905 et seq.
specification of 918
what are usually covered . . . . 1042 et seq.
illegal, cannot be insured against 1043
which are not assumed by the insurer . . . 1164
the subject must be proved to have been within . . 2129
See *Barratry*, *Excepted Risks*, *Fire*, *Fire Insurance*, *Perils of the Seas*, *Piracy*, *Revenue Laws.*
ROBBERY.
loss by is insured against 1106
ROOTS.
the exception of average on, does not include dry sarsaparilla 144, 1764
ROTTEN CLAUSE.
the construction of 849
must be specially pleaded 2035
SAFE CONDUCT.
privilege of an alien enemy residing under . . . 151
SAILORS. See *Seamen.*
SAILS.
damage to 1105
lost in keeping off a lee shore 1297
let go, to make a vessel right 1298
SALE.
pretended, does not affect the national character . 256
of the ship by the master does not defeat a prior bottomry 303, 1597
of the subject, its effect as to an abandonment . . . 1497
of the ship by the master, when authorized . . 1537
of the ship by the owner or master, when not necessary, does not make the loss total 1573
of the ship, when justified 1577
of the ship by master, when it may be disclaimed and defeated by the owners' 1578
fairness of the master's conduct in selling, is considered to be of weight 1585

SALE, *continued.*
of the ship, on application of the master to, and order by, vice-admiralty court, does not conclusively justify it . . 1587
of the ship on libel by the salvors, as to its being a total loss . 1588
of the ship bought in by the master, as to the amount of the loss 1590
of the cargo, in case of necessity, authorizes an abandonment . 1623
of the subject, when not a waiver of an abandonment . 1700
SALT.
in the memorandum, does not include saltpetre . . 1764
SALTPETRE. See *Salt.*
SALVAGE.
defined 1488
adjustment as to, under divers policies on a subject at different values 1505
expenses of, when included in determining whether the loss is total 1551
salvage loss, in reference to the right of abandonment . . 1610
on freight 1644, 1649, 1652
belongs to the assured, where the loss is compromised at less than total with the underwriters 1713
goes to the underwriters subject to the expenses for saving, in case of abandonment . . . 1714, 1716, 1721, 1726
received by the assured, is to be accounted for on abandonment 1714
how far subject to lien for seamen's wages on abandonment . 1719
semble, that the assured cannot vest the underwriters with the ownership of salvage, against their express disclaimer . 1726
when diminished by the act of the assured, deduction is to be made 1798
SALVAGE LOSS.
what is, and how adjusted 1480
SARSAPARILLA ROOT.
not included under the exception of "roots" . . . 1764
SEA-LETTER.
the meaning of the term 144
is a certificate of national character 805
how proved 2111
SEALING VOYAGE.
valuation in 1210
SEAMEN.
wages of, not insurable 212
have no interest in the owner's policy on freight on account of their wages 406
occasional absence or sickness of, does not render the ship unseaworthy 711
barratry by 1081

SEAMEN, *continued.*
lien of, for wages 1719
entitled to wages down to the time of loss . . . 1719
SEARCH.
the effect of resistance by neutral to, when rightfully demanded 285, 818
the right of . . . . . 818 et seq.
resistance to, when permitted 823
SEA-RISKS. See *Perils of the Seas.*
SEAWORTHINESS.
implied warranty of . . . . 695 et seq.
varies at different times and places 719
depends on the voyage or service 720
degree of, requisite in port 720
warranty of, as to cargo and freight . . . 723
as to proof of, by the assured, in the first instance . 724, 2152
where the risk is to begin at an intermediate stage of the voyage 727
non-compliance with the warranty of, after the policy has attached, may not wholly discharge the underwriters . 730
the assured is bound to keep the vessel seaworthy so far as practicable 731
unseaworthiness occasioned by the mismanagement of the master, the effect of 733
suspension of the risk by temporary unseaworthiness . . 734
warranty of, is not waived by a prior survey, procured by the underwriters 753
want of, how pleaded 2032
when unseaworthiness is presumed 2079
See *Crew, Pilot.*
SECRETARY OF A COMPANY.
See *Assignment, Clerk, Presumption.*
SEIZURE.
for forfeiture as affecting the insurable interest . . 195
is equivalent to capture 1108
during the period of the risk for forfeiture . . . 1147
exception of the risk of . . . . 1153 to 1160
SENTENCE. See *Judgment.*
SET-OFF.
in case of the assignment of the policy 82
reservation of the right of, against an assignee of the policy 106
debts due from an agent cannot be the subject of, as against the principal 413
stipulation for 903
in adjustments . . . . . 1796 et seq.
by an agent, right of . . . . 1909, 1925 to 1927
requires the demands to be mutual 1924

SET-OFF, *continued.*
of a broker who is agent for both parties . . . 1927
plea of 2044
between the assured and underwriter 2170
SETTLEMENT. See *Adjustment.*
SHEATHING.
liability of the underwriters for damage to . . . 1105
SHIP.
must be seaworthy . . . . 39, 695 et seq.
national character of 229
belligerent, as to sale of, in a neutral port . . . 257
authority of the master to sell . 303, 1537, 1574, 1578, 1580
must answer to the description in the policy . . 450, 463
the common description of, in the policy . . . 463
warranted neutral, must have a certificate and documents of national character 803, 805
warranted neutral, may carry a belligerent cargo . . 824
employed in service auxiliary to hostile operations of a belligerent, becomes belligerent 825
the amount of the insurable interest in 1222
includes tackle, boat, guns, provisions . . . 1223
the amount of insurable interest of a charterer in . . 1225
diminution of the value of 1265
when partial loss on, is merged in a total loss . . 1266, 1267
when not heard of, is presumed to be lost . . 1496, 1595
abandonment of . . . . . 1519 to 1597
not reparable for the voyage, may be abandoned . . 1528
as to an abandonment of, when deserted by the crew, and brought into port by salvors 1529
the total loss of, by capture 1530
damaged, whether it may be taken possession of and repaired by the underwriters, and restored to the assured, he dissenting 1559
purchase of, by the master, on sale abroad, may be adopted by the owner or underwriter . . . 1580, 1590
SHIPMENTS.
successive, insurable value of 1227
SHIP-OWNER.
his liability for loss on the cargo does not exonerate the underwriter 1052
his responsibility for the conduct of the master and mariners . 1056
his lien on the cargo, for the purpose of transshipment . 636
SHIP'S HUSBAND. See *Agent.*
SHORT INTEREST.
return of premium on account of 53

SIMULATED PAPERS.
the use of, is a breach of the warranty of neutrality . 809
SKINS.
what is included under the exception of average on . . 1764
SLIP OR LABEL. See *Agreement.*
SMUGGLING.
trade in violation of the domestic laws cannot be legally insured 209
in violation of foreign revenue laws, may be legally insured 268, 1118, 1119, 1153
SPARS.
lost in carrying a press of sail to keep off a lee-shore, as to their being contributed for 1297
SPECIE.
is covered as merchandise 432
SPES RECUPERANDI.
belongs to the assured where the claim for loss has been compromised 1713
SPOLIATION.
of papers, inference from 2082
STATEMENTS.
being part of the *res gestæ*, are evidence to explain an act . 2089
STIPULATIONS.
the essential, in a policy 30
against the conclusiveness of decisions of courts of admiralty . 46
implied, are part of the contract 67
to keep insured, runs with the lessor's title . . . 103
implied, as to documents or insignia showing national character 745
to prosecute a claim 854
to claim property as Spanish 855
for cancelling the policy 857
of a respondentia bond 858
to give orders not to cruise 859
for "a passport in the usual form" 860
relative to prior insurance 864
in a fire policy, how construed 872
in fire policies, that the assured will give notice of a loss, produce certificates, submit to examination, and furnish proof of loss . . . . . 884 to 886, 1805 to 1813
for set-off 903
not to abandon 1507
for preliminary proof, non-compliance with, how waived . 1812
in life policies . . . . . 891 et seq.
See *Agreement, Express Warranty, Implied Warranty.*
STOCK.
"in trade," how construed in fire policies . . . 489

STOPPING IN TRANSITU.
insurable interest, in case of right of . . . 197
as to the effect of, on the national character of goods . 264
STOWAGE.
proper, is requisite to seaworthiness 704
STRAINING OF THE SHIP.
as to the liability of the underwriter for . . 1087, 1143
STRANDED SHIP.
expense of floating, when general average . 1312, 1313, 1340
STRANDING.
the underwriter is liable for 1087
loss of freight by, is contributed for 1362
voluntary, goods contribute for damage by, though not carried further on the voyage 1314
not, *ipso facto*, a total loss 1526
of a lighter, not a stranding within the meaning of the memorandum 1759
how far it defeats the memorandum 1761
SUB-AGENT.
may be adopted by the principal 1870
whether he has a lien against his immediate employer for his general balance 1916
See *Insurance Agent.*
SUBJECT OF INSURANCE.
defined 2
if not put at risk, the premium not due 520
must be specified in the policy 31
sale of, without an assignment of the policy, defeats the policy 87
effect of a conditional sale of 90
as to the policy being void on account of a part of the subject being illegal 232
description of . . . . . 415 et seq.
to be declared by the assured, may be declared after a loss 438
identified merely as being a consignment to the assured . 451
description of, in fire policies . . . 485 et seq.
description of, in fishing voyages 496
transfer of, to the underwriters, carries rights of action growing out of it 2010
description of, in the declaration 2017
SUBMERSION.
does not necessarily authorize abandonment . . 1527, 1607
SUBSCRIPTION TO THE POLICY.
allegation of, in the declaration 2016
SUBSEQUENT POLICY.
risk under, postponed until prior terminates . . . 1259

SUBSEQUENT POLICY, *continued.*
the amount of the insurable interest under, is determined by the value at which the subject is insured in it . . 1262
SUCCORING THE DISTRESSED.
reasonable delay for the purpose of, is not a deviation . 1027
SUICIDE.
exception of the risk of, in life policies 895
SUPERCARGO.
his insurable interest 311
SURVEY.
by the agent of underwriters is not a waiver of the warranty of seaworthiness 753
what constitutes a regular 852
construction of a reference to, in the policy . . . 873
when evidence 2096
of cargo, not indispensibly requisite to the recovery of a loss . 2134
SURVEYORS.
report of, that the ship is not worth repairing, is not conclusive 1589
TACKLE.
is a part of the ship 1223
TECHNICAL TOTAL LOSS. See *Abandonment, Total Loss.*
TEMPORARY REPAIRS.
are general average 1300
TENDER.
plea of 2043
TERMINI OF THE VOYAGE.
terminus a quo . . . . . 918 to 947
terminus ad quem . . . . . 948 to 974
as a test of deviation 992
THEFT.
as to loss by, being covered 1106
THIRD FOR NEW. See *New for Old.*
TIME.
referred to in a representation 558
TIME POLICY.
defined 949
TOTAL LOSS.
defined 1485
constructive or technical, defined 1487
constructive, abandonment requisite in . . . 1491
provision in respect to 52
of cargo, is not a constructive total loss of the ship . 1141
when abandonment is not requisite to the recovery of . . 1495
payment of, under a fire policy, vests in the insurer an equitable right to the remnants of the subject paid for . . 1511

TOTAL LOSS, *continued.*
of the ship by capture 1530
constructive, by damage to the ship over fifty per cent., how estimated . . . . . 1543 to 1555
by damage to the cargo over fifty per cent. . . 1608 et seq.
wages and provisions of the crew during detention for repairs are not included in estimating damage to the ship to the amount of fifty per cent. 1553
offer or readiness of the underwriters to repair, as affecting a claim for a total loss 1556, 1557, 1559
underwriters are not liable for, in consequence of refusing to discharge a bottomry bond 1558
claim of, as to its being affected by sale of the ship . 1573
as to the abandonment of a ship subject to a lien for repairs 1594
of cargo . . . . . 1598 to 1626
of a part of the cargo 1599
in case of remnants, or claims on account of loss of the cargo, abandonment should be made 1600
by loss of the voyage on the cargo . . 1601, 1606, 1619
a total loss of the ship is not necessarily such of the cargo 1601 to 1604, 1622
by change in specie of the cargo 1605
submersion is not necessarily a total loss of cargo . . 1607
of cargo, by damage over fifty per cent., how estimnted 1608 to 1610
of cargo, cannot be claimed, after the arrival of any considerable part at the port of destination . . . 1611
rule of constructive, does not apply after arrival at the port of destination 1612
rule of constructive, applies where over fifty per cent. is paid in compromise with captors 1613
of cargo, as to the right of abandonment being affected by the exception of average 1614, 1615
by jettison 1616, 1617
temporary delay of the voyage is not . . . 1618, 1619
in case of necessity, to sell the subject . . . 1623
incurred by neglect of the assured to discharge a lien, does not give a right to make abandonment 1626
of freight . . . . . 1630 to 1653
of freight, by hypothecation 1637
of freight, in case of absolute loss of the cargo . . 1642
constructive total loss of cargo by capture is such of freight 1645
of freight, by the owner or charterer, depends in part upon the charter-party 1646
the right to recover for, is not defeated by subsequent events 1648

TOTAL LOSS, *continued.*
how far underwriters are liable for, in addition to a particular average 1743
is *primâ facie* that of the gross value 1744
adjustment of, in fire insurance 1749
in a policy of reinsurance against fire 1753
See *Abandonment.*
TOUCHING.
construction of liberty for 1005
TRADE.
coasting, usage in 37
inland, provisions of policies on 60
the course of, is impliedly referred to in the policy . 119, 133
with an enemy, is illegal 147, 223, 237
colonial and coasting, as to the national character of . 278, 816
prohibited, as to representation and concealment of 595 et seq.
hazardous, condition not to carry on, under fire policies . 882
TREATIES.
have the force of laws 216
TROVER.
for a policy 1992
TRUSTEE.
insurable interest of 89, 288
how he may insure 293
when he may insure without specifying his interest . . 422
UNDERWRITER.
has an insurable interest against the risks for which he is liable 186
offer of, to repair, whether it affects the character of the loss 1556, 1557, 1559, 1706
is not liable for ordinary perils 1086
whether he has a right to repair, notwithstanding the dissent of the assured 1706
rights of, how affected by other insurance on the subject . 1715
UPPER WORKS.
as to liability for damage to 1105
USAGE.
the contract of insurance is affected by 36, 119, 132 to 144, 2120, 2134
in a coasting trade 37
evidence of, how limited 133
must, to be of force, be conformable to law . . . 135
local and general 140
to carry goods on deck 460, 1282
of trade, need not be disclosed 593
effect of, as to lien and set-off 1912, 1914
reasonableness of, is a question for the court . . 1944

USAGE, *continued.*
is the test of deviation 980
what is sufficient to constitute 1003
will justify deflections and delay on a voyage 1003
plea of 2031
VALUATION.
what it is 1178, 1188
of an illegal subject or risk, is void 1181
fraudulent, is void 1182
fairly made, is binding 1183
should not be high 1184
its object 1189
has no effect on another policy 1191
as to setting aside or opening 1192, 1203
may be applied to assured's share or proportion . . . 1195
applied *pro ratâ* to a part of the subject 1196
of goods and proceeds, is of the whole proceeds . . . 1197
whether to be applied to a homeward cargo . . . 1198
at so much per pound, &c., refers to the pound of the place where the policy is made 1199
includes the premium 1201
of a foreign currency of the invoice, does not make a valued policy 1202
of freight, is that of a full cargo 1204
of freight, may exceed the actual amount . . . 1205, 1207
of freight, whether of each passage or of successive passages . 1208
is usually made of profits 1209
of "catchings and profits," how applied 1210
in fire policies 1212
of divers articles separately 1788
VALUED POLICIES.
defined 27, 1178
VALUE OF THE SUBJECT.
is the market value, the necessity of fixing . . 33, 1176
the assured should understand how it is estimated . . 1177
need not be proved under a valued policy 1187
must be proved under an open policy 1187
of the same subject, may vary in different policies . . 1190
to be declared 1193
mistake in declaring 1194
in fire policies 1213
insurable, is the invoice of each successive shipment . 1227
insurable, for successive passages 1228
insurable, drawback is not to be deducted in estimating . 1235
of the ship, with reference to abandonment . . . 1538

See *Insurable Interest, Valuation.*

VENDEE.
insurable interest of, in case of stoppage *in transitu* . . 197
VOLUNTARY STRANDING. See *Average, General.*
VOYAGE.
the effect where a part of, is illegal 231
construction of 981, 986
description of, must be taken in its commercial acceptation . 979
specification of, what it includes 997
loss of, as ground for abandonment . . 1113, 1521, 1601
WAGER POLICIES.
defined, are void 4, 6, 7, 211
WAGES.
accruing before total loss, stipulation as to . . . 49
of seamen, not insurable 212
of the master are insurable, of the mate not so . . 212, 213
and provisions of the crew, chargeable upon insurers during the period of departure from the course of the voyage for the purpose of repairs and refitting 1104
in delay for repairs are general average . . . 1328
of the crew, whether general average while they are employed in repairs 1329
paid by mistake, not being due, are not general average . 1330
do not contribute to general average . . . 1390
whether a part of particular average 1429
and provisions during an embargo are not covered . 1430
and provisions of the crew during detention for repairs in reference to the question of total loss 1553
of seamen, how far charged upon salvage on abandonment 1719, 1720
WAIVER.
oral, of a forfeiture of the policy, is not sufficient . 10, 1040, 2155
objection to misrepresentation of . . . 660 et seq.
by underwriters, of preliminary proof under marine fire policies 889, 1812
of forfeiture 904
of abandonment . . . . . 1699 et seq.
of lien by an agent 1919
as to, by acceptance of a ship repaired by the insurers . . 2166
WARLIKE STORES.
are contraband of war 273
WARRANTY.
is not made by the statement of immaterial facts in a paper referred to in the policy 72
particular warranties and conditions . . 846 to 865
in fire policies . . . . . 866 to 890
provinces of court and jury respecting . . . 1947

WARRANTY, *continued.*
proof of compliance with 2122
See *Burden of Proof*, *Condition*, *Express Warranty*, *Implied Warranty*, *Seaworthiness*, *Stipulations*.
WEAR AND TEAR.
the underwriter is not liable for 1088
WEARING APPAREL. See *Average, General.*
WHALING VOYAGES.
insurance upon 59
usage of 199
taking sea-elephants is included in, by usage . . . 144
description of the subject in 458
WITNESS.
as to the competency of . . . . . 2052 to 2054
WORDS AND PHRASES.
construction of 142, 144, 921, 945, 970
WORMS.
as to loss by, being included under perils of the seas . . 1101

END OF VOLUME II.