THE PRINCIPLES OF THE LAW RELATING TO MARINE INSURANCE AND General Average IN ENGLAND AND AMERICA,

ALPHABETICALLY ARRANGED:

With occasional References to French and German Law.

BY

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OF THE MIDDLE TEMPLE, ESQUIRE, BARRISTER-AT-LAW.

"Denique sit quidvis simplex duntaxat et unum."

HOR., *Ars Poetica.*

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TO

SIR WILLIAM BALIOL BRETT, KNT.,

ONE OF THE JUSTICES

OF

HER MAJESTY'S COURT OF COMMON PLEAS.

PREFACE.

To enter upon a new field of legal literature is a step which cannot be taken without considerable misgivings; and I think timidity on the part of an author would be excusable even were there no beacons in existence to warn him of the dangers and difficulties which must attend his enterprise. At the time when I conceived the design which I have now executed, I was impressed with the laborious and difficult nature of the work, and this impression certainly did not diminish as the work progressed, and my leisure time became more limited.

The law with which I have had to deal is almost entirely judge-made. It is the result of judicial labour, extending from the time of Lord Mansfield to the date of the present publication, applied to a singularly crude and ill-framed instrument—a policy of marine insurance. Every sentence of the old Lloyd's policy has received its interpretation by a variety of minds, dealing with peculiar circumstances; and, as time has advanced and commercial transactions have become more complicated, it has necessarily been more difficult to secure uniformity of decision. But the extraordinary complexity of the subject is only to be fully appreciated by following into all their consequences the unex-

pressed conditions which, by long observance, have attained the dignity of law, and the practices of those learned maritime accountants called average adjusters, which play so important a part in the settlement of losses. Confining myself to insurance law proper, I will put two examples. Prominent among unexpressed conditions is the subject of my first title, "Abandonment." By abandonment of the subject-matter of the insurance to the underwriter, a loss which is "constructively total"—an expression which has been condemned as infelicitous, but for which it is difficult to find a substitute—may be converted into an absolute total loss. This species of loss it will be seen does not arise merely from the operation of a peril: the peril having happened, the assured must give notice of abandonment, and if, in the opinion of a court of law, he is late in giving his notice, the loss is not total, but partial. Case after case has been decided upon the question whether a particular notice was given in time, there being no fixed limit according to the locality of the loss, as in the French law. The question of time being settled, then may arise the further question, whether the condition of the property justified abandonment. The loss arising from damage at a distant port, the question whether it was so extensive as to justify abandonment can only be decided by the evidence of witnesses on the spot as to the extent of the damage, and in the case of the ship, by the cost or impossibility of repairs. Considering the proportions which this branch of the law of marine insurance has assumed, and the difficulties by which it is now surrounded—which have certainly not diminished since Lord Mansfield

expressed his dissatisfaction with the practice—it is remarkable that some effort has not been made either to prohibit abandonment or to impose upon the right statutory limitations. Another unexpressed condition, which most forcibly illustrates the artificial state of the law, is that which is now known as an implied warranty, namely, that a ship insured in a voyage policy is seaworthy at the commencement of the risk. Very recent cases have shewn that a valuable insurance may be won or lost, according to the caprice of a jury—won and lost under precisely similar conditions. I have in my mind the cases of *Anderson* v. *Morice*, and *The Merchants' Trading Company* v. *The Universal Marine Insurance Company*, and, although the Court of Common Pleas expresses itself satisfied that the propositions which it lays down in the first case are not inconsistent with the rulings of the learned judge at *Nisi Prius* in the second, the fact remains, that, governed by the same principles, one jury found that a ship which sank whilst quietly riding at anchor in a roadstead was unseaworthy, and another found that a ship which sank in harbour without any apparent cause was seaworthy. The verdict may, of course, have been right in both cases, but such a condition of things certainly seems anomalous. If further evidence were wanted of the almost shadowy distinctions in legal principle upon which verdicts may depend, I should refer to *Daniels* v. *Harris*, which, at the time I write, is gone down to a new trial, the Court thinking that the direction of one of our ablest judges as to seaworthiness might have misled the jury. The law of marine insurance and of general average, indeed,

opens a wide field from which to derive extraordinary illustrations shewing the unsatisfactory nature of case law; but to allude to them in detail would uselessly extend this introduction, and I propose to add a few words only as to the possibility of educing principles from the materials which the cases supply.

I said at the outset that there are beacons which exist, warning me of the dangers of my enterprise. I refer to the opinions of such masters of jurisprudence as Austin and Duer. Austin says in his 37th Lecture, "A law (or rule of law) made by judicial decision exists nowhere in general or abstract form. It is implicated with the peculiarities of the specific case or cases to the adjudication or decision of which it was applied by the tribunals; and in order that its import may be correctly ascertained, the circumstances of the cases to which it was applied, as well as the general propositions which occur in the decisions, must be observed and considered. The reasons given for each decision must be construed and interpreted according to the facts of the case by which those reasons were elicited, rejecting as of no authority any general propositions which may have been stated by the judge but were not called for by the facts of the case or necessary to the decision. The reasons when so ascertained must then be abstracted from the detail of circumstances with which in the particular case they have been implicated. Looking at the reasons so interpreted and abstracted, we arrive at a ground or principle of decision which will apply universally to cases of a class which, like a statute law, may serve as a rule of conduct. Without this process of

abstraction no judicial decision can serve as a guide of conduct or can be applied to the solution of subsequent cases. For as every case has features of its own, and as every judicial decision is a decision on a specific case, a judicial decision as a whole (or as considered *in concreto*) can have no application to another, and therefore a different one."

In considering the weight to be given to this passage, it is to be remembered that Austin delivered his last lecture in 1832, and I think I may say without risking contradiction that during the last forty years our judges have done more than judges ever did before in enunciating principles independent of the facts giving rise to the decisions. In marine insurance, most certainly, the numerous remarkable decisions of recent years have gone very far in settling principles which previously were floating about encumbered with the liens of particular cases. Many of these decisions, I may add, are free from the vice which Judge Duer considers inherent in case law. At p. 266 of his first volume, that learned and clear writer says: "We are always in danger of being misled by the remarks of eminent judges, especially when expressed in those terms of decision which are natural to superior minds, when we fail to attend to the special circumstances of the cases in which they were made; since it is always probable that the necessary or proper limitation that those circumstances suggest, *although omitted to be stated*, was present to the mind of the judge and influenced his opinion."

Now, taking modern reports of English cases, I believe I could mention several in which it would be impossible to point out a single omission on the part of the judges to state every fact and every

incident having any bearing upon their decisions. Indeed, with the greatest possible humility and deference, I have felt that occasionally too much elaboration has of late been devoted to the expositiou of judicial views, which is doubtless due to the multiplication of cases to which reference has to be made, and possibly in time we may find that, whilst avoiding the danger pointed out by Duer, we are creating a mass of distended authorities incapable of facile application.

The few remarks which I have made will, I trust, obtain for me the indulgence which I feel that my work demands. I have endeavoured, as far as possible, to avoid stating propositions which would not bear severance from the setting of facts in which they were placed by the judges; and whenever I have felt doubt I have appended short notes or digests of the decisions, to serve as illustrations or explanations. In studying conflicting cases and elaborate judgments, I have spared no pains to ascertain the true principles, and to state them as nearly as possible in the words of the judges themselves or of the distinguished text writers whose guidance and authority I acknowledge throughout the volume.

I can scarcely venture to hope that I have attained that which many consider unattainable, both brevity and lucidity, or indeed that I have garnered every principle which undistracted research could find, and I can only excuse such defects as may be apparent by observing that I have carried on the work in the intervals of business and that I have had to perform simultaneously the double labour of collection and arrangement. For my own part I shall be glad to find that I have been accurate in the main and reasonably comprehensive. My

critics must not judge of the completeness of the work by the table of cases. One of my objects has been to get rid of the citations where the principles are settled beyond discussion, giving a reference only to the final binding decision. I have omitted altogether those cases relating to obsolete law unless they usefully illustrated that which is new.

I have availed myself of every opportunity of submitting the results of my labours to those competent to offer advice and suggestions, and I have to thank Mr. James P. Aspinall, the editor of an excellent series of reports known as "Aspinall's Maritime Law Cases," for the service which he rendered me at the commencement of the work in discussing points upon which difference of opinion existed.

With a view to suggesting a possible assimilation of the laws of European nations, I have occasionally introduced references to the laws of France and Germany. The English cases will be found noted up to the hour of going to press; and considering the number and importance of those of recent date, my work has an advantage in this respect which no other text book possesses.

The design of the work, however, is that for which I am most anxious to secure approbation. If I have made a single step in advance towards simplification—not to use the term codification—of the law, I shall be amply rewarded.

F. OCTAVIUS CRUMP.

3, Essex Court, Temple,
April, 1875.

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Payment by sellers' draft on purchaser at six months' sight, with documents attached." The Sunbeam did not belong either to the sellers or the purchaser, but was chartered by the sellers' agents "to proceed to Rangoon, to ship and carry a cargo of rice to any port in the United Kingdom or Continent." On the 3rd February, 1871, the plaintiff effected insurance with the defendant "at and from Rangoon to any port or place of discharge in the United Kingdom or Continent by the Sunbeam, warranted to sail from Rangoon on or before the 1st of April, on rice, as interest may appear; amount of invoice to be deemed the value; average payable on every 500 bags; the said merchandizes, &c. are and shall be valued at 5,500*l.*, part of 6,000*l.*"

The Sunbeam arrived in the Rangoon river on the 3rd March, 1871. The rice was brought to the ship in lighters from stores near the town of Rangoon, and was carried on board the Sunbeam, and there stored by coolies. On the 30th March there were 8,878 bags on board; 400 more would have completed the cargo, and they were in lighters alongside. On the morning of the 30th March the ship suddenly made a great deal of water and sank at her moorings during the following night. Bills of lading for so much of the cargo as was shipped were given after the loss.

The defence of no insurable interest in the plaintiff at the time of the loss was rested upon the fact that the contract was for a full cargo, and unless a full cargo was shipped the purchaser had the option of rejecting that which was loaded. The Court said, "We think that the plaintiff was entitled as against the defendant to decline to exercise that option, and to insist that the contract of purchase and sale was fulfilled by the loading, on behalf of the vendors, on board the Sunbeam, of the rice which was on board when the ship foundered, and that consequently the property in such rice was in him, the plaintiff, at the time of the loss."

Cases.

Jackson v. *Union Mar. Ins. Co.* (cited at p. 123) was affirmed in the Exch. Cham., L. R., 10 C. P. 125, diss. Cleasby, B., who delivered a learned and elaborate judgment.

Lishman v. *Northern Maritime Insurance Company* (cited at pp. 86, 217) has been affirmed, but is not yet reported.

Thompson v. *Hopper* (cited at pp. 110, 181, 339) was followed in *Dudgeon* v. *Pembroke*, L. R., Q. B. 581.

Forbes v. *Aspinall* (cited at p. 129) was followed in *Denoon* v. *Home and Colonial Insurance Company*, L. R., 7 C. P. 341.

Freight.

Alison v. *Bristol Marine Insurance Company* has been reversed on appeal. No principle founded upon it, but it is cited in the text (p. 128). I may here state the marginal note of the report on appeal.

The plaintiff chartered his ship to A. for a voyage from Greenock to Bombay with a cargo of coals, freight to be paid on right delivery of cargo at the rate of 42*s.* per ton of 20 cwt. on the quantity delivered; and it was provided that such freight should be paid, say one-half in cash on signing bills of lading, less four months' interest at bank rate, but at not less than five per cent. per annum, five per cent. for insurance, and two and one-half per cent. on gross amount of freight in lieu of consignment commission at Bombay, and the remainder on right delivery of cargo, &c. A cargo of 2,178 tons of coal was loaded, and bills of lading signed, and 2,286*l.* was paid on account of freight. The plaintiff insured the freight under the charter-party, and the charterer effected an insurance on the cargo, which was expressed to be on 2,178 tons of coal and increased value thereof by prepayment of freight, valued at 4,500*l.* The ship sailed, and was lost near Bombay; about half the cargo was lost, and the remainder was safely delivered to the consignees of the charterers free of freight. The plaintiff, the ship owner, sued his insurer as for a total loss of the unpaid half freight. The defendants paid into Court the half of such unpaid freight:—Held, reversing the decision of the Court below, that the amount of freight prepaid must be distributed over the whole of the cargo; and, consequently, the charterer was bound to pay to the plaintiff half the amount of the freight remaining unpaid upon the delivery of the half cargo; that there was only a partial loss of freight, covered by the payment into Court; and the defendants were, therefore, entitled to judgment. L. R., 9 C. P. (Ex. Ch.) 559.

At p. 129, after "*Forbes* v. *Aspinall*," insert "*Denoon* v. *Home and Colonial Insurance Company*, L. R., 7 C. P. 341."

General Average.

At p. 136. The principle that loss by letting water into the ship to extinguish a fire is general average has always been a correct legal principle, but a controlling custom of British average adjusters excluding it was recognized in *Stewart* v. *West India & Pacific Steamship Co.* A jury, however, in *Achard* v. *Ring* [see title "Usage"], negatived the existence of any such custom. The point is wholly unimportant except as concerns contracts entered into before *Stewart's case*, as in consequence of that decision adjusters include such loss in general average.

Mutual Insurance Associations.

Page 195. Insert after "*Alexander* v. *Campbell*," "See tit. 'Policy: Conditions attached to the Policy.'" Sect. 382, ' p. 225.

Re-Insurance.

Sect. 400. See on this head generally, *Mackenzie* v. *Whitworth*, Ex. Ch., Feb. 9 and 10, 1875.

Abandonment.

Definition.

1. ABANDONMENT is the act by which the assured, declining as a prudent owner uninsured who exercises a reasonably sound judgment to prosecute the adventure, cedes to his insurer the subject-matter of the insurance affected by a peril insured against but still existing in specie, in order to acquire the right to claim for a total loss.

Allen v. *Sugrue*, 8 B. & C. 561; *Irving* v. *Manning*, 2 C. B. 784; *Young* v. *Turing*, 2 M. & G. 593.

The right to abandon.

2. The constructive total loss of the subject-matter of insurance *primâ facie* entitles the assured to give notice of abandonment.

Fleming v. *Smith*, 1 H. of L. Ca. 513; *Martin* v. *Crockett*, 14 East, 465.

3. The above doctrine involves the consequence that in the case of partial or average loss abandonment cannot make the loss total without the assent of the insurer.

Thellusson v. *Fletcher*, 1 Esp. 73; *Cazalet* v. *St. Barbe*, 1 T. R. 187; *Thompson* v. *Royal Exchange Ass. Co.*, 16 East, 214.

4. To be valid it must be justified by the state of things existing at the time.

Phillips, s. 1520; *Bainbridge* v. *Neilson*, 10 East, 329;

1 Camp. 237; *Naylor* v. *Taylor*, 9 B. & C. 718; 4 M. & R. 526; *Cologan* v. *L. Ass. Co.*, 5 M. & S. 447.

[NOTE.—The right to abandon is definitely decided by proper estimates of experts at the time and place of the loss. *Cazalet* v. *St. Barbe*, 1 T. R. 190; *Fulton Ins. Co.* v. *Goodman*, 32 Ala. N. S. 108.]

See *infra*—Notice: when conclusive.

5. The assured is in no case *obliged* to abandon.

Allwood v. *Henckell*, Park, Ins. 280; *Gracie* v. *New York Ins. Co.*, 8 Johns. N. Y. at p. 244.

AMERICAN LAW.—Where there is any hope of the subject-matter being recovered, the assured *ought* to abandon.

Gracie v. *New York Ins. Co.*, 8 Johns. N. Y. at p. 237.

6. Abandonment is not necessary where the interest to be made over to the insurer is of a shadowy and unsubstantial character.

Mellish v. *Andrews*, 15 East, 13; *Potter* v. *Rankin*, L. R., 5 C. P., Ex. Ch. 341 (judgment of Cockburn, C. J.), and L. R., 6 Eng. & Ir. App. 83. [*See* "FREIGHT."]

7. If the master has commenced to repair without consulting the insurers, the abandonment is invalid.

Benson v. *Chapman*, 2 H. of L. Ca. 696; *Fleming* v. *Smith*, 1 H. of L. Ca. 513; Arn. 1st ed. 1111, 1112.

AMERICAN LAW.—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.

Humphrey v. *Union Ins. Co.*, 3 Mass. C. C. 429; *Depeyster* v. *Columbian Ins. Co.*, 2 Caines, N. Y. 85; *Dickey* v. *N. Y. Ins. Co.*, 4 Cow. N. Y. 222; *Depeau* v. *Ocean Ins. Co.*, 5 Id. 63. See *Coolidge* v. *Gloucester Ins. Co.*, 15 Mass. 341, *contrà*.

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 the value.

Saurez v. *Sun Mut. Ins. Co.*, 2 Sandf. N. Y. 482.

8. The circumstances 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 unless the ship is restored to the possession or control of the owners in a condition then constituting only a partial loss.

Ph. s. 1542; *Holdworth* v. *Wise*, 7 B. & C. 794. See *Dixon* v. *Reid*, 5 B. & Ald. 597.

9. When the assured has reason to believe that damage has been sustained sufficient to warrant an abandonment he loses his right to abandon by attempting to prosecute the voyage and omitting at the earliest practicable moment to ascertain the extent of the damage.

Potter v. *Rankin*, L. R., 5 C. P. (judgment of Cockburn, C. J.), at p. 373. [*See* "FREIGHT."] See L. R., 6 E. & I. 83.

10. The assured may labour to avert a loss, and by so doing does not prejudice his right to abandon.

Kidston v. *The Empire Marine Ins. Co.*, L. R., 1 C. P. at pp. 543, 544.

FRENCH LAW.—The assured is *bound* to labour to avert a total loss.

Code de Com. art. 381; Ord. de la Mar. 1681, liv. 3, tit. 6, art. 51.

11. Where the subject-matter 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.

Ph. s. 1517; *Rice* v. *Homer*, 12 Mass. 237.

12. A right to abandon which has been lost by

delay may be revived under a change of circumstances.

Stringer v. *English and Scottish Marine Ins. Co.*, L. R., 4 Q. B. 676; 5 Q. B. 599; *Gernon* v. *Royal Ex. Ass. Co.*, 6 Taunt. 383.

AMERICAN LAW.—A right to abandon does revive under an adequate change of circumstances affecting the subject insured.

Dorr v. *Union Ins. Co.*, 8 Mass. 494.

So long as the loss continues total down to the time of abandonment, the assured may abandon at any time.

Dorr v. *New Eng. Ins. Co.*, 11 Mass. 1; *Maryland and Phœnix Ins. Co.* v. *Bathurst*, 5 Gill & J. Mad. 159; *Bohlen* v. *Delaware Ins. Co.*, 4 Binn. Penn. 430; *Roget* v. *Thurston*, 2 Johns. Cas. N. Y. 248; *Earl* v. *Shaw*, 1 Johns. Cas. N. Y. 313; *Steinbach* v. *Columbian Ins. Co.*, 2 Caines, N. Y. 132; *Lawrence* v. *Sebor*, 2 Caines, N. Y. 203; *Brown* v. *Phœnix Ins. Co.*, 4 Binn. Penn. 445; *Montgomery* v. *United States Ins. Co.*, 4 Binn. Penn. 469, n.; *Tom* v. *Smith*, 3 Caines, N. Y. 245.

[NOTE.—Mr. Phillips is of opinion that this doctrine does not vary the general principle, as the loss being total abandonment is unnecessary. Sect. 1674.]

Notice.

13. Notice of abandonment may be waived by the underwriter, *ex. gr.*, where after a demand he makes a payment on a claim for a total loss.

2 Pars. 176; *M'Lellan* v. *Maine F. and M. Ins. Co.*, 12 Mass. 246; *Calbreath* v. *Gracy*, 1 Wash. C. C. 219.

14. If not waived notice must be given to the underwriter or the agent who subscribed for him within a reasonable time after the assured receives news of the disaster.

In time.—*Gernon* v. *Royal Ex. Ass. Co.*, 6 Taunt. 381;

Suydam v. *Mar. Ins. Co.*, 2 Johns. 138; Phillips, s. 1684.

17. A notice in any form of words will suffice if it convey to the underwriters the intention of the assured to abandon.

Currie v. *The Bombay Native Ins. Co.*, L. R., 3 P. C. 73, enlarging the rule in *Parmeter* v. *Todhunter* (*inf.*)

AMERICAN LAW.—If the intention of the assured to abandon be conveyed to the underwriters so as to leave no reasonable doubt, a proper offer will be implied to have been made, though no formal notice be proved.

Patapsco Ins. Co. v. *Southgate*, 5 Peter's Sup. Ct. R. 604; *Bell* v. *Beveridge*, 4 Dall. 272; *Suydam* v. *Mar. Ins. Co.*, 2 Johns. N. Y. 138; *Duncan* v. *Coates*, cited in 3 Yeates, Penn. 378; *Columbian Ins. Co.* v. *Catlett*, 12 Wheat. at p. 392.

18. By universal practice it may be oral.

Parmeter v. *Todhunter*, 1 Camp. 542.

19. Abandonment of the same subject-matter cannot be made first to one set of underwriters and then to another.

Higginson v. *Dall*, 13 Mass. R. 96; *U. S. Ins. Co.* v. *Scott*, 1 Johns. N. Y. 105.

[NOTE.—An abandonment may be made to several underwriters on the same policy; but it does not make them co-partners and jointly liable for repairs. *U. S. Ins. Co.* v. *Scott* (*sup.*)]

20. One with whom a policy is deposited as security for a loan cannot give a valid notice of abandonment on behalf of the owner without his express authority.

Jardine v. *Leathley*, 32 L. J., Q. B. 132; 3 B. & S. 700.

AMERICAN LAW.—By mortgaging the subject-matter the assured ceases to be owner for the purposes of abandonment, and can claim only for a partial loss.

Gordon v. *Mass. Fire and Mar. Ins. Co.*, 2 Pickering (Mass.) R. 249.

But a subsequent ratification by the mortgagee perfects the abandonment.

Fulton Ins. Co. v. *Gordon*, 32 Ala., N. S. 108.

21. It is doubtful whether the consignee of a bill of lading has a right to give notice of abandonment. *Semble*, he has if he has a right to the absolute and unconditional possession of the goods.

Ph. s. 1518; *Conway* v. *Gray*, 10 East, 536; *Same* v. *Forbes*, 10 East, 539; *Maury* v. *Sheddon*, 10 East, 540.

When conclusive.

22. Notice of abandonment operates as an abandonment in fact if accepted by the underwriter, or where the totality of the loss continues down to the commencement of action.

Goss v. *Withers*, 2 Burr. 696, 697; *Thornely* v. *Hebson*, 2 B. & A. 518; *Bainbridge* v. *Neilson*, 10 East, 329; *Patterson* v. *Ritchie*, 4 M. & S. 394; *Dean* v. *Hornby*, 23 L. J., Q. B. 129; *Smith* v. *Robertson*, 2 Dow. 474; *Holdsworth* v. *Wise*, 7 B. & C. 794; *Naylor* v. *Taylor*, 9 B. & C. 718.

AMERICAN LAW.—As abandonment once rightfully made, having regard to the actual facts and not to the information received, is binding and conclusive between the parties, and the rights flowing from it become vested rights, and are not to be divested by subsequent events.

Phillips, s. 1705 (n. 2); *Munson* v. *New Eng. Mut. Ins. Co.*, 4 Mass. 88; *Bradlie* v. *Maryland Ins. Co.*, 12 Peters, U. S. 378; Kent's Com. 3, ss. 324, 325 (note *a*).

FRENCH LAW.—Preponderates in favour of the American principle in its entirety.

2 Valin. 143, Ins. art. 60; Emerigon, c. 17, s. 6; Code de Com. liv. 2, tit. 10, s. 3, art. 385.

GERMAN LAW.—Idem.

German Gen. Merc. Law, art. 870.

Acceptance.

23. If the underwriter declines the abandonment he should declare his determination as soon as he has had reasonable time and opportunity for informing himself of the state of the damaged property.

Harrison v. *Hudson*, 3 B. & B. 926; Moore, 288; *Smith* v. *Robertson*, 2 Dow's App. Ca. 474.

AMERICAN LAW.—The underwriter is not bound to signify his acceptance. If he says nothing and does nothing, the proper conclusion is that he does not mean to accept.

Peele v. *Merch. Ins. Co.*, 3 Mass. 27; *Peele* v. *Suffolk Ins. Co.*, 7 Pick. 254; *Gloucester Ins. Co.* v. *Younger*, 2 Curtis, C. C. 322.

24. 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.

Acceptance.—*Hudson* v. *Harrison* (*sup.*); *Peele* v. *Merch. Ins. Co.* (*sup.*); *Peele* v. *Suffolk Ins. Co.*, 7 Pick. Mass. 254; *Reynolds* v. *Ocean Ins. Co.*, 1 Met. Mass. 160; *Gloucester Ins. Co.* v. *Younger*, 2 Curt. C. C. 322; *The Phœnix Ins. Co.* v. *Copelin*, 1 Asp. Mar. L. Ca. 14.

No acceptance.—*Thellusson* v. *Fletcher*, 1 Esp. 72; *Griswold* v. *New Y. Ins. Co.*, 1 Johns. N. Y. 205; *Badger* v. *Ocean Ins. Co.*, 23 Pick. Mass. 347.

25. Acceptance is an implied admission of a right to abandon and of a total loss.

Smith v. *Robertson*, 2 Dow's P. C. 474; *Bainbridge* v. *Nelson*, 10 East, 329; *Cincinnati Ins. Co.* v. *Bakewell*, 4 B. Monr. Ky. 541.

26. A payment under a demand for a total loss is not conclusive proof of an abandonment and acceptance.

Tunno v. *Edwards*, 12 East, 487.

27. In cases of re-insurance the re-insurer is bound by the first insurer's acceptance of an abandonment, and is not entitled to notice of the abandonment.

Hastie v. *De Peyster*, 3 Caines, N. Y. 190; Ph. s. 1506; 3 Kent, 278.

To what Abandonment applies.

28. It applies to every case where the perils covered by the policy have occasioned a loss.

FRENCH LAW.—It applies to cases of capture, shipwreck, stranding with partial loss, disability of the vessel occasioned by perils of the sea, arrest of a foreign power, or arrest on the part of the government of the insured after the commencement of the voyage, and a loss or damage of the property insured, if amounting to at least three-fourths of its value.

Code de Com. art. 369.

GERMAN LAW.—It applies (1), when the vessel is missing; (2), when the object of the insurance is in danger from the fact of the vessel or goods being laid under embargo, or seized by a belligerent, or otherwise arrested by order of government, or captured by pirates, and not being released within a period of six, nine and twelve months, according to named positions at the time of detention, seizure or capture.

German Gen. Merc. Law, art. 865.

29. There can be no abandonment of things

included in the policy, but not actually at risk at the time of the disaster.

Amery v. *Rodgers*, 1 Esp. 208; Code de Com. art. 372.

Abandonment of part.

30. If only a part of the property insured is at risk and a total loss happens upon this, it may be abandoned.

31. Subjects of insurance separately specified and valued, may be separately abandoned.

32. The insurance being indiscriminate, upon different kinds of goods, one entire parcel, or on ship and cargo jointly, there cannot be an abandonment of part.

Ph. ss. 1661, 1687; Arn. 4th ed. 847; and see Abinger, C. B., in *Hills* v. *Lond. Ass. Co.*, 5 M. & W. 569.

[NOTE.—The above principles are those most generally accepted as correct by the text-writers. As to the last (No. 32), however, the courts appear inclined to hold that where the interests are by their nature separate, though insured in the aggregate, they must be treated as divisible for the purpose of calculating the damage. (*Cator* v. *The Great Western Ins. Co. of N. Y.*, L. R., 8 C. P. 552.) Hence it would seem that under such circumstances there may be an abandonment of part.]

AMERICAN LAW.—Where the amount insured is insured indiscriminately upon the different interests of ship, cargo and freight, one of those interests may be separately abandoned.

Guerlain v. *Columbian Ins. Co.*, 7 Johns. N. Y. 527; *Deidricks* v. *Com. Ins. Co. of New York*, 10 Johns. 234.

FRENCH LAW.—There cannot be a partial or conditional abandonment.

Code de Com. liv. 2, tit. 10, s. 3, art. 372; Emerig. Des Ass. c. 17, s. 8.

GERMAN LAW.—Idem.

German Gen. Merc. Law, art. 870.

Effect upon the Property.

33. Abandonment carries with it to the insurer not only the title to the subject insured to the extent covered by the policy, but its proceeds, if recovered, any compensation by way of indemnity, and all rights and liabilities that may be collateral or incidental to ownership.

Goss v. *Withers*, 2 Burr. 683; *Hamilton* v. *Mendes*, Ibid. 1211.

EXAMPLES.

On capture: the *spes recuperandi*. *Goss* v. *Withers*; *Hamilton* v. *Mendes* (*sup.*)

Freight: when pending, or earned on fresh cargo taken on board at an intermediate port. *Barclay* v. *Stirling*, 5 M. & S. 6. [*See* "FREIGHT."]

The right to claim contribution on account of jettison.

Walker v. *U. St. Ins. Co.*, 11 Serg. & R. Penn. 61. [Only an indirect authority for the proposition.]

A right of action accruing to the shipper on bills of lading, or on affreightment for the pending voyage.

Mellon v. *Bucks*, 8 Mart., La. 567; *Merc. Ins. Co.* v. *Calebs*, 20 N. Y. 173.

Claims against third parties on account of negligence or acts occasioning damage to the subject-matter, or destruction of it by a peril insured against. Ex. gr.:—

Loss by theft recoverable against the shipowner.

Atlantic Ins. Co. v. *Storrow*, 5 Paige, N. Y. Ch. 285.

Damage by collision.

North of England Iron Steamship Co. v. *Armstrong*, L. R., 5 Q. B. 244; 2 Phillips, p. 384, s. 1710.

[NOTE.—The principle is the same whether the total loss is absolute or constructive.]

34. The transfer operates from the moment of the loss.

Cammell v. *Sewell*, 3 H. & N. 617; 27 L. J., Ex. 447; 5 H. & N. 728; 29 L. J., Ex. 350; *Miller* v. *Woodfall*, 8 E. & B. 493; 27 L. J., Q. B. 120; *Case* v. *Davidson*, 5 M. & S. 79;

Leavenworth v. *Delafield*, 1 Caines, N. Y. 573; *Scheffelin* v. *New York Ins. Co.*, 9 Johns. N. Y. 20; *Gracie* v. *New York Ins. Co.*, 8 Johns. N. Y. R. 237.

FRENCH LAW.—The transfer operates from the time of notice of abandonment being given. Code de Com. art. 385; but according to Emerigon from the commencement of the risk, c. xvii. ss. 6 and 9.

35. The underwriter is entitled to have the subject-matter abandoned to him free from incumbrances which do not arise out of the perils insured against.

Phillips, s. 1717; *Williams* v. *Smith*, 2 Caines's Rep. pp. 19, 20.

36. Where there are several underwriters they participate in the proceeds of the abandonment in the proportion which the subscription of each bears to the whole value of the subject-matter, without regard to the date of the different subscriptions or the priority of the policies if more than one.

Arn. 4th ed. 868; *Newby* v. *Reid*, 1 Bl. Rep. 416.

FRENCH LAW.—The underwriters whose subscription or whose policy is earliest in date are entitled to priority, and if their subscriptions equal the value of the subject-matter insured, they take the whole to the prejudice of underwriters on later policies.

Ord. de la Marine, liv. 3, tit. 6, art. 24, 25; Code de Com. art. 359; 4 Boulay-Paty, Droit Mar. 116, 121.

37. 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.

2 Phillips, 386; ex. gr., agreements with reference to salvage.

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Reynolds v. *Ocean Ins. Co.*, 22 Pick. Mass. 191; 1 Met. Mass. 160; *Norton* v. *Lexington Ins. Co.*, 16 Ill. 235; *Hart* v. *Delaware Ins. Co.*, 2 Wash. C. C. 346. See Story, J., in *Peele* v. *Merch. Ins. Co.*, 3 Mass. C. C. 27. Story and Phillips hold that it does not, Ph. s. 1557.

Underwriters may endeavour at their own expense to get a stranded ship afloat, and the question of the right to abandon, or the validity of an abandonment remains in suspense in the mean time.

See *Wood* v. *Lincoln Ins. Co.*, 6 Mass. 479 (at p. 484), and *The Phœnix Ins. Co.* v. *Copelin*, 1 Asp. Mar. L. Ca. 14.

42. Dealings of the assured himself or of his authorized agent with the abandoned property amounting unequivocally and unmistakeably to acts of ownership, waive the abandonment.

Chesapeake Ins. Co. v. *Stark*, 6 Cranch, 268, 272; *Lawrence* v. *Vanhorne*, 1 Caines, N. Y. 285.

Waiver.—*Abbott* v. *Sebor*, 3 Johns. N. Y. Ca. 39; *Ogden* v. *Fireman Ins. Co.*, 10 Johns. N. Y. Rep. 176; 12 Ibid. 24; *Peele* v. *Merch. Ins. Co.*, 3 Mass. C. C. 27; *Benson* v. *Chapman*, 2 H. of L. Cas. 696; *Dickey* v. *American Ins. Co.*, 3 Wend. 658; *Saidlier* v. *Church*, 2 Caines, N. Y. 244; *Field* v. *Citizens' Ins. Co.*, 11 Mo. 50.

No waiver.—*Brown* v. *Smith*, 1 Dow's App. Cas. 349; *Parker* v. *Towers*, 2 Browne, Penn. App. 80; *Walden* v. *Phœnix Ins. Co.*, 5 Johns. N. Y. R. 310; *Columbian Ins. Co.* v. *Ashby and Stribling*, 4 Pet. 139; *Dickey* v. *N. Y. Ins. Co.*, 4 Cow. N. Y. 222; *Livingston* v. *Hastie*, 3 Johns. N. Y. Ca. 293; *Mowry* v. *Charleston Ins. Co.*, 6 Rich. So. C. 146; *Ruckman* v. *Merch. Ins. Co.* 5 Du. N. Y. 342.

43. If the assured unnecessarily involves the property in new speculations and enterprises, he is considered as receding from his abandonment.

Ph. s. 1703.

44. Waiver cannot be inferred from any acts done by the master while acting as agent of both

parties, and for the benefit of all concerned in attempting to recover or repair the damaged property.

45. This rule applies to cargo as well as ship.

Brown v. *Smith*, 1 Dow, App. Cas. 349; *Catlett* v. *Pacific Ins. Co.*, 1 Wend. N. Y. 561.

46. Abandonment will be defeated if subsequent events show that it was made on insufficient grounds.

Hamilton v. *Mendes*, 2 Burr. 1198.

American Law.—Or if it be proved that the loss arose from want of diligence or prudence, or from culpable negligence of the owner or his agent.

Amer. Ins. Co. v. *Ogden*, 20 Wend. 286.

47. Recapture and restoration of the property before action brought may defeat an abandonment.

Arn. 4th ed. 921; *Lozano* v. *Janson*, 28 L. J., C. P. 337.

48. The effect of the capture and the condition of the property at the time of restoration, which are matters of evidence, determine the right of the assured to avail himself of the abandonment.

Hamilton v. *Mendes*, 2 Burr. 1198; *Patterson* v. *Ritchie*, 4 M. & S. 393.

Adjustment.

49. An adjustment by the underwriter is a simple promise to pay, not conclusive where it can be shown to have been made under any misconception as to material facts, or to have been induced by fraud.

English Cases (*infra*); *Faugier* v. *Hallett*, 2 Johns. Ca. N. Y. 233.

50. A mistake of the law is no ground for setting aside an adjustment.

[NOTE.—The following cases illustrate the principle:—*Adams* v. *Saunders*, 4 C. & P. 25; *Hog* v. *Gouldney*, Beawes, 310; *Hewitt* v. *Flexney*, Ibid. 308; *Wiebe* v. *Simpson*, Selw. N. P. 990; *Herbert* v. *Champion*, 1 Camp. 134; *Christian* v. *Coombe*, 2 Esp. 489; *Sheriff* v. *Potts*, 5 Esp. 95; *Shepherd* v. *Chewter*, 1 Camp. 134; *Reyner* v. *Hall*, 4 Taunt. 725; *Luckie* v. *Bushby*, 13 C. B. 864; 22 L. J., C. P. 220; *Bilbie* v. *Lumley*, 2 East, 469. Doubtful—*Rogers* v. *Maylor* and *De Garron* v. *Galbraith*, 1 Park. 267.]

51. Payment of the amount of the adjustment makes it absolutely conclusive (*a*), and money can be recovered back only on the ground of fraud (*b*).

(*a*) *Herbert* v. *Champion*, 1 Camp. 134 (Lord Ellenborough); 2 Phillips, p. 480, s. 1815.
(*b*) *Bilbie* v. *Lumley*, 2 East, 469.

52. An acceptance of an abandonment is an adjustment of a loss as total, and a payment on a claim for a total loss is in effect an adjustment.

For the principles upon which losses are adjusted, *see* "Loss" under various titles, and "GENERAL AVERAGE," and "PARTICULAR AVERAGE."

OF INSURERS.

Their Appointment.

53. 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 agent; 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.

Phillips, s. 1848.

54. The same person may be agent of both assured and underwriters.

Phillips, s. 1850; *Acey* v. *Fernie*, 7 M. & W. 151.

55. Notice of the assignment of a policy and evidence thereof being given to an agent, he thereafter becomes the agent of the assignee.

Phillips, s. 1907.

56. An agent may employ a sub-agent, but in the absence of usage cannot, without the consent of his principal, delegate his authority and transfer his responsibility to another.

Phillips, s. 1869; *Corlett* v. *Gordon*, 3 Camp. 472.

[NOTE.—Where the employment of a sub-agent is authorized by usage, or by the express instructions of the principal,

the general rules are that the original agent is not liable for the acts or omissions of the substitute appointed or employed by him, unless in the appointment or substitution he was guilty of fraud or gross negligence, or improperly co-operated in the acts or omissions from which a damage has resulted, and that the sub-agent, when duly appointed, is himself directly responsible to the principal for his own negligence or misconduct. 2 Duer, 187.]

57. The revocation of an agent's authority does not affect any agreement he may have made, though he will cease to be authorized to bind his principal further.

Phillips, s. 1871.

Business of the Agency.

58. The purposes of the agency are to make applications for insurance, to make representations, effect insurance, alter and cancel policies (*a*), pay premiums, make abandonments, settle losses and return of premiums, and receive and make payments.

Phillips, s. 1878.

(*a*) See No. 94, *post.*

59. The agent must keep his principal advised of the business of the agency;

Must keep and duly render accounts of the business of the agency;

And select brokers and other sub-agents with due vigilance and discretion; and give them proper instructions to collect and preserve the evidence, if his agency is for making an abandonment or adjusting or prosecuting for a claim.

Phillips, s. 1901.

Persons having implied Authority to insure.

60. A partner to insure partnership property.

Hooper v. *Lusby*, 4 Camp. 66.

[NOTE.—*Semble*, a special partnership for a particular adventure implies the authority of each partner to insure the partnership property.]

61. A consignee interested on account of advances amounting only to a proportionate part of the value of the consignment, to insure as trustee of the residue for the consignor.

See *Ebsworth* v. *The Alliance Marine Ins. Co.*, L. R., 8 C. P. 596.

62. A general agent of a foreign principal having uncontrolled and unassisted management of the business.

2 Duer, 111, 113.

63. A master (or supercargo), where the position of the subject-matter raises the implication.

Arn. 4th edit. 149, citing *Crawfurd* v. *Hunter*, 8 T. R. 23; 2 Duer, 101. *Per* Jones, J., in *De Forrest* v. *Fulton, F. & M. Ins. Co.*, 1 Hall, 84.

64. A merchant returning a consignment as in excess of order has authority to insure as agent of the consignor.

Cornwall v. *Wilson*, 1 Ves. sen. 511.

65. A prize agent as such.

Stirling v. *Vaughan*, 11 East, 619; 2 Duer, 105, n.

66. An agent fully empowered by owners of ship and cargo captured as prize to protect their interests in a foreign court and "to forward the ship."

Robertson v. *Hamilton*, 14 East, 522; 2 Duer, 101, 102.

67. An agent who undertakes to insure, or, being a person to whom application would naturally be made, being applied to and not declining so to act.

Ashurst, J., in *Smith* v. *Lascelles*, 2 Term Rep. 187; 1 Emerig. 148, c. 5, s. 6, art. 2.

Persons not having implied Authority.

68. Part owners.

Naked consignees and agents for procuring consignments.

Ship's husband, merely as such.

Master or supercargo, merely as such.

Ratification.

69. Insurance being made by a person acting voluntarily without instructions or order from the party interested for whom the policy is intended, will, if it is ratified by the latter, be available to him.

Phillips, s. 1868.

70. Ratification may be proved by adoption of the policy or be inferred from surrounding circumstances.

French v. *Backhouse*, 5 Burr. 2728; *Robinson* v. *Gleadow*, 2 Bing. N. C. 156; *Lindsay* v. *Gibbs*, 4 Jur. N. S. 779; 28 L. J., Ch. 692; *Routh* v. *Thompson*, 13 East, 274; *Barlow* v. *Leckie*, 4 J. B. Moore, 8.

71. Knowledge of the insurance having been made is necessary to an effectual ratification, and if a general order to insure is given before the unauthorized insurance is made, but not received until afterwards, there is no ratification.

Bell v. *Janson*, 1 M. & S. 201.

(4) When he has been accustomed in the course of dealing to insure for his correspondent.

[NOTE.—Unless he has well-grounded information that the correspondent is insolvent, or is threatened with insolvency.]

2 Duer, 124.

(5) When he accepts bills of lading, accompanied by an order to insure as an implied condition.

Arn. 4th ed. 155; *Smith* v. *Lascelles*, 2 T. R. 187.

(6) When it is the usage of the particular trade to which his agency and the insurance relate that he should insure.

2 Duer, 127, 128.

77. Total failure to fulfil such obligation (without notice) subjects the agent to an action for all the loss which his correspondent may have sustained from the non-insurance.

Smith v. *Lascelles*, 2 T. R. 187; 2 Duer, 120; *Great Western Ins. Co.* v. *Cunliffe*, 30 L. T. R., N. S. 118 (reversed on appeal, the damages claimed not being matter for inquiry in equity).

78. Notice of refusal to act as agent, inability to procure insurance on terms named, or of difficulties delaying the insurance, should be given to the principal within reasonable time.

Arn. 4th ed. 157; *Corlett* v. *Gordon*, 3 Camp. 472; *Catlander* v. *Oelrichs*, 5 Bing. N. C. 58.

79. An insurance broker is bound to know—

(1) What is material to be communicated to an underwriter.

Seller v. *Work*, 1 Marsh. Ins. 305; *Maydew* v. *Forrester*, 5 Taunt. 615; 2 Duer, 202, 203.

(2) All the formal details necessary to make a sea policy a legally valid instrument.

Turpin v. *Bilton*, 5 Man. & Gr. 455.

(3) The clauses essential to be inserted in a policy.

Mallough v. *Barber*, 4 Camp. 150; *Park* v. *Hammond*, Holt's N. P. 80; 4 Camp. 344.

[NOTE.—Agents who are presumably as well skilled as brokers will be expected to possess the same amount of knowledge, and to exercise it on behalf of their principal. Duer recognizes degrees of responsibility proportioned to the capacity and competency of the agent (vol. 2, pp. 204, 205).]

80. If by failure of the agent to communicate material facts, or to make the policy valid by attention to details, or to insert essential clauses, the insurance is avoided, he is liable to his principal for the loss.

2 Duer, 204; *Richards* v. *Murdock*, 10 B. & C. 527. See *Proudfoot* v. *Montefiore*, L. R., 2 Q. B. 511.

81. The question whether an agent exercised reasonable and proper care, skill and judgment is one of evidence in each particular case.

[NOTE.—It would seem that the evidence of skilled witnesses is admissible as to the construction of facts otherwise proved or inferences to be made from them. Phillips, s. 2112; Arn. 4th ed. 167, 168.]

82. The practice being unsettled and the law uncertain, the mistake of the agent affords no evidence of want of reasonable skill and ordinary diligence.

[NOTE.—A general order to insure seems to be satisfied by an insurance in the form in general use at the place to which the order refers; but reasonable diligence must be used to obtain the best terms.

Comber v. *Anderson*, 1 Camp. 523; *Moore* v. *Mourgue*, Cowp. 479; Duer on Ins., vol. 2, p. 231.]

Right to Recover.

83. To enable a principal to recover in an action against the agent, there must be—

(1) Default, and

(2) Damage resulting from it.

84. Default is not actionable if the projected insurance is illegal, and would therefore be void if entered into.

Webster v. *De Tastet*, 7 T. R. 157.

85. Nor is concealment of a material fact by which the insurance is avoided actionable if disclosure would have deterred the underwriters altogether from accepting the risk.

Paley on Principal and Agent, 20; *Glaser* v. *Cowie*, 1 M. & Sel. 52.

86. If the principal puts himself in communication with his agent, and is in accord with him in what he does or neglects to do, he cannot recover against his agent any damage that ensues.

Anderson v. *The Royal Exchange Ass. Co.*, 7 East, 38.

Defence.

87. An agent cannot take advantage of any defence arising out of his own wrong.

With this exception, all the defences open to underwriters sued upon the policy are open to him.

Arn. 4th ed. 170, 171.

88. And he is entitled to make the same deductions as the underwriters.

Harding v. *Carter*, 1 Marsh. Ins. 309; *Delany* v. *Stoddart*, 1 T. R. 22; *Wilkinson* v. *Coverdale*, 1 Esp. 75; *Glaser* v. *Cowie*, 1 M. & S. 52.

What recoverable.

89. The agent may be made liable not only for such loss as would be recoverable against the underwriter, but beyond, *ex. gr.*, for the costs of a previous action on the policy brought with his concurrence or brought without his concurrence but defeated by some misconduct of his in effecting the insurance not disclosed to the principal until action brought.

2 Duer, 330; *Seller* v. *Work*, 1 Marsh. Ins. 305.

90. Losses irrecoverable against underwriters owing to concealment by the agent, paid by them without suit but voluntarily refunded by the assured, may be recovered against the agent.

Maydew v. *Forrester*, 5 Taunt. 615.

91. *Semble*, if the principal seeks to recover from the agent for a constructive total loss he must abandon to the agent.

2 Duer, 326, 327.

II. *After effecting Insurance.*

92. The agent retaining possession of the policy is bound to enforce the rights and protect the interests of his principal in all matters arising out of the contract.

2 Duer, 245; *Richardson* v. *Anderson*, 1 Camp, 43, n.; *Goodson* v. *Brooke*, 4 Camp. 163; *Xenos* v. *Wickham*, 33 L. J., C. P. 13, 21 (Blackburn, J.)

93. This includes—

Demanding return of premium.

Giving notice of abandonment.

Jardine v. *Leathley*, 3 B. & S. 700.

Preparing and submitting proof of loss; settling amount, receiving same and handing it over to his principal.

Bousfield v. *Cresswell*, 2 Camp. 545.

[NOTE.—Where divers persons are named as assured 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.

Phillips, s. 1906.]

It is doubtful whether an agent has implied authority to insure a second time on the underwriter becoming insolvent.

2 Duer, 188.

Cancellation of Policy.

94. The agent can cancel a policy only by express authority of his principal.

Xenos v. *Wickham*, 14 C. B., N. S. 452; L. R., 2 H. L. 296.

Rights of Agents against the Property and third Persons.

95. A del credere agent who is liable to pay a loss to the assured in consequence of the insolvency of the underwriters, and an agent who is liable for a loss in consequence of the failure through his default to procure insurance is entitled to allowance for salvage.

And on paying a loss in case of the insolvency of the underwriters, he is entitled to use the name of the assured in subsequent proceedings against the underwriters in respect of it, where the assured only

is named in the policy; or he may proceed in his own name for his own benefit if the policy is in his own name.

2 Duer, 336; Phillips, s. 1905.

OF UNDERWRITERS.

Their Appointment.

96. The appointment of agents to subscribe policies should be formal.

[NOTE.—It is usually made by power of attorney. See Arn. 4th ed. 174–5.]

97. In the absence of a formal appointment it is a question of evidence whether surrounding circumstances prove agency.

Neal v. *Ewing*, 1 Esp. 61; *Courteen* v. *Touse*, 1 Camp. 43 (see 2 Duer, 341, n.); *Brocklebank* v. *Sugrue*, 5 Car. & P. 21; 1 B. & Ad. 81.

Extent and Execution of Powers.

98. The ordinary purposes of the agency are 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 assured, receive premiums, adjust losses and return of premium, and make payments.

Richardson v. *Anderson*, 1 Camp. 43, n.; Phillips, s. 1858; 2 Duer, 343.

99. The authority must not be exceeded.

Baines v. *Ewing*, L. R., 1 Ex. 320.

[NOTE.—The authority does not justify the alteration of the policy. *Brocklebank* v. *Sugrue*, 5 C. & P. 21.]

If the agent, in making the contract, exceeds his authority, the contract is void.

2 Duer, 346.

[NOTE.—The violation of secret instructions of course does not affect the assured, and the underwriter has his remedy against the agent. 2 Duer, 346.]

100. Authority to subscribe policies does not necessarily authorize the agent to settle and pay losses. It is, however, one circumstance tending to show such authority.

[NOTE.—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. Phillips, s. 1873.]

101. 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 abandonment so as to bind them.

Phillips, s. 1875.

102. In general the agent of the underwriters for receiving applications is such for receiving notice of other insurances, incumbrances, &c., and as such his knowledge will affect them, and his acts will bind them.

Phillips, s. 1876.

[NOTE.—Under what circumstances the assured is affected by the mistakes of the agent of the underwriters, see 2 Phillips, 527.]

103. Lloyd's agents are bound by their printed instructions, and cannot make up or sign an adjustment of a loss, or accept abandonment as the representatives of the underwriters.

Arn. 4th edit. 177.

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agents who, as principals, instruct them if without notice that they are agents.]

Man v. *Shiffner*, 2 East, 523; *Cahill* v. *Dawson*, 26 L. J., C. P. 253.

[NOTE.—The part of the last clause within brackets has been objected to as giving an agent power to pledge the goods of his principal, and Mr. Phillips seems to think it unsound. See s. 1916; Arn. 4th edit. 196 *et seq.*]

107. Usage or agreement, or the previous course of business between the parties, may give a right where it otherwise would not exist.

Green v. *Farmer*, 4 Burr. 2214.

[NOTE.—Mr. Phillips says: "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. Sect. 1912, par. 2. See *Olive* v. *Smith*, 5 Taunt. 56; *Bartlett* v. *Pentland*, 10 B. & C. 760; *Scott* v. *Irving*, 1 B. & Ad. 605.]

108. A general agent with whom a policy is left for safe custody has no lien upon it for money advanced independently of the policy.

Muir v. *Fleming*, Dowl. & Ry. N. C. 29.

109. An agent effecting a policy on goods to be shipped by a correspondent has a lien on the proceeds after a loss for his general balance against the shipper, although the goods are consigned to him on condition of his agreeing to pay over the proceeds of the shipment to a third party.

Man v. *Shiffner*, 2 East, 523.

110. A broker employing an agent to insure who pays premiums and delivers over the policies has

no lien for the premiums on the policies so delivered.

Snook v. *Davidson*, 2 Camp. 218.

As against Underwriters.

111. A broker of an underwriter who pays losses on policies for his principal, retaining the policies, has a lien upon the salvages for his general balance.

Ph. s. 1923; *Moody* v. *Webster*, 3 Pick. Mass. 424.

Loss and Revival.

112. Lien is lost—

By parting with possession of the policy.

By the holder pledging the policy as his own.

[NOTE.—An assignment of a policy to keep for the transferor, subject to his lien, is not a pledge forfeiting the lien. *M'Combie* v. *Davies*, 7 East, 5; *Urquhart* v. *M'Iver*, 4 Johns. N. Y. 102.]

By taking a security payable in the future.

Hewison v. *Guthrie*, 2 Bing. N. C. 755.

113. The lien is revived—

On the policy again coming to the hands of the agent while his immediate employer is interested.

Whitehead v. *Vaughan*, Cooke's B. L. 576.

[NOTE.—Assignees having in the meantime become interested, the lien for a general balance does not revive as against them. *Levy* v. *Barnard*, 8 Taunt. 143; 2 J. B. Moore, 34; *Sweeting* v. *Pearce*, 9 C. B. 534; *Spring* v. *South Carolina Ins. Co.*, 8 Wheat. 268.]

SET-OFF.

Against the Assured.

114. All premiums returned and all losses accruing on the policy may be retained and set-off until a lien is satisfied.

Phillips, s. 1909.

115. The right of the agent to retain and set-off sums received from underwriters against any liability he may have assumed for the future for his principal, will depend on whether he has a lien on the policy for his commissions, or has made advances upon the credit of the policy.

Godin v. *London Ass. Co.*, 1 Burr. 490; *Hammond* v. *Barclay*, 2 East, 227; *Castling* v. *Aubert*, 2 East, 325.

Against Underwriters.

116. The debts which can be set-off must be mutual.

117. Therefore, losses which are due by the underwriter to the assured cannot be set-off by the broker against a claim for premiums payable to the underwriter.

Wilson v. *Creighton*, 3 Doug. 132; *Houston* v. *Robertson*, 4 Camp. 342; 6 Taunt. 448; *Shee* v. *Clarkson*, 12 East, 507.

118. A broker acting *del credere* does not merely as such acquire any additional right of set-off.

Cumming v. *Forrester*, 1 M. & S. 494; *Peele* v. *Northcote*, 7 Taunt. 478.

119. But a broker insuring in his own name and (1) having a lien on the policy, (2) acting *del credere*, or (3) being interested as having made advances against consignments, is entitled to set-off against the claim of the underwriters for premiums losses due on the policy.

Parker v. *Beasley*, 2 M. & S. 422; *Koster* v. *Eason*, 2 M. & S. 112; *Grove* v. *Dubois*, 1 T. R. 112.

120. The contingency upon which a return of premium is due having happened, the broker is

entitled to set-off such return against the claim of the underwriter for premiums.

Shee v. *Clarkson*, 12 East, 507.

Bankruptcy of the Underwriter.

121. 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 premiums, and the broker, being debtor for premiums, is discharged therefrom, 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.

Phillips, s. 1927; *Parker* v. *Smith*, 16 East, 382; *Minett* v. *Forrester*, 4 Taunt. 541, n.; *Goldschmidt* v. *Lyon*, 4 Taunt. 534.

Losses not having been adjusted they are not strictly the subject of set-off, but as against the trustee of a bankrupt underwriter they may be set-off by an agent having a lien and insuring in his own name as a mutual credit.

2 Duer, 307; *Bullen* v. *Lee*, 27 L. J., Q. B. 161.

Recovering back Money paid.

122. 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.

Phillips, s. 1927; *Jameson* v. *Swainstone*, 2 Camp. 546, n.; *Edgar* v. *Fowler*, 3 East, 222; *Buller* v. *Harrison*, Cowp. 565.

[See "Premium: Return of."]

123. A policy being void by misrepresentation without fraud, the underwriter cannot recover back from the agent of the assured money which he has paid over to his principal in ignorance of the misrepresentation.

Holland v. *Russell*, 1 B. & S. 424.

Alien Enemy.

See "Capture, Arrest and Detention, tit. Capture (British)," and "Illegality."

All other Perils, Losses and Misfortunes.

See "Policy: Usual Clauses."

Assignment.

See "Policy."

Association.

See "Mutual Assurance Association."

Barratry.

Definition.

124. Barratry is the wilfully wrongful or illegal (*a*) act of the master or mariners by whatever motives induced, causing damage to the owner of the ship or goods.

Vallejo v. *Wheeler*, Cowp. 143; *Erle* v. *Rowcroft*, 8 East, 126; *Lockyer* v. *Offley*, 1 Term Rep. 252, and cases cited *infra*.

American Law.—Non-feasance, as in failing to prevent an act injurious to the owners, gross and culpable negligence and gross misconduct, amount to barratry. Anyone, including the master and mariners, may insure against barratry committed by another.

Phillips, s. 1065; *Stone* v. *National Ins. Co.*, 19 Pick. Mass. 34; *Paradise* v. *Sun Mut. Ins. Co.*, 6 La. Ann. 596; *Kendrick* v. *Delafield*, 2 Caines, 67.

French Law.—The insurer is not chargeable for barratry unless there be an express stipulation to the contrary. The term includes fraud, negligence, unskilfulness, or mere imprudence (*b*), and the word "master" (*patron*) includes "mariner."

Code de Com. art. 353.

German Law.—The underwriter is responsible for "risk of dishonesty or default of any member of the crew, so far as a loss may thereby be entailed upon the insured object."

Gen. Germ. Merc. Law, art. 824, cl. 6.

(*a*) The expressions "wilfully unlawful," "fraudulent," and "unlawful," are used by various writers.

(*b*) "Non seulement les prévarications, mais encore les fautes du Capitaine." Code Fr. Exp. par Rogron.

act of the master will deprive the owner of his remedy against the underwriter.

Hobbs v. *Hannam*, 3 Camp. 93; *Boutflower* v. *Wilmer*, 2 Selw. N. P. 973.

130. Barratry may be committed as against the special owner, although the general owner retain a lien for the freight and control of the ship and is a consenting party.

Park (Hildyard's), 199; *Saville* v. *Campion*, 2 B. & A. 503; *Tate* v. *Meek*, 8 Taunt. 280. [These two cases have nothing to do with barratry, but illustrate the subject by showing when the ownership in the vessel is divested.]

131. Whether a charterer is owner *pro hâc vice* depends upon the terms of the charter-party.

Vallejo v. *Wheeler*, Cowp. 143 [the ship must be "let as a house."—Lord Mansfield]; *Soares* v. *Thornton*, 7 Taunt. 627; 1 Moore, 373; *Christie* v. *Lewis*, 2 Brod. & B. 410.

AMERICAN LAW.—There must be an actual demise, and the master and mariners must be paid and victualled by the charterer to make him owner, so as to relieve the underwriter of liability for his barratrous act.

Ph. s. 1083.

132. The underwriters are liable to the owner for an act of barratry committed by the master with the privity of the freighter.

Boutflower v. *Wilmer*, 2 Selw. N. P. 973.

133. And to a charterer navigating the ship and appointing the master for an act of barratry by the master with the privity of the owner.

Vallejo v. *Wheeler*, Cowp. 143; *Marcardier* v. *Chesapeake Ins. Co.*, 8 Cranch, Sup. C. R. 39; *Hooe* v. *Groverman*, 1 id. 214; *Hobbs* v. *Hannam*, 3 Camp. 93.

AMERICAN LAW.—Barratry may be committed by the master of a ship in respect of the cargo, though the owner of the cargo is at the same time owner of the ship, and though the master is also the supercargo and consignee for the voyage.

Cook v. *Commercial Ins. Co.*, 11 John. S. C. N. Y. 38.

By Mariners.

134. Barratry of the mariners is any crime or fraud committed by them under such circumstances that it could not have been prevented by the prudence or vigilance of the assured or his representative the master.

135. Where the cause of the loss is a superior force, originating with the crew, the underwriters are liable as for barratry by the mariners.

136. Greater diligence is looked for from the owners in controlling the acts of the mariners than in controlling the acts of the master.

1 Ph. 619, s. 1081; *Pipon* v. *Cope*, 1 Camp. 434; *American Ins. Co.* v. *Bryan*, 26 Wend. N. Y. 563; *King* v. *Shepard*, 3 Stor. C. C. 349.

Who can Commit.

137. The master (as such) and mariners.

A master who is also supercargo and consignee.

Earl v. *Rowcroft*, 8 East, 126; *Cook* v. *Commercial Ins. Co.*, 11 Johns. N. Y. 40.

A master who is owner as against the other part-owners.

Jones v. *Nicholson*, 10 Ex. 28.

Carriers by land and their servants.

Boehm v. *Combe*, 2 M. & S. 172.

Who cannot Commit.

138. A master who is himself sole owner or general freighter.

Ross v. *Hunter*, 4 T. R. 33; *Steinbach* v. *Ogden*, 3 Caines, N. Y. 1; *M'Intyre* v. *Browne*, 1 Johns. N. Y. 229; *Barry* v. *Louisiana Ins. Co.*, 5 Mart. N. S. La. 667; *Hallet* v. *Columbian Ins. Co.*, 8 Johns. N. Y. 272; *Tagard* v. *Loring*, 16 Mass. 336.

[NOTE.—The onus of proving the master to be owner lies upon the underwriter.]

A master who is general owner, though he have bottomried and mortgaged the ship, retaining the control and navigation.

Lewin v. *Suasso*, Post. Dict. 147.

Consignees and factors not being at the same time masters.

Ph. s. 1080; *Kendrick* v. *Delafield*, 2 Caines, N. Y. 67.

AMERICAN LAW.—A master who is a part owner.

Marcardier v. *Chesapeake Ins. Co.*, 8 Cranch. 39; *Wilson* v. *Gen. Ins. Co.*, 12 Cush. Mass. 360; Phillips, s. 1082.

139. WHAT HAS BEEN HELD TO AMOUNT TO BARRATRY.

Sailing out of ordinary course to take in cargo on a smuggling adventure unknown to charterer.

Vallejo v. *Wheeler*, 1 Cowp. 143.

Dropping anchor and going ashore to find a market for captain's own private adventure. Barratry from the moment of leaving the direct course.

Ross v. *Hunter*, 4 Term Rep. 33.

Sailing out of port without paying port dues, whereby the ship and goods were subjected to forfeiture.

Knight v. *Cambridge*, 8 Mod. 231.

Sailing out of port without leave in breach of an embargo. Consequent loss of seamen's wages and provisions.

Robertson v. *Ewer*, 1 T. R. 127.

Sailing, or attempting to sail, into or out of a blockaded port without the knowledge of the owners, though with a view to their benefit.

Goldschmidt v. *Whitmore*, 3 Taunt. 508; *Richardson* v. *Marine Ins. Co.*, 6 Mass. at pp. 117, 121; *Calhoun* v. *Ins. Co. of Penn.*, 1 Binn. Penn. 293; *Vos* v. *United Ins. Co.*, 2 Johns. Cases N. Y. 180.

Sailing with contrary winds in opposition to the directions of the pilot, having before refused to sail when the wind was fair. Cutting the cable, whereby the ship drifted on to the rocks.

Hayman v. *Parish*, 2 Camp. 148.

Any act of a neutral ship which forfeits its neutrality (*a*), notwithstanding warranty of neutral property as lawful trade (*b*).

(*a*) Per Buller, J., 2 Park, Ins. 758.

(*b*) *Suckley* v. *Delafield*, 2 Caines, N. Y. 222; *Wilcocks* v. *Union Ins. Co.*, 2 Binn. Penn. 574.

See also *Garrels* v. *Kensington*, 8 T. Rep. 230; *Dederer* v. *Delaware Ins. Co.*, 30 Wash. C. C. Rep. 61; *Brown* v. *Union Ins. Co. of New London*, 6 Hall's L. J. 526; *Wiggin* v. *Amory*, 14 Mass. 1.

Illegal trading (*a*), *ex. gr.*, with the public enemy resulting in confiscation (*b*).

(*a*) *Suckley* v. *Delafield*, 2 Caines, N. Y. 222.
(*b*) *Earl* v. *Rowcroft*, 8 East, 216.

Collision with an enemy privateer in order to have ship captured.

Archangelo v *Thompson*, 2 Camp. 620.

Resistance to search when rightfully demanded by a belligerent.

Brown v. *Union Ins. Co. of New London*, 6 Hall's L. J. 526.

Cruising of merchantman in quest of prize contrary to intention and instructions of owners, and consequent loss by being driven ashore.

Moss v. *Byrom*, 6 T. Rep. 379.

Smuggling in fraud of owners.

Havelock v. *Hancill*, 3 T. Rep. 277.

Fraudulent sale and appropriation of proceeds by master who is part owner.

Jones v. *Nicholson*, 10 Exch. 28; 23 L. J., Ex. 330.

Intentionally running the ship on shore without any justifying necessity.

Soares v. *Thornton*, 7 Taunt. 627; 1 Moore, 373.

Fraudulently procuring ship to be condemned and sold.

Hibbert v. *Martin*, 1 Camp. 538.

Nonfeasance of master in failing to prevent scuttling, or put out fire when able to do so.

Potapsco Ins. Co. v. *Coulter*, 3 Peter's Sup. Ct. Rep. 222.

Unreasonable and wilful delay for barratrous purposes is barratry from the time of the detention of the ship.

Roscow v. *Corson*, 8 Taunt. 684; *Bradford* v. *Levy*, Ry. & Moo. 331; 2 C. & P. 137.

Scuttling the ship with the knowledge of the shipowner barratry as against freighter, giving him a right to claim against underwriters on cargo.

Ionides v. *Pender* (per Hannen, J., at N. P.), 1 Asp. M. L. Ca. 432.

By Mariners.

Conspiring with prisoners of war on board, overpowering master and rest of crew, and running ship on shore, where she was captured.

Toulmin v. *Anderson*, 1 Taunt. 227.

Crew of neutral captured vessel attempting unlawful rescue.

Wilcocks v. *Union Ins. Co.*, 2 Binn. Rep. 579; *Dederer* v. *Delaware Ins. Co.*, 2 Wash. C. C. 61.

Stealing of cargo (other than petty thefts).

Stone v. *National Ins. Co.*, 19 Pick. Mass. 34.

One of the crew conspiring with prisoners on board and running away with the ship.

Hucks v. *Thornton*, Holt, 40.

140. What has been held not to amount to Barratry.

Breaking up ceiling and end bows of sea-damaged ship before survey. No proof given of fraudulent intent.

Todd v. *Ritchie*, 1 Stark. 240.

Ship by owner's directions, but against protests of the owner of insured goods, put into a port other than that intended, captain signing false bills of lading. Owner of goods not entitled to recover as for a barratrous act.

Nutt v. *Bourdieu*, 1 T. R. 323.

The master induced by the offer of a reward to the owners of ship to go off the course of his voyage to rescue a ship that had been run away with.

Hood's Executors v. *Nesbitt*, 2 Dall. Penn. 137; 1 Yeates, Penn. 114.

Carrying deck cargo after warning by ship's agent, master having signed clean bills of lading.

Atkinson and Hewitt v. *The Great Western Ins. Co.*, 1 Asp. Mar. L. Ca. 382.

A barratrous act of the crew rendered possible by the gross negligence of the owners, though not amounting to guilty connivance. Ship seized three times after three successive acts of smuggling by the crew.

Pipon v. *Cope*, 1 Camp. 434.

An intentional adoption in mistake of instructions of a course other than the proper course of the ship, resulting in embargo and condemnation, not barratrous in the absence of fraud.

Phyn v. *Roy. Ex. Ass. Co.*, 7 T. R. 505.

Taking an intermediate voyage without the instructions of the owners, but without fraud.

Bottomley v. *Bovill*, 5 B. & C. 210.

Violation of a blockade through ignorance of the law.

Dederer v. *Delaware Ins. Co.*, 2 Wash. C. C. 61.

Master compelled to deviate by mutinous crew in order to take prize home, not barratry of the master.

Elton v. *Brogden*, 2 St. 1264. See this case discussed in *Vallejo* v. *Wheeler* (*sup.*), and in *Scott* v. *Thompson*, 1 N. R. 181; Park, 124, n.

Unintentional contravention of the rules of the Merchant Shipping Act whereby a collision occurred—although to be considered wilful for the purposes of the act—not barratry on the part of master and mariners of vessel in default.

Grill v. *General Iron Screw Collier Co.*, L. R., 1 C. P. 600; 35 L. J., C. P. 321.

Blockade.

See "Capture, Arrest and Detention" and the several subjects, tit. "Loss."

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145. Before hypothecating the ship or cargo the master should in all cases, if practicable, communicate with the owners.

The Lizzie, L. Rep., 2 Adm. & Ecc. 254; *The Hamburg*, 2 Moo. P. C., N. S. 289; *The Panama*, L. Rep., 2 A. & E. 390; *The Karnak*, L. R., 2 A. & E. 289; *The Onward*, 1 Asp. Mar. L. C. 540; L. R., 4 A. & E. 38.

As to what is a valid hypothecation, see Maclachlan on Shipping, pp. 43, 136, 153; and Williams and Bruce, Ad. Prac. p. 31; Phillips, ss. 1561 *et seq*; Parsons on Mar. Ins., c. v., s. vii.

146. So far as the bottomry is not authorized by the necessity of the case, it will be inoperative as against the underwriter as well as the owner.

Stainbank v. *Fenning*, 11 C. B. 59; *Stainbank* v. *Shephard*, 13 C. B. 418; Maclachlan on Shipping, pp. 44, 136, 153.

147. An underwriter is liable on a policy on bottomry only in the event of an absolute total loss of the subject-matter.

Thompson v. *Roy. Ex. Ass. Co.*, 1 M. & S. 30; *Stephens* v. *Broomfield*, L. R., 2 P. C. 516.

148. There is neither average nor salvage upon a bottomry bond.

Joyce v. *Williamson*, 3 Doug. 164; 2 Hild. Park, 897.

French Law.—The lender contributes to general average. Code de Com. sect. 141; *Le Guidon*, c. 19, art. 5.

Capture, Arrest and Detention.

Clause in Ordinary Policy.

149. "Takings at sea, arrests, restraints and detainments of all kings, princes and people of what nation, condition or quality soever."

Interpretation of Terms.

Takings at Sea.

150. Includes:—

Takings by an enemy lawfully or unlawfully.

Goss v. *Withers*, 2 Burr. 683, 694, 695; *Powell* v. *Hyde*, 5 E. & B. 607; 25 L. J., Q. B. 65.

By government officers acting unlawfully.

Lozano v. *Janson*, 2 E. & E. 160; 28 L. J., Q. B. 337.

By mutinous passengers.

Kleinwort v. *Shepard*, 1 E. & E. 447; 28 L. J., Q. B. 147.

By pirates.

Dean v. *Hornby*, 3 E. & B. 180; 23 L. J., Q. B. 129.

American Law.—By insurrection of slaves constituting cargo.

M'Cargo v. *New Orleans Ins. Co.*, 10 Rob. La. 202.

But not by mutinous crew.

Green v. *Pacific Ins. Co.*, 9 All. Mass. 217.

Arrest, Restraint and Detention.

151. Arrest is a taking of goods with the intention of restoring them at one time or other.

Restraint and detention is the preventing the goods from being got away without laying hands upon them.

Per Brett, J., in *Rodocanachi* v. *Elliott*, L. R., 8 C. P. at p. 659.

152. There may be arrest, restraint or detention in a home or foreign port, or at sea, by the native government of the owners (*a*), or a friendly power (*b*).

(*a*) *Bazett* v. *Meyer*, 5 Taunt. 824; *Aubert* v. *Gray*, 3 B. & S. 163, 169; 32 L. J., Q. B. 50.*

(*b*) *Touteng* v. *Hubbard*, 3 B. & P. 291; *Green* v. *Young*, 2 Ld. Raym. 840; Salk. 444; *Hagedorn* v. *Whitmore*, 1 Stark. 157; *Francis* v. *Ocean Ins. Co.*, 6 Cowen, 404; 2 Wend. 64.

As—

By embargo.

Arn. 4th ed. p. 700.

By blockade.

Geipel v. *Smith*, L. R., 7 Q. B. 404.

By a state of siege.

Rodocanachi v. *Elliott*, L. R., 8 C. P. 649. (Affirmed by Ex. Ch., June 15, 1874.)

[The policy here was held to contemplate and thus to cover land transit.]

(*) *Aubert* v. *Gray* (32 L. J., Q. B. 50). This case overrules Lord Ellenborough's decision in the cases of *Conway* v. *Gray*, *Conway* v. *Forbes*, and *Murray* v. *Sheddon* (in 10 East), to the effect that the act of a government is the act of each subject, and that therefore the assured could not recover for a loss arising from his own act. *Bazett* v. *Meyer* (5 Taunt. 824) was decided on the same principle as *Aubert* v. *Gray*. *Campbell* v. *Innes* (4 B. & Ald. 423) admitted the correctness of *Bazett* v. *Meyer*, and the distinction between the two cases is that in the latter the underwriter did, and in the former did not, know all the circumstances. In *Campbell* v. *Innes*, the fact that the assured was an American subject was not communicated to the underwriter, and on that ground, the loss having arisen from a seizure by the American government, the court gave judgment in his favour.

People.

153. The ruling power.

Nesbitt v. *Lushington*, 4 T. R. 783.

Right of Action.

Capture.

154. The ship is lost by capture, though she be never condemned at all, nor carried into any port or fleet of the enemy.

2 Burr. 694; 2 Emerigon, c. 16, s. 2, p. 212.

155. If the master of the ship arrange the capture with the captor without the privity of the assured, the underwriter is liable.

Arcangelo v. *Thompson*, 2 Camp. 620.

See "Barratry."

156. Loss by capture may be recovered, though the property in the subject-matter be not changed.

Shee's Marshall, p. 394. See the argument in *Lozano* v. *Janson*, 28 L. J., Q. B. 337.

157. The underwriter is liable for all loss properly arising out of the capture.

Berens v. *Rucker*, 1 Black. 313.

Alien Property.

158. Insurance on alien property by a British subject does not cover any loss happening during the existence of hostilities between the respective countries of the assured and assurer.

Brandon v. *Curling*, 4 East, 409; *Furtado* v. *Rogers*, 3 B. & P. 191, 198; *Lubbock* v. *Potts*, 7 East, 449; *Glaser* v. *Cowie*, 1 M. & S. 52.

159. A loss by British capture or by capture of a co-belligerent cannot be recovered against British underwriters by an assuree who was an alien enemy at the time of the capture, though the insurance was made in time of peace, and the action brought after its restoration.

Brandon v. *Curling*, 4 East, 409; *Kellner* v. *Le Mesurier*, 4 East, 396; *Gamba* v. *Le Mesurier*, 4 East, 407; *Furtado* v. *Rodgers*, 3 B. & P. 191.

160. The subject of a hostile foreign state domiciled in this country may recover against British underwriters for loss by capture by the foreign government and its allies if the loss arise in course of trade licensed by the British government.

Usparicha v. *Noble*, 13 East, 332; *Flindt* v. *Scott*, 5 Taunt. 674; *Anthony* v. *Moline*, 5 Taunt. 711; *Scharkoneg* v. *Andrews*, 5 Taunt. 716.

Wrongful Seizure.

161. A loss by wrongful seizure may be recovered by the insured of any nationality, the risk being lawful.

Lozano v. *Janson*, 2 Ell. & Ell. 160; 28 L. J., Q. B. 337. See per Lord Campbell, C. J.

See "Ship" and "Cargo," tit. "Loss."

Warranties.

162. A ship warranted free from capture in her port of discharge is within the warranty, having once come within a land risk for the purpose of discharging her cargo.

Dalgleish v. *Brooke*, 15 East, 295; *Oom* v. *Taylor*, 3 Camp. 203; *Maydhew* v. *Scott*, 3 Camp. 204; *Cockey* v. *Atkinson*, 2 B. & A. 460; *Mellish* v. *Stainforth*, 3 Taunt. 499; *Levy* v. *Vaughan*, 4 Taunt. 387; *Keyser* v. *Scott*, 4 Taunt. 659; *Levin* v. *Newnham*, 4 Taunt. 722.

163. The question of intention to discharge is one of evidence.

Reyner v. *Pearson*, 4 Taunt. 662; *Levin* v. *Newnham*, 4 Taunt. 722; Park, 87, 7th edit.

Arrest and Detention.

164. The assured may abandon and claim direct against the underwriter for a total loss by arrest or detention; and if the arresting power has made compensation to an amount less than the value of the subject-matter, the balance is recoverable.

Valin, liv. 3, t. 6, art. 49, p. 127; Emerigon, c. xii. s. 33, vol. 1, pp. 543—545.

165. Detention does not dissolve the contract of affreightment; and demurrage, cash expended, and the wages and provisions of the crew during the period are not recoverable against the underwriters.

Hadley v. *Clarke*, 8 T. R. 259; *Eden* v. *Poole*, 1 Park, 117; *Robertson* v. *Ewer*, 1 T. R. 127; *Everth* v. *Smith*, 2 M. & S. 278; *Lateward* v. *Curling*, 1 Park, 207; *Fletcher* v. *Poole*, 1 Park, 89; Benecke Pr. of Indem. 462; 1 Emerigon, 529.

166. Underwriters are not liable for loss arising to ship or cargo from interdiction of trade at the port of destination after risk commenced, interception of the voyage by blockade short of actual detention, or by the imminent and palpable danger of capture or seizure.

Arn. 4th edit. 677; *Hadkinson* v. *Robinson*, 3 B. & P. 388; *Lubbock* v. *Rowcroft*, 5 Esp. 49; *Atkinson* v. *Ritchie*, 10 East, 530; *Forster* v. *Christie*, 11 East, 205.

[NOTE.—*Semble*, that a loss of freight caused by a blockade preventing the commencing or completing of a voyage may be

recovered against the underwriters. See *Geipel* v. *Smith*, L. R., 7 Q. B. 404.]

AMERICAN LAW.—In a state of uncertainty; *King* v. *Delaware Ins. Co.*, 6 Cranch, 71; Phillips, c. xiii. sect. 10.

FRENCH LAW.—The underwriters are liable for such loss: Emerigon, chap. xii. s. 31, vol. 1, p. 533.

167. A time being fixed for abandonment after detention, the assured is bound to wait that time, but the loss is then total irrespective of the fact that no action is brought before restoration.

Fowler v. *English and Scotch Marine Ins. Co.*, 34 L. J., C. P. 253.

Goods loaded on deck, unless from obvious necessity or in accordance with known usage of trade.

Ross v. *Thwaite*, 1 Park, Ins. 23; *Backhouse* v. *Ripley*, ib. 24; *Da Costa* v. *Edmunds*, 4 Camp. 142; *Gould* v. *Oliver*, 4 Bing. N. C. 134; *Milward* v. *Hibbert*, 3 Q. B. Rep., N. S. 120; *Taunton Copper Co.* v. *Merchants' Ins. Co.*, 22 Pick. Mass. 108; *Smith* v. *Miss. F. and M. Ins. Co.*, 11 La. 142; *Rogers* v. *Mechanics' Ins. Co.*, 1 Stor. C. C. 603; Ph. s. 460.

Live stock.

Lawrence v. *Aberdein*, 5 B. & Ald. 107; *Allegre's Administrators* v. *Maryland Ins. Co.*, 2 Gill. & John. 136; *Wolcott* v. *Eagle Ins. Co.*, 4 Pick. Mass. 429.

Provender of live stock.

Wolcott v. *Eagle Ins. Co.*, 4 Pick. Mass. 429 (where the English and American cases are cited).

Semble, bank notes and bills of exchange.

Palmer v. *Pratt*, 2 Bing. 185; *Gregory* v. *Christie*, Park, Ins. 4th ed. 11; *Thompson* v. *Royal Ex. Ass. Co.*, Manning's Dig. 164, ed. 1820. But covered by the word "property;" *Whiton* v. *Old Colony Ins. Co.*, 2 Metc. Mass. 1.

Contraband of war.

1 Magens, 9, s. 14; Weskett, 260, tit. "Goods."

[NOTE.—It has been held included in the term "all lawful goods,"—*per* Kent, J., in *Seton* v. *Low*, 1 John. Ca. N. Y. 1; Ph. s. 446, n. 3.]

171. The interest of a *respondentia* bondholder cannot be insured as goods.

Glover v. *Black*, 3 Burr. 1394.

[NOTE.—This rule may be varied by the usage of a particular trade.

Gregory v. *Christie*, Park, 256.]

172. Freight not paid in advance and other expenses to be incurred on the goods during the risk are not a part of the insurable interest.

Phillips, s. 1233; *Mansfield* v. *Maitland*, 4 B. & Ald. 582; *Winter* v. *Haldiman*, 2 B. & Ad. 649.

Effect of Description.

173. A common policy on ship and goods may, by a memorandum, be made a valid policy on goods.

Haughton v. *Ewbank*, 4 Camp. 80.

If goods are specified and goods of another class to a like amount be shipped the policy is inoperative.

Hunter v. *Prinsep* (*per* C. J. Mansfield, Marsh on Ins. (by Shee), 255); Emerigon, tom. i. pp. 300, 301.

A policy on goods generally, or on time, or which gives liberty to touch and stay at intermediate ports, covers successive cargoes which may be put on board during the voyage.

Valin, liv. 3, tit. 6, art. 27, p. 78; Pothier, h. t. n. 63; Emerigon, tom. ii. p. 73; *Grant* v. *Paxton*, *Grant* v. *Decarvin*, 1 Taunt. 474; *Coggeshall* v. *Amer. Ins. Co.*, 3 Wend. N. Y. 383.

American Law.—A policy on goods outward and upon their "proceeds" home applies to return goods shipped on the credit of the outward cargo left at a foreign port to be sold, but not to the outward cargo carried home again.

Haven v. *Gray*, 12 Mass. 71; *Whitney* v. *Amer. Ins. Co.*, 3 Cow. N. Y. 210; 5 Id. 712; 3 Kent Comm. 310.

As to meaning of "proceeds;"

Dow v. *Hope Ins. Co.*, 1 Hall, N. Y. 170; *Dow* v. *Whetten*, 8 Wend. N. Y. 160.

The description of goods shipped "between" two dates does not cover those shipped on the days named.

Atkins v. *Boylston F. & M. Ins. Co.*, 5 Metc. Mass. 439.

The policy being on goods by ship or ships for a specified voyage from a certain port or certain ports, or in general for a limited period, the subject must be identified by the ports of shipment, the voyage, or the time of shipment.

Ph. s. 437, who cites *Robinson* v. *Touray*, 3 Camp. 157; *Crowley* v. *Cohen*, 3 B. & Ad. 478.

A policy upon the loading of certain vessels employed in a certain navigation for a specified period, is applicable to all the lading of all the vessels within such period.

Crowley v. *Cohen*, 3 B. & Ad. 478; *Henshaw* v. *Mutual Ins. Co.*, 2 Blatchf. C. C. 99.

The vessel on board of which goods are insured must answer to the description in the policy.

Ph. s. 450; *Sea Ins. Co.* v. *Fowler*, 21 Wend. N. Y. 600.

A mere misnomer which does not mislead the underwriter will not avoid the policy.

Ionides v. *Pacific Ins. Co.*, L. R., 7 Q. B. 517; *Hall* v. *Molineaux*, cited in *Le Mesurier* v. *Vaughan*, 6 East, 382.

"*To be declared.*"

174. Where the insurance is on goods by a ship or ships as thereafter to be declared, or on goods thereafter to be declared and valued (*a*), the

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Agents.

176. Agents, to whom a debt is due in respect of the goods by the consignors, so as to give a lien on them, have an insurable interest.

Wolff v. *Horncastle*, 1 B. & P. 316.

A general agent of the consignor, holding the bills of lading upon which he has made advances, who becomes consignee by reason of the refusal of the intended consignee to receive the cargo, has an insurable interest either on behalf of his principal or himself.

Idem.

Bailees.

177. A bailee, being liable by law or by contract for certain risks, whereby the subject bailed may be lost or damaged, has an insurable interest in respect of such risks.

Ex. gr., A carrier, who has cast upon him the liabilities of an insurer and of a common carrier as such, has an insurable interest in the goods committed to his care to their full value.

Crowley v. *Cohen*, 3 B. & Ad. 428.

A lighterman.

Joyce v. *Kennard*, L. R., 7 Q. B. 78 (which, however, was a case of an express contract to indemnify for loss of goods carried generally by the plaintiffs, and was not an ordinary contract of marine insurance).

Consignees.

178. Consignees have an insurable interest:—

(1) When the goods are delivered on board their own ship or to their agent without any reservation of a right of property by the consignors.

Schotsman v. *Lancashire and Yorkshire Railway*, L. R., 2 Ch. 332 (where all the cases are cited and discussed).

(2) When the goods are shipped on board a general ship and the bill of lading is delivered (*a*) or indorsed unreservedly to them.

Turner v. *Trustees of Liverpool Docks*, 6 Ex. 543. See *Stephens* v. *Australasian Ins. Co.*, L. R., 8 C. P. 18.

[NOTE.—(*a*) The consignees need not be mentioned by name, Sm. Merc. Law, 7th ed. 304.]

(3) When they are under advances to the consignors or under liabilities for them in respect of the goods. They may insure in their own name to the extent of their interest.

Ebsworth v. *Alliance Marine Ins. Co.*, L. R., 8 C. P. 596 (where all the cases are cited and discussed).

[NOTE.—*Semble*, they may insure in their own names to the extent of the whole value of the consignment, being trustees for the consignors for the value beyond their own interest. Id.]

The interest in the goods giving the right to insure vests immediately they are shipped on board.

Ogle v. *Atkinson*, 5 Taunt. 759; *Van Castell* v. *Booker*, 2 Ex. 691; *Wait* v. *Barker*, 2 Exch. 1; *Turner* v. *Trustees of Liverpool Docks* (*sup.*); *Rowley* v. *Bigelow*, 12 Pick. Mass. 307.

Creditors.

179. A lender on *respondentia* has an insurable interest, if repayment depends upon the safe arrival of the goods.

Arn. 4th ed. 38; Ph. sect. 307.

A pledgee who advances money to consignees, receiving the bill of lading as security, has an insurable interest.

Sutherland v. *Pratt*, 12 M. & W. 16.

Where goods are consigned by a debtor, with orders to the consignee to pay the proceeds to his creditor, without any agreement between the debtor and creditor to that effect, the creditor has an insurable interest.

Hill v. *Secretan*, 1 Bos. & P. 315.

A pledge of goods, as a security against a contingent liability, gives an insurable interest to the pledgee to the amount of his liability.

Russell v. *United Ins. Co.*, 4 Dall. 421; 1 Wash. C. C. 409.

Any creditor, to whom goods are assigned as a collateral security, or the amount of whose debt is invested in the goods, has an insurable interest in them to the amount of his debt.

Locke v. *North American Ins. Co.*, 13 Mass. Rep. 61; *Wells* v. *Philadelphia Ins. Co.*, 9 Serg. & Rawle, 103.

A seizure or attachment at the suit of a creditor does not divest the insurable interest of the debtor until a legal absolute sale is made.

Franklin Ins. Co. v. *Findlay*, 6 Whart. Penn. 4833; *Bell* v. *Western Mar. and Fire Ins. Co.*, 5 Rob. La. 423; Id. 428.

perty in the goods has passed depends upon the intentions of the consignor.

Caldwell v. *Ball*, 1 T. R. 205; *M'Andrew* v. *Bell*, 1 Esp. 373; *Hibbert* v. *Carter*, 1 T. R. 745; *Hubbersty* v. *Ward*, 8 Ex. 330; *Shepherd* v. *Harrison*, L. R., 5 E. & I. App. 116.

Master.

183. A master may insure his share of the cargo.

Arn. 4th ed. 42.

Shipper.

184. The shipper has an insurable interest in goods shipped until, by actual or symbolical transfer, he divests himself of the property;

Moakes v. *Nicolson*, 19 C. B., N. S. 290; *Mitchell* v. *Ede*, 11 A. & E. 888; *Turner* v. *Trustees of Liverpool Docks*, 6 Ex. 543; *Haille* v. *Smith*, 1 B. & P. 563; *Walley* v. *Montgomery*, 3 East, 585; *Coxe* v. *Harden*, 4 East, 211; *Gurney* v. *Behrend*, 3 E. & B. 622; 23 L. J., Q. B. 265; *Seagrave* v. *Union Mar. Ins. Co.*, L. R., 1 C. P. 305; *Shepherd* v. *Harrison*, L. R., 5 E. & I. App. 116;

or by his illegal act the goods are forfeited and seized.

1 Ph. pp. 114, 115; *Pipon* v. *Cope*, 1 Camp, 134; *Clark* v. *Protection Ins. Co.*, 1 Stor. C. C. 109.

Trustee.

185. A trustee may insure to the full value of the goods.

Lucena v. *Craufurd*, 2 B. & P. N. R. 324 (Lord Eldon); *Crawfurd* v. *Hunter*, 8 T. R. 13; *Waters* v. *Monarch Life Ass. Co.*, 5 E. & B. 870; 25 L. J., Q. B. 102; *Pratt* v. *Phœnix Ins. Co.*, 1 Browne, Penn. 267; *Henshaw* v. *Mutual Ins. Co.*, 2 Blatch. C. C. 99.

Vendee.

186. A purchaser who is liable for the price of goods has an insurable interest in them, though the vendor has a lien upon them for the exercise of his right of stopping them *in transitu*.

Clay v. *Harrison*, 1 Ll. & W. 104.

Whether a vendee of goods stopped *in transitu* has an insurable interest is not yet decided. *Semble*, he has.

See note (2) to *Clay* v. *Harrison* (*sup.*); Ph. s. 197.

An agreement to purchase, followed by a specific appropriation by the vendor of a particular cargo and acceptance thereof by the vendee as the thing bargained for, confers upon the vendee an insurable interest.

Sparkes v. *Marshall*, 2 Bing. N. C. 761.

There may be a complete contract, so as to pass the property in the goods from the buyer to the seller, although the price has not been definitely agreed on between them.

Joyce v. *Swann*, 17 C. B., N. S. 84.

THE RISK.

Commencement and Duration.

187. "Beginning the adventure upon the said goods and merchandises from the loading thereof on board the said ship."

On Board.

188. In general the risk does not commence until the goods are on board, and continues while they are on board.

[NOTE.—Emerigon says the risk commences as soon as the goods are loaded on board; *or* in boats for the purpose of being conveyed to the ship.—Vol. ii. p. 49. This appears to be the general law. See *Pelly* v. *Royal Exch. Ass. Co.*, 1 Burr. at p. 349.]

Transshipment.

(1) The ship being disabled, goods transferred to another ship are covered in the substituted ship.

Marshall Ins., by Shee, 195.

(2) There being an agreement in the policy that the goods may be unloaded and re-shipped, they are covered if put on board lighters or a store ship, when such a course is justified by usage.

Tierney v. *Etherington*, cited 1 Burr. 348.

Port of Loading.

189. The naming of the port of loading is not, *as a rule*, a warranty that the goods shall be loaded there; to make it so there must be words to that effect in the policy.

[NOTE.—Mr. Phillips says, that in the absence of words of warranty in the policy, "the specification of the terminus *à quo* is to be taken as mere recital, description, or intention, or expectation, being at most an implied representation of the loading."—Vol. i. p. 526, s. 939.]

The words "port or ports of loading" mean, not merely those places which are technically called

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Merely hoisting without landing is insufficient.

Murray v. *Columbian Ins. Co.*, 11 Johns. 302 ; Ph. s. 939.

The policy being upon goods loaded at a wharf, the risk usually commences with the responsibility of the owner and master, and when that of the wharfinger ceases.

Corban v. *Downe*, 5 Esp. 41 ; Ph. s. 940.

"*From a Port.*"

191. A policy on goods "from a certain port" covers goods put on board at an outport in the vicinity of that named where it is usual to take on board goods of a like description.

Rickman v. *Carstairs*, 5 B. & Ad. 651; *Moxon* v. *Atkins*, 3 Camp. 200; *M'Cargo* v. *Merchants' Ins. Co.*, 10 Rob. La. 334; *Delonguemere* v. *N. Y. Firemen's Ins. Co.*, 10 Johns. N. Y. 119 (open roadsteads).

The risk under such a policy commences from the time of sailing.

Pothier, Ins. art. 63 ; *Thellusson* v. *Fergusson*, Doug. 360 ; *Audley* v. *Duff*, 2 Bos. & P. 111; *Sellar* v. *M'Vicar*, 1 B. & P., N. R. 23.

A vessel has sailed the moment she is unmoored and got under way in complete preparation for the voyage, with the purpose of proceeding to sea without further delay at the port of departure.

Bond v. *Nutt*, Cowp. 601; *Thellusson* v. *Fergusson*, 1 Doug. 361; Phillips, s. 772.

"*At and from.*"

192. A policy on goods "at and from" a foreign

port covers only homeward cargo which is on board;

Mellish v. *Allnutt*, 2 M. & S. 106; *Smith* v. *Mobile Ins. Co.*, 30 Ala. N. Y. 167; *Mobile Ins. Co.* v. *M'Millan*, 31 ibid. 711;

and while the ship is preparing for the voyage.

Marsh. on Ins. by Shee, 206; *Williamson* v. *Innes*, 8 Bing. 81. Arn. 364, n. 4; *Gardner* v. *Columbian Ins. Co. of Alexandria*, 2 Cranch, C. C. 473. As to the meaning of "at and from" see "Ship;" *Houghton* v. *Empire Mar. Ins. Co.*, L. R., 1 Ex. 206.

If a policy describe a voyage at and from a place which is the head of a port, it will not cover a voyage at and from a distinct place which is a member of the same port.

Payne v. *Hutchinson*, 2 Taunt. 405 n. See also *Constable* v. *Noble*, 2 Taunt. 402.

A policy on goods at and from a particular island or country covers both outward and homeward cargo lost in passing from port to port of such island or country.

Cruikshank v. *Janson*, 2 Taunt. 301; *Camden* v. *Cowley*, 1 W. Bl. 417; *Forbes* v. *Aspinall*, 13 East, 323; *Warre* v. *Miller*, 4 B. & Cr. 538; *Rickman* v. *Carstairs*, 5 B. & Ad. 651.

[NOTE.—The clause: "Outward cargo to be considered homeward interest twenty-four hours after arrival at first port or place of trade" covers only such cargo as is on board at the time of loss after arrival at the port, the valuation being taken as a datum for calculating the partial loss.

Tobin v. *Harford*, 13 C. B., N. S. 791; 32 L. J., C. P. 134; 34 L. J., C. P. 37.]

The Voyage.

193. A policy on goods laden on board a vessel

for a certain voyage applies to the pending or first passage or trip.

Ph. s. 448; *Courtnay* v. *Miss. Fire and Mar. Ins. Co.*, 12 La. 233.

Termination.

194. The risk continues upon the goods and merchandizes, "until the same be discharged and safely landed" at the port of destination;

Until the insured voyage is abandoned;

Blackenhagen v. *London Ass. Co.*, 1 Campb. 454 (*a*); *Richardson* v. *Marine Fire and M. Ins. Co.*, 6 Mass. 102 (see pp. 117 and 121);

or it is intercepted and broken up, although by a peril not insured against;

Roux v. *Salvador*, 3 Bing. N. C. 266; *Speyer* v. *N. Y. Ins. Co.*, 3 Johns. N. Y. 88;

or put an end to by deviation.

See "Deviation" (*post*).

The risk may be terminated at any period of the voyage, either by subsequent arrangement of the parties, or in accordance with prior stipulation in the policy.

Arn. 4th ed. 377; *Ionides* v. *Harford*, 29 L. J., Ex. 36.

(*a*) See this case and the question of abandonment of voyage discussed in *Brown* v. *Vigne*, 12 East, 283.

Where it is usual at the port of discharge to land goods by boats, the insurance, without express words, extends to the boats.

Rucker v. *London Ass. Co.*, 2 B. & P. 432, nn.; *Hurry* v. *R. Ex. Ass. Co.*, 2 B. & P. 430; *Matthie* v. *Potts*, 3 B. & P. 23; *Coggeshall* v. *American Ins. Co.*, 3 Wend. N. Y. 283; *Stewart* v. *Bell*, 5 B. & Ald. 238; *Wadsworth* v. *Pacific Ins. Co.*, 4 Wendell's Rep. 38; *Oscar* v. *Louisiana Ins. Co.*, 5 Martin, N. S. 386; *Parsons* v. *Mass. Fire and Mar. Ins. Co.*, 6 Mass. 197.

This benefit may be lost by the interference of the assured.

Sparrow v. *Carruthers*, 2 Str. 1236; *Strong* v. *Natally*, 1 B. & P., N. R. 16.

Cargo is "landed" immediately it is put on land at the particular port intended by the parties, although it does not reach the hands of the consignees.

Brown v. *Carstairs*, 3 Camp. 161; *Barrass* v. *London Ass. Co.*, 1 Marsh. Ins. 266.

Exception.—If landed justifiably for a temporary purpose, or under such circumstances as to be protected by the usage of trade, the underwriter is not discharged.

Pelly v. *Royal Exchange Ass. Co.*, 1 Burr. 341. But see *Harrison* v. *Ellis*, 7 E. & B. 465; 26 L. J., Q. B. 239; *Tierney* v. *Etherington*, cited 1 Burr. 348, 349.

Goods being transshipped necessarily or in pursuance of leave given by the policy, the policy continues to attach until the goods are discharged from the substituted ship.

Plantamour v. *Staples*, 1 Marsh. Ins. 164; *Oliverson* v. *Brightman*, 7 Q. B. 781; *Bold* v. *Rotherham*, 8 Q. B. 797; 15 L. J., Q. B. 279; *De Cuadra* v. *Swann*, 16 C. B., N. S. 77[2].

[NOTE.—But if they are unnecessarily unshipped so as to change the risk the underwriter is released.]

Goods being insured for twenty-four hours after being safely landed, the risk terminates on each parcel at the end of twenty-four hours after it is landed.

Phillips, sect. 972 (who holds to this doctrine even though the insurance be entire, in opposition to *Gardner* v. *Smith*, 1 Johns. Cas. N. Y. 141); *Mansur* v. *New Eng. Ins. Co.*, 12 Gray, Mass. 520.

Suspension and Revival.

197. The risk being suspended, it depends upon the construction of the policy whether it can revive.

Where the policy is for one entire voyage the risk once suspended cannot revive.

Pelly v. *Royal Ex. Ass. Co.*, 1 Burr. 341; *Ellery* v. *New Eng. Ins. Co.*, 8 Pick. Mass. 14; *Marten* v. *Salem Mar. Ins. Co.*, 2 (Tyng's) Mass. 420.

LOSS.

Total—Absolute.

198. An absolute total loss occurs where by the happening of the perils insured against the goods—

(1) Go to the bottom of the sea.

(2) Are taken out of the possession and control of the assured, so as to leave no reasonable hope of recovery.

Cologan v. *London Ass. Co.*, 5 M. & S. 447; *Dyson* v. *Rowcroft*, 3 B. & P. 374; *Bondrett* v. *Hentigg*, Holt, N. P. 149.

(3) Are in such a condition that they cannot be carried on and are thrown overboard.

(4) Are in a state of progressive decay, so that if sent on, their species would disappear before arrival and are sold.

Roux v. *Salvador*, 3 Bing. N. S. 266.

GERMAN LAW.—Art. 258 of the General Mercantile Law thus defines a total loss :—When the vessel or the goods have been destroyed, or when they have been withdrawn from the assured without hope of their recovery, particularly when they have been irrevocably sunk or have been so damaged as to lose their original properties, or have been declared good prize.

No degree of damage, however great, can amount to an absolute total loss on goods warranted free of average if they arrive in specie at their port of destination.

Navone v. *Haddon*, 9 C. B. 30; *M'Andrews* v. *Vaughan*, 1 Park, Ins. 185; *Glennie* v. *Lond. Ass. Co.*, 2 M. & S. 371; *Mason* v. *Skurray*, 1 Park, Ins., by Hildyard, 253; 1 Marsh. Ins. 218, 219.

[NOTE.—High authority favours the doctrine that if the goods, although arriving in specie, are worth nothing, they are an absolute total loss. See Lord Ellenborough, 5 M. & S. at p. 455; Benecke (Pr. of Indem.) 379].

AMERICAN LAW.—See the *Great Western Ins. Co.* v. *Fogarty* (*U. S. Sup. C.*), 30 L. T. Rep., N. S. 613, and cases cited in the judgment.

Capture.

199. Loss of goods by capture is total if followed by confiscation or unpreventible sale, without restitution before action brought.

Mullett v. *Shedden*, 13 East, 304; *Mellish* v. *Andrews*, 15 East, 13; *Stringer* v. *English and Scottish Mar. Ins. Co.* L. R., 4 Q. B. 676; L. R., 5 Q. B. 599.

[NOTE.—In the last case the sale might have been prevented by giving security, but the court thought that a prudent owner, uninsured, would not have given it, and held the loss by sale total.]

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by the supercargo investing the proceeds for the purpose of remittance and not as a new commercial adventure merely for profit.

Phillips, s. 1628; *Pacific Ins. Co.* v. *Catlett*, 4 Wend. N. Y. 75; *Catlett* v. *Pacific Ins. Co.*, Id. 561.

Total—Constructive.

Definition.

202. There is a constructive total loss of goods by abandonment—

(1) When subsisting in specie they are so damaged and spoiled that they cannot be carried on so as to arrive in merchantable condition;

(2) When the charges for salvage are so high that the cost of restoring or recovering them would exceed their market value when such cost had been incurred; and

(3) When the assured is deprived of the free disposal of them under circumstances which render their restitution uncertain.

Shee's Marshall, p. 452, and cases cited under several sub-headings (*post*).

The doctrine of constructive total loss of the whole cargo is not applicable to a loss at the port of final destination.

Phillips, s. 1612.

Arrest, Restraint or Detention.

203. Arrest, restraint or detention gives a right to abandon perishable cargo, or other subject-matter if its probable duration will cause a loss, or de-

prive the owner of possession for an unreasonable period.

Rodoconachi v. *Elliott*, L. R., 8 C. P. 649; *Hamilton* v. *Mendes*, 2 Burr. 1199; *Rotch* v. *Edie*, 6 T. R. 413; *Cologan* v. *L. Ass. Co.*, 5 M. & S. 447.

The detention of a cargo on board ship in a neutral port in consequence of the impossibility or danger of entering the port of destination, cannot create a total loss within the meaning of a policy insuring against arrest and detention of princes.

Hadkinson v. *Robinson*, 3 Bos. & P. 388; *Blackenhagen* v. *Lond. Ass. Co.*, 1 Camp. 454; *Barker* v. *Blakes*, 9 East, 283; *Lubbock* v. *Rowcroft*, 5 Esp. 50; *Parkin* v. *Tunno*, 11 East, 22; *Forster* v. *Christie*, 11 East, 205. See *Geipel* v. *Smith*, L. R., 7 Q. B. 404.

Barratry.

204. Barratry, whereby the goods come into the hands of strangers, becomes a total loss by abandonment, though the goods ultimately reach their destination.

Dixon v. *Reid*, 1 D. & R. 207; 5 B. & A. 597.

Capture.

205. Capture gives the right of abandoning immediately, and this right subsists so long as the property is detained by the captors or their government.

Dean v. *Hornby*, 3 Ell. & Bl. 180; *M'Andrews* v. *Vaughan*, 1 Park, 185; *Dorr* v. *Union Ins. Co.*, 8 Mass. 494; *Rhinelander* v. *Ins. Co. of Penn.*, 4 Cranch, 28; *Bordes* v. *Hallett*, 1 Caines, N. Y. 444.

The technical total loss is gone on the decree of acquittal and for restoration of the property; unless by reason of hindrance arising from the capture

the prosecution of the adventure is prevented, or the damage caused by or the liens arising from perils insured against justify the assured in refusing to take possession.

Lozano v. *Janson*, 2 Ell. & Ell. 160; *Adams* v. *Delaware Ins. Co.*, 3 Binn. Penn. 287; *Marshall* v. *Delaware Ins. Co.*, 4 Cranch, 202; 2 Wash. C. C. 54.

Restitution being probable, even after confiscation of the goods themselves or their proceeds, the assured cannot recover without notice of abandonment.

Tunno v. *Edwards*, 12 East, 487; *Goldsmid* v. *Gillies*, 4 Taunt. 803.

Goods being recaptured after notice of abandonment not accepted, and arriving at their destination before action brought, damaged so as to be a partial loss only, the assured is not entitled to recover a total loss.

Patterson v. *Ritchie*, 4 M. & S. 393.

An abandonment on capture being delayed in order to derive advantage from a high market or made subsequently on peace being arranged and prices falling is of no effect.

Livermore v. *Newburyport Mar. Ins. Co.*, 1 Mass. 264.

Damage.

206. 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.

Gernon v. *R. Ex. Ass. Co.*, Holt, 49; 6 Taunt. 381; *Hudson* v. *Harrison*, 3 Brod. & B. 97; 6 J. B. Moore, 288; *Reimer*

AMERICAN LAW.—Even though less than half the goods are landed.

Forbes v. *Manufacturer's Ins. Co.*, 1 Gray Mass. 371.

FRENCH LAW.—The right to abandon is limited to cases in which the loss or deterioration (*a*) amounts to three-fourths of the value of the goods.

Free of Average.

207. There cannot be a constructive total loss by sea damage of goods warranted free of particular average.

Thompson v. *Roy. Exch. Ass. Co.*, 16 East, 214; *Hedberg* v. *Pearson*, 7 Taunt. 153; *Navone* v. *Haddon*, 9 C. B. 30; *Ralli* v. *Janson*, 6 E. & B. 482; 25 L. J., Q. B. 300. See *Cator* v. *Great Western Ins. Co. of New York* (*sup.*)

FRENCH LAW.—The clause free of average discharges the underwriters from all liabilities for average losses, whether general or particular, except in those cases which give a right of abandonment; and in such cases the assured may choose whether he will abandon or proceed for an average loss.

Boulay-Paty, Comment. on Emerigon, c. xii. s. 46, vol. 2, p. 19; Code de Comm. art. 409.

Loss of Voyage..

208. Where a voyage is broken up the assured may abandon.

Manning v. *Newnham*, 3 Doug. 130; *Wilson* v. *Roy. Ex. Ass. Co.*, 2 Camp. 623, 625.

Loss of the voyage for a season, the goods being in safety, and not perishable, or being perishable

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(*a*) Loss relates to quantity, deterioration to quality (Pardes. Droit Comm. No. 845, p. 401).

but not in danger of being spoiled by the delay, is no ground of abandonment.

Anderson v. *Wallis*, 2 M. & S. 240; *Hunt* v. *Royal Ex. Ass. Co.*, M. & S. 47; 2 Parsons on Mar. Ins. 151.

Ship—Inability to carry Cargo.

209. When the ship becomes innavigable, and the goods cannot be carried on by another ship, or only at a cost greater than their saleable value on arrival, the assured may abandon.

Navone v. *Haddon*, 9 C. B. 30; *Hudson* v. *Harrison*, 3 B. & B. 97; *Manning* v. *Newnham*, 3 Dougl. 130; *Wilson* v. *Royal Ex. Ass. Co.*, 2 Camp. 622. See *Currie* v. *Bombay Native Ins. Co.*, L. R., 3 P. C. 72; *Lawrence* v. *New Bedford Com. Ins. Co.*, 2 Stor. 471; *Willard* v. *Miller's Ins. Co.*, 24 Mo. 561.

Sale.

210. If by reason of the direct operation of the perils insured against goods are sold under circumstances making the sale binding upon the underwriters, but the proceeds are still outstanding without any default of the assured, he may abandon and claim a total loss.

See Phillips, sect. 1497; *Mitchell* v. *Edie*, 1 Term Rep. 608.

[NOTE.—A justifiable sale is generally speaking a total loss and the assured is chargeable for the proceeds. Whether the loss is partial or total the adjustment and payment are precisely the same.]

Submersion.

211. Submersion of the cargo gives a right to abandon, and notice should be given while the

submersion continues, otherwise the loss may cease to be total.

Anderson v. *R. Ex Ass. Co.*, 7 East, 38.

Loss of Part.

212. So long as the risk continues an absolute total loss may occur of part of a cargo remaining on board after the other part has been discharged.

A general insurance on several separate articles, wholly distinct in their nature, gives the assured a right to recover for a total loss of part.

Duff v. *M'Kenzie*, 3 C. B., N. S. 16; 26 L. J., C. P. 313; *Wilkinson* v. *Hyde*, 3 C. B., N. S. 30; 27 L. J., C. P. 116.

American Law.—See *Vandenheuvel* v. *United Ins. Co.*, 1 Johns. N. Y. 406, and cases *passim*.

Cargo being shipped in separate packages, each package appearing by the terms of the policy to be separately valued and insured, or the loss being capable of adjustment on each package, there may be a total loss of separate packages.

Hills v. *London Ass. Co.*, 5 M. & W. (Lord Abinger), pp. 569, 576. See *Cator* v. *G. W. Ins. Co. of N. Y.*, L. R., 8 C. P. 552.

[Note.—A policy not complying with the foregoing rule cannot be varied by a subsequent declaration.

Ellis v. *Entwistle*, 2 H. & N. 549; 27 L. J., Exch. 105.]

Where an insurance free of average is made upon goods of the same species, shipped in bulk, or in packages without any provision in the policy indicating that a loss is to be adjusted on the different packages separately, the assured cannot recover

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What is ordinary and what extraordinary leakage depends upon the nature of the article and the length of the voyage.

2 Valin, 83, liv. 3, tit. 6, art. 31.

Adjustment.

Under valued Policies.

215. The words of the policy are—"The said goods and merchandises, &c. for so much as concerns the assured by agreement between the assured and assurers to this policy are and shall be valued at £ ."

The valuation is conclusive in the absence of fraud. To recover, the assured has only to prove that the goods were on board.

Lewis v. *Rucker*, 2 Burr. 1169; 2 Valin, 115; 2 Emerig. 659.

Under open Policies.

The value is adjusted by taking the invoice price at the loading port, together with the shipping charges and cost of insurance.

Usher v. *Noble*, 12 East, 639; *Forbes* v. *Aspinall*, 13 East, 326, 327.

American Cases.—The cases are contradictory as to whether the value of the goods should be taken to be their prime cost, their invoice price, or their actual market value at the commencement of the risk.

See 1 Parsons, Mar. Ins. 246.

The practice, however, is almost universal of taking the invoice price as the measure of indemnity.

Idem, 249.

Where the invoice is in foreign currency, the rate of exchange, when the risk attaches, is the basis of value.

[NOTE.—This appears to be settled law notwithstanding *Thellusson* v. *Bewick*, 1 Esp. 77. See Parsons, Mar. Ins. 249, 250.]

When goods have been bartered for other goods, the original cost of the goods given in exchange, together with the charges and the premium for the homeward voyage, is the basis of value.

Ben. Ins. 128.

FRENCH LAW.—On insurances on homeward bound cargoes from countries where commerce is carried on only by barter, the value of the returns is estimated as equal to the goods given in exchange, adding the charges of transport.

Ord. de la Mar. tit. Ass. art. 65; Co. de Com. art. 340.

Charges on the outward bound voyage, which are incurred merely for the purpose of the homeward bound cargo, ought to be considered as part of the prime cost of the latter.

Ben. Ins. 129.

Goods which are either of the proprietor's own manufacture, or have been brought from distant places to the port of shipment, where there is no regular sale for them, merely for the purpose of

being forwarded from thence, must not be valued according to the price for which they might be sold at the place of loading; but their value at the place from whence they came, together with the expenses, must be the basis of the value to the insured.

Ben. Ins. 129.

[See "General Average" and "Particular Average," *post.*]

policies and risks, would regard as bearing on those risks.

Ionides v. *Pender*, 30 L. T. Rep., N. S. 547.

A slip being in practice the complete and final contract between the parties to a policy binding upon them in honour and good faith, although not legally enforceable, there is no obligation on the assured to communicate to the underwriters a material fact which comes to his knowledge after the initialing of the slip and before the issuing of the policy.

Lishman v. *Northern Maritime Ins. Co.*, L. R., 8 C. P. 216; *Cory* v. *Patton*, L. R., 7 Q. B. 304.

218. A policy may be avoided by concealment by the principals and through the intervention of agents, *ex. gr.* :—

By the Underwriter.

Where an underwriter subscribes a policy knowing that the ship has arrived safe. The premium may be recovered back.

Arn. 4th edit. 511, n. 1.

By the Assured.

Where a principal having knowledge of a material fact insures through an agent to whom he does not communicate it.

2 Valin, liv. 3, t. 6, art. 40, p. 95; Arn. 4th edit. 509, 510.

Where an agent has knowledge of a material

fact which it was his duty to communicate, the principal insurer being in ignorance.

Froudfoot v. *Montefiore*, L. Rep., 2 Q. B. 511; *Gladstone* v. *King*, 1 M. & S. 35; *Fitzherbert* v. *Mather*, 1 T. R. 12.

If an agent, in ignorance of a loss, effect insurance for his principal, who knew of the loss, but not in time to communicate with his agent before the execution of the policy, it is valid.

Arn. 4th edit. 510.

The utmost degree of reasonable diligence should be used in communicating knowledge acquired after the order to insure has been given.

Arn. 4th edit. 527; Ph. s. 561.

If the assured purposely and fraudulently neglects to learn material facts there is a concealment.

Ph. s. 548.

Issuing a policy with knowledge that there was an innocent concealment by the assured before the slip was initialed, will, if it affect the mind of the assured and induce him to believe the contract still subsisting, throw the onus of proving that such belief was not justified upon the underwriters.

Morrison v. *Universal Mar. Ins. Co.*, L. R., 8 Ex. 40; Ibid. 197.

Matters necessary to be communicated.

219. The actual port of loading:

Hodgson v. *Richardson*, 1 W. Bl. 463; *Harrower* v. *Hutchinson*, L. Rep., 4 Q. B. 523; 5 Id. 584;

the employment of the ship in service of peculiar danger:

1 Emerig. 172; 2 Valin, liv. 3, tit. 6, art. 49, pp. 127, 128;

the happening of an accident likely to result in damage:

Gladstone v. *King*, 1 M. & S. 35; *Proudfoot* v. *Montefiore*, L. Rep., 2 Q. B. 511;

and an excessive valuation of profits on goods:

Ionides v. *Pender*, 30 L. T. Rep., N. S. 547; *Catron* v. *Tenn. Ins. Co.*, 6 Humph. 176;

should be communicated.

If a violent storm has prevailed at a foreign sailing port at a time when the ship sailed, the fact should be communicated to the underwriter.

Arn. 525-6 (n. 1).

Matters not necessary to be communicated.

220. The general usages of trade.

The general and established restrictions imposed on trade by municipal laws.

[Note.—In order to render it unnecessary to communicate the effect of foreign municipal law on the adventure, there must be a clear inference of knowledge from its notoriety.]

A state of war.

Facts of public notoriety; or where they are matters of inference and the materials for informing the judgment of the underwriter are common to both parties.

Bates v. *Hewitt*, L. R., 2 Q. B., 605, per Cockburn, C. J.

[Note.—The refusal of the shipowner to submit his vessel classed A 1 at Lloyds to the halftime survey, in accordance with Lloyds' rules, need not be communicated to the underwriter who is a subscriber at Lloyds. *Gandy* v. *Adelaide Ins. Co.*, L. R., 6 Q. B. 746. In this case the underwriter

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Liability to Capture, &c.

222. Any circumstance within the knowledge of the assured, and not equally within the knowledge or means of knowledge of the underwriter, which affects the national character of the subject insured, and therefore exposes it to capture or detention, must be disclosed to the underwriters.

Mayne v. *Walter*, Park, Ins. 531; Arn. 4th edit. 521; *Campbell* v. *Innes*, 4 B. & Ald. 423; Phillips, s. 627. See *Hodgson* v. *Mar. Ins. Co. of Alexandria*, 5 Cranch, 100.

If the underwriter knows of a foreign law likely to affect the subject of insurance, he should make inquiries of the assured. Both parties being ignorant, the underwriter runs all risks.

Cases *supra*, Park, Ins. 531-2.

The private knowledge of the assured concerning the shifting regulations of foreign states, by which the subject assured is exposed to seizure, ought to be communicated.

Blagge v. *New York Ins. Co.* 1 Caines, 548; approved in *Harrower* v. *Hutchinson*, L. R., 5 Q. B. at p. 592.

Illustrations.

223. The following are facts lying peculiarly within the knowledge of the assured, which may expose the property to seizure, and therefore ought to be disclosed to the underwriters:—

That the projected adventure is illicit by the municipal law of foreign countries.

That the interest assured is belligerent.

That other goods by the same ship are belligerent.

That the goods insured are contraband of war [unless they are insured as "lawful goods"].

That the assured or other shipper has shipped goods which are contraband of war.

That it is intended to violate a blockade.

That the property belongs to a house established in a belligerent country.

Phillips, s. 624.

That the ship has sailed without convoy.

Sawtell v. *Lowdon*, 5 Taunt. 358.

Condition and Position of the Ship.

224. All material information, although uncertain, and amounting to rumours only (*a*), and proving ultimately to be unfounded (*b*), communicated to the assured with regard to the state and position of the ship, in the course of the voyage, ought to be disclosed.

[NOTE.—In the case of a voyage policy, matters covered by the warranty of seaworthiness need not, of course, be communicated. There being no such warranty in time policies, everything material must be communicated. Arn. 4th edit. 524. See "Warranties; Seaworthiness," *post.*]

A material fact should be communicated although the source of the information of the assured is open to the underwriter, *ex. gr.*, where it is posted at Lloyds.

Leigh v. *Adams*, 25 L. T. Rep., N. S. 566; 1 Asp. M. L. C. 147.

[NOTE.—There is no rule of law which affects the underwriter with notice of whatever may be in Lloyds' lists, beyond those things which are matters of general knowledge, and not applicable to a particular ship. *Morrison* v. *Universal Mar. Ins. Co.*, L. R., 8 Ex. 40.]

(*a*) *Da Costa* v. *Scanderet*, 2 P. Wms. 169; *Nicholson* v. *Power*, 20 L. T. Rep., N. S. 580.

(*b*) *Seaman* v. *Fonereau*, 2 Str. 1183; *Lynch* v. *Hamilton*, 3 Taunt. 36; *Lynch* v. *Dunsford*, 14 East, 494.

Representation.

Definition.

225. The communication of a fact, or the making of a statement by one party to the other tending to influence his estimate of the character and degree of risk to be insured against.

[Note.—A representation is construed according to the fair and obvious import of words, and is equivalent to an express statement of all the inferences naturally and necessarily arising from it.

Phillips, s. 550.]

Representations are—

(1) Affirmative and (2) Promissory.

(1) When they assert the past or present existence of the facts to which they relate:

(2) When they assert that the specified event will happen or act be performed.

2 Duer, 657.

If the representation is expressed in technical language, it may be interpreted by reference to usage.

Chaurand v. *Angerstein*, 1 Peake's N. P. 46.

Misrepresentation.

Definition.

226. An untrue representation by one party which induces the other to enter into the contract.

It may be—

(1) *Fraudulent:* of facts material or immaterial.

sumption is that the subject matter of the representation is material to the risk.

Arn. 4th edit. 495; *Court* v. *Martineau*, 3 Dougl. 161; *Bridges* v. *Hunter*, 1 M. & S. 18; Phillips, s. 659.

How made.

228. A representation may be by the policy itself (*a*), by a separate writing, by a mere implication, or by words spoken.

Phillips, ss. 524—527; *Stewart* v. *Morrison*, Millar on Ins. 59; 2 Duer, 721—738; Arn. 4th edit. 481.

Shewing to an underwriter a letter from an agent containing an opinion, which proves to be incorrect as to a material fact, is not necessarily a misrepresentation.

Anderson v. *Pacific F. & M. Ins. Co.*, L. R., 7 C. P. 65.

Binding Effect.

229. A representation being once made in reference to a proposed insurance continues to be binding, unless it is subsequently revoked or modified before the policy is executed.

Edwards v. *Footner*, 1 Camp. 530; Phillips, s. 547.

Falsification and its Consequences.

230. In the absence of moral fraud a substantial compliance with the terms of a representation is all that is required.

De Hahn v. *Hartley*, 1 T. R. 343; *Pawson* v. *Watson*, 2 Cowp. 785.

(*a*) It then almost always becomes a warranty. Arn. 4th ed. 480, 481.

Exception.—A representation that a ship is or was to sail on a particular day, must be strictly complied with.

Phillips, s. 672; Arn. 4th edit. 498.

Where it is a reasonable conclusion from all the circumstances that the failure to comply with the strict terms of the representation has not substantially altered the nature of the risk as described in the policy, such non-compliance will not discharge the underwriter's contract.

Bize v. *Fletcher*, Park Ins. 203, and cited 1 Dougl. 284; Arn. 4th edit. 499.

A false representation of a material fact necessarily preceding the commencement of the risk avoids the policy.

When the policy has attached and the representation is falsified by a subsequent event, the breach discharges the assured from the time it occurs, but does not release him from liability for antecedent losses.

2 Duer, Ins. 696.

A positive affirmative representation of material facts in respect to the future is, in effect, a stipulation that they shall be substantially as stated.

Phillips, s. 553; 2 Duer, Mar. Ins. 657.

A non-fulfilment of such a representation will defeat the policy if it occurs prior to or simultaneously with the commencement of the risk, or be a ground of forfeiture if it occurs afterwards.

Arn. 4th edit. 486.

The breach transitory in its nature of a promissory representation does not exonerate the underwriter from subsequent losses from perils unaffected by such representation.

2 Duer Ins. 697; Arn. 4th edit. 500, 501.

If a promissory representation is falsified by an act of the government, by irresistible force or unavoidable accident, the validity of the contract and the liability of the assured are not impaired.

2 Duer, 699.

Expectation, Opinion and Belief.

231. An honest statement of an expectation, opinion or belief, which turns out to be unfounded, will not affect the contract.

Anderson v. *Pacific F. and M. Ins. Co.*, L. R., 7 C. P. 65; Phillips, s. 551; Arn. 4th edit. 487.

A bonâ fide statement by the owner of goods of the time of the ship's sailing, which turns out untrue, does not avoid the policy, as it can only be an expression of expectation as to an event over which he has no control.

Bowden v. *Vaughan*, 10 East, 415; Arn. 488, 4th edit.

But if, with the intention to deceive, an expectation or belief is expressed of the possible truth of which the party expressing it knows nothing, the policy is void.

Arn. 486, 487, 4th edit.; Maule, J., in *Evans* v. *Edmunds*, 13 C. B. at p. 786.

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several underwriters may (*semble*, it does) affect the contract with all.

Arn. 4th edit. 506 (see Ellenborough, C. J., *Forester* v. *Pigou*, 1 M. & S. at p. 13); *Pawson* v. *Watson*, 2 Cowp. 785; *Brine* v. *Featherstone*, 4 Taunt. 869; *Barber* v. *Fletcher*, Doug. 305; *Stackpole* v. *Simon*, Park, 8th ed. 933; *Feise* v. *Parkinson*, 4 Taunt. 640; *Marsden* v. *Reid*, 3 East, 572; *Elting* v. *Scott*, 2 Johns. 156; *Himely* v. *South Carolina Ins. Co.*, 1 Const. So. Ca. 154.

The representation must relate only to the risk covered by the policy in question, and is confined in its operation to such policy.

Arn. 4th ed. 506; 2 Duer, Ins. 677.

If one name is put first on a policy as a decoy, and the policy is exhibited to other underwriters who subscribe it, it is void as against them.

Wilson v. *Ducket*, 3 Burr. 1361; 2 Duer, 678, 679; Arn. 4th edit. 508.

Waiver and Revocation.

235. A representation is waived by the underwriter who executes a policy inconsistent in terms with such representation.

2 Duer, 658, 659; *Kemble* v. *Browne*, 1 Caines' N. Y. R. 75.

[NOTE.—The inference is that the policy was executed on other grounds.]

The operation of a representation may be neutralised by the assured confessing his mistake before the policy is executed, or stating that he will not hold himself bound by it, or by controlling or qualifying it by a subsequent statement.

Arn. 4th edit. 499, 500.

Deviation and Change of Voyage.

Definitions.

236. *Deviation.*—Voluntary departure without necessity—or a departure through gross ignorance on the part of the captain (*a*)—from the usual course of the voyage insured; or delay in commencing and prosecuting the voyage for purposes foreign to the objects of the adventure.

Change of Voyage.—Where either before or after sailing the assured, or his duly authorized agent (*b*), abandons the thought of proceeding to the port of destination originally prescribed by the policy and determines to sail for another.

Woolridge v. *Boydell*, 1 Dougl. 16 *a*.

Intention to deviate.

237. A mere intention to deviate does not discharge the insurer.

Kewly v. *Ryan*, 2 H. Bl. 343; *Thelusson* v. *Fergusson*, 1 Dougl. 360.

Evidence of Deviation.

238. In all cases the question of whether there has been a deviation is one of fact to be decided according to the circumstances, subject to the general rules hereinafter stated.

Elliott v. *Wilson*, 4 Br. P. C. 470 (authorities referred to in head note).

(*a*) *Phynn* v. *Roy. Exch. Co.*, 7 T. Rep. 505.
(*b*) *Tasker* v. *Cunningham*, 1 Bligh, 87.

If the risk be enhanced there is a deviation.

If the risk be altered without being enhanced there is a deviation.

Arn. 1st edit. 342; 4th edit. 416; Phillips, s. 983; *Company of African Merchants* v. *British and Foreign Marine Ins. Co.*, L. R., 8 Ex. 154.

Effect of Deviation.

239. Deviation determines the liability of the underwriter from the time of leaving the track of the specified voyage.

Marshall, Ins. 139; *Hare* v. *Travis*, 7 B. & C. p. 14.

Effect of Change of Voyage.

240. If the determination to change the voyage be formed before the risk attaches, the policy is void *ab initio*. If not formed until after sailing the underwriter is discharged from all losses which may occur subsequently to its being formed, although before the vessel reaches the dividing point of the two voyages.

Woolridge v. *Boydell*, 1 Doug. 16a; *Way* v. *Modigliani*, 2 T. Rep. 30. (See this latter case questioned, 1 Ph. s. 992; 2 Ben. Des. Ass. 331; Arn., 4th edit. 423.)

If the voyage is given up and another entirely distinct one undertaken on account of a peril not insured against, the risk thereupon ceases.

1 Phillips, p. 588.

Circumstances which justify Deviation.

241. Deviation may be justified—

1. By usage.
2. By licence in the policy.

There being a liberty to touch and stay, it is no deviation to trade unless by so doing the risk is materially varied.

Arn. 4th edit. 446. See *Raine* v. *Bell*, 9 East, 194; *Urquhart* v. *Barnard*, 1 Taunt. 450.

A general liberty to touch at a port or at ports without specifying them will justify touching only for the purposes of the voyage.

3 Kent, Comm. 3rd edit. 315; Ph. s. 1007; *Langhorn* v. *Allnutt*, 4 Taunt. 511.

A policy on a ship at a port "during her stay and trade there," does not justify staying for purposes unconnected with trade.

[See CARGO, *ante*.]

3. Deviation to *save life* is obviously justifiable on principles of humanity (Ph. s. 1027). Deviation to *save property only* is fatal (Id.).

4. A *forced interposition* of an intermediate voyage does not discharge the underwriter if the specified *terminus ad quem* is still kept in view.

Driscol v. *Passmore*, 1 Bos. & Pull. 200.

[NOTE.—The force may be physical or moral, or exist in a state of circumstances leaving the captain no alternative (Arn. 4th edit. 466). The breaking of bulk in a port into which the ship is driven will avoid the policy. *Stett* v. *Wardell*, 2 Esp. 610.]

6. When in consequence of disaster the vessel cannot safely pursue the voyage, the master is not only justified in quitting the course and seeking the most convenient and suitable port for repairs and

supplies, or on account of other exigencies of the voyage, but it is his duty to seek such port.

Ph. s. 1018, *et seq.*; *Motteux* v. *Lond. Ass. Co.*, 1 Atk. Ch. 544; *Pelly* v. *Royal Ex. Ass. Co.*, 1 Burr. 341.

But if the ship was inadequately fitted out in the first instance, departing from the voyage to repair the deficiency is a deviation.

Forshaw v. *Chabert*, 3 B. & B. 158; *Kettrell* v. *Wiggin*, 13 Mass. Rep. 68.

[Note.—Sending ashore for provisions was held justifiable in *Thomas* v. *Royal Ex. Ass. Co.*, 1 Price, 195.]

7. The ship may go out of its course, or delay (1) To avoid an impending storm; (2) To escape from an enemy; (3) To seek for convoy; and (4) To gain intelligence, *ex. gr.*, as to a rumoured blockade of the port of destination.

Phillips, s. 1025; Arn. 4th ed. p. 470. See *Elliott* v. *Wilson*, 4 Brown's P. C. 470.

If the ship quit the course described in the policy from necessity, she must pursue such new voyage of necessity in the direct course and in the shortest time, otherwise the underwriter will be discharged.

Lavatre v. *Wilson*, 1 Doug. 284.

The ship being at a port contemplated by the parties, it is no deviation to supply a deficiency of provender for live stock on board if it do not delay the voyage or alter the risk.

Cormack v. *Gladstone*, 11 East, 347.

And if the ship be in port for a necessary purpose, it is no deviation to trade if the voyage be not delayed nor the risk varied.

Raine v. *Bell*, 9 East, 195.

8. The deviation must be strictly confined to the purposes of self-defence. The engagement begun in self-defence may, however, be prosecuted to capture; but if a desire be evinced to profit by the capture of prizes, and the direct course of the voyage be thus departed from, there will be a deviation.

Jolly v. *Walker*, 2 Park, Ins. 630. See other cases Arn. 4th edit. 459. *Haven* v. *Holland*, 2 Mason's Rep. 230.

The Voyage.

242. The voyage, a deviation from which discharges the underwriter, is the sailing from one port to another by the regular and customary track with all practicable safe and convenient expedition.

Phillips, s. 981; Arn. 4th edit. 416; *Hartley* v. *Buggin*, 2 Park, Ins. 652; *Davis* v. *Garrett*, 6 Bing. 716.

The language describing the course of the voyage must be taken in its mercantile acceptation.

Phillips, s. 979.

Any usage as to the course or mode of pursuing a voyage, or any variation from the usual manner of pursuing and conducting it, rendered necessary and authorized under the policy by the circumstances, thereupon becomes a part of the voyage to the same effect as if expressly provided for.

Phillips, s. 981.

A voyage is commonly characterized by its implied or expressed object and particular limits.

Phillips, s. 986.

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when bonâ fide for the benefit of all concerned, unless expressly prohibited by the terms of the policy.

D'Aguilar v. *Tobin*, 11 East, 22.

It is no deviation for a ship which has once sailed with convoy, and is driven back, to sail again without convoy, whether warranted to sail with convoy or not.

Laing v. *Glover*, 5 Taunt. 48.

But convoy being lost by delay, there is a deviation.

Williams v. *Shee*, 3 Camp. 469.

Cruising.

245. Clauses empowering the ship to cruise and carry letters of marque are strictly construed.

Parr v. *Anderson*, 6 East, 202; *Soyres* v. *Bridge*, 2 Doug. 527.

Leave to chase, capture and man prizes, does not extend to convoying the prize afterwards.

Lawrence v. *Sydebotham*, 6 East, 45.

AMERICAN LAW.—This is no deviation unless involving delay or departure from the direct course of the voyage.

1 Phillips, s. 1030.

Delay.

246. Unusual and extraordinary delay in the prosecution of a voyage and prolongation of its

period, without necessity or just cause, after the risk has begun, is a deviation.

Arn. 4th edit. 451.

[NOTE.—As to what is reasonable delay see *Schroeder* v. *Thompson*, 7 Taunt. 463; *Bain* v. *Case*, 3 C. & P. 496; *Columbian Ins. Co.* v. *Catlett*, 12 Wheat. 283.]

There being liberty to stay, and additional delay being caused by trading, there is a deviation.

Arn. 4th edit. 448; *Inglis* v. *Vaux*, 3 Camp. 436.

The insurance being on a seeking ship, a detention for a reasonable time for the purpose of the seeking adventure is not a deviation.

Phillips v. *Irving*, 7 M. & G. 325; 13 L. J., C. P. 145.

Goods being insured until landed, any unusual and unreasonable delay in landing them has the effect of a deviation.

Phillips, s. 998.

If, owing to some unexcused delay in the course of performing her outward voyage, the ship is prevented from "arriving at the port" at and from which she is insured for her homeward voyage until an unreasonably long time after the subscription of the policy, such delay is a deviation, although the outward voyage is totally foreign to the underwriter on the homeward policy.

Mount v. *Larkins*, 8 Bing. 108; *Freeman* v. *Taylor*, Ibid. 124; *De Wolf* v. *The Maritime Bank*, 30 L. T., N. S. 605.

Ports—Order specified in Policy.

247. The ports being named in a particular order in the policy, that order must be observed although the sequence is not geographical.

Beatson v. *Haworth*, 6 T. Rep. 531; *Marsden* v. *Reid*, 3 East, 572.

Ports—Geographical Order.

248. A ship being insured on a voyage to ports of discharge with liberty to touch at intermediate ports which are not specifically named in the policy, she must visit such intermediate ports in the geographical order of their distance from the port of departure. If she fails to do so it is a deviation.

Clason v. *Simmonds*, 6 T. Rep. 533; *Gairdner* v. *Senhouse*, 3 Taunt. 16.

The ship must sail from the *terminus a quo*, but may omit to touch at all or any of the intermediate ports.

2 Parsons, Mar. Ins. p. 26.

There being liberty to touch at any port or ports for orders, or for any other purpose, on a voyage from London to port or ports of discharge in the Baltic, the ship is not bound to touch at ports in their geographical order, but may return to a port she has quitted as to her port of discharge.

Andrews v. *Mellish*, 5 Taunt. 496; 2 M. & S. 27.

Ports—Re-visiting.

249. To re-visit a port already touched at or to sail backwards and forwards from one port to the

A prior deviation is not impliedly waived, although known to the underwriter at the time he accepts the risk, in case the policy in the usual way describes the voyage so that the deviation in question is a breach of the condition implied in such description.

Redman v. *London*, 3 Camp. 503; 5 Taunt. 461; Arn. 4th edit. 418.

AMERICAN LAW.—The forfeiture is cancelled by the fact of the previous deviation being known to the underwriter.

Ph. s. 1041; *Coles* v. *Marine Ins. Co.*, 3 Wash. C. C. 159.

THE LOSS.

252. The loss need not have been in any way whatever connected with the deviation.

Arn. 4th ed. 417. See *Thompson* v. *Hopper*, 26 L. J., Q. B. 18 and 22, and "Perils of the Sea," *post*.

Double Insurance.

[See "Over-Insurance," *post*.]

Embargo.

[See "Capture, Arrest and Detention," "Illegality," and tit. Loss, under "Ship" and "Cargo."]

Fire.

[See "Policy;" usual Clauses, *post.*]

253. Fire is specifically insured against in the common form of marine policies.

The fire may be the result of accident, of lightning, of the act of an enemy, of the voluntary act of the assured to prevent capture (capture being a peril insured against) (*a*), of the combustion of goods on board not the property of the assured from inherent vice or damage before shipment, and from sea damage to goods after shipment.

Arn. 4th ed. 694, 695; 1 Emerig. c. xii, s. 17, p. 428.

Insurers are not liable for the extraordinary effects of an ordinary fire; but they are liable for the ordinary effects of an extraordinary fire.

Austin v. *Drew*, 4 Camp. 360; 6 Taunt. 436; 2 Marsh, 790; Phillips, sect. 1095 *a*.

The loss by accidental fire may be recovered, though the goods be landed and stowed according to the usage of trade.

Pelly v. *Royal Exch. Ass. Co.*, 1 Burr. 341.

[NOTE.—This rule does not apply to cargo which is taken on shore for the purposes of barter.

1 Pars. 563, citing *Martin* v. *Salem Mar. Ins. Co.*, 2 Mass. 420.]

(*a*) *Gordon* v. *Rimmington*, 1 Camp. 123; Phillips, sect. 1098; 1 Pars. 558, *n*.

Risk of fire in a steamer is covered by the ordinary policy.

Pattison v. *Mills*, 1 Dow & Cl. 342; 2 Bligh, N. S. 59.

The crew being ordinarily competent, a loss of which their negligence is the remote, but fire the proximate, cause, is recoverable.

Busk v. *Royal Ex. Ass. Co.*, 2 B. & Ald. 73.

AMERICAN LAW.—Now the same. *Palapsco Ins. Co.*, 3 Peter's Sup. Court Rep. 222; *Columbia Ins. Co.* v. *Lawrence*, 10 Ibid. 517; *Waters* v. *Merchants' Ins. Co.*, 11 Ibid. 213.

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Advanced Freight.

255. Money advanced to the assured as owner of the ship on account of freight of the cargo loaded on board her, and subject to the risk of the voyage, is substantially freight, and may be insured by a policy on "money advanced on account of freight."

Hall v. *Janson*, 4 E. & B. 500; 24 L. J., Q. B. 97; *De Silvale* v. *Kenall*, 4 M. & Sel. 37; *Ellis* v. *Lafone*, 8 Ex. 546; *Manfield* v. *Maitland*, 4 B. & Ald. 582; *Winter* v. *Haldimand*, 2 B. & Ad. 649; *Wilson* v. *Martin*, 11 Exch. 684; *Hicks* v. *Shiel*, 7 E. & B. 633; 26 L. J., Q. B. 205; Maclachlan on Shipping, 442, 443.

Sums borrowed by the captain from the charterer at the port of loading to be repaid by deductions from the freight are taken to be advanced freight.

The Karnak, L. R., 2 P. C. 505; and see *Currie* v. *Bombay Native Ins. Co.*, L. R., 3 P. C. 83.

Scope of the Policy.

256. Freight may be insured for either a part or the whole of an intended voyage, or a part or the whole of the time which the voyage is likely to occupy.

Taylor v. *Wilson*, 15 East, 324 (overruling *Murdock* v. *Potts*, Park, 634); *Hall* v. *Brown*, 2 Dow's P. C. 367; *Michael* v. *Gillespie*, 26 L. J., C. P. 306; 2 C. B., N. S. 627; *Gordon* v. *American Ins. Co. of N. Y.*, 4 Den. N. Y. 360.

A policy on freight, which gives the ship leave to call at intermediate ports and take on board goods at such ports, covers freight of goods loaded at an intermediate port.

Barclay v. *Stirling*, 5 M. & S. 6.

Insurable Interest.

257. The assured must possess a legal or equitable title to the ship, and an inchoate right to the freight.

The interest commences when the owner or hirer having goods ready to ship, or a contract with another person for freight, has commenced the voyage, or incurred expenses and taken steps towards earning freight.

Phillips, s. 328; approved by Blackburn, J., in *Barber* v. *Fleming*, at p. 71 of 5 L. R., Q. B.

[Note.—Although the contract may, as to some of its terms, be left to future arrangement (*Truscott* v. *Christie*, 2 B. & B. 320), it must be valid and binding for the payment of freight (*Forbes* v. *Aspinall*, 13 East, 323), and in no way contingent. "It makes no difference whether the contract was by charterparty or otherwise." "The word charterparty frequently misleads, and is apt to convey the idea of something extraordinary; but there is no magic in the word charterparty, and an agreement of any sort is equally valid." Burrough, J., in *Truscott* v. *Christie*, 2 B. & B. at p. 330. See *Parke* v. *Hebson*, 2 B. & B. 326 (where the contract was by letters); and *Warre* v. *Miller*, 4 B. & C. 538 (a verbal agreement).]

A mere hope or expectation of earning freight is not insurable.

See the judgments in *Barber* v. *Fleming* (*sup.*); *Patrick* v. *Eames*, 3 Camp. 441; *Adams* v. *Penn. Ins. Co.*, 1 Rawle, Penn. 97.

The interest in contract or chartered freight has commenced if the ship be proceeding to the port mentioned in the policy at which she will take in cargo, although she is in ballast.

Barber v. *Fleming*. See "Illustrations," *infra*.

[Note.—Mr. Phillips would extend this principle as follows (vol. 1, p. 177):—"Where the vessel has sailed for an intended port for the mere purpose of there taking a cargo for a subsequent passage, to procure which the owner has funds on board

or reliable credit, and it appears that such a cargo can undoubtedly be there procured, the interest in freight for the entire voyage homeward has accrued." He has, however, no distinct authority for it.]

Illustrations.

Thompson v. *Taylor*, 6 T. R. 478. Clause in the policy: "At and from London to Teneriffe, at and from thence to any of the West India islands, Jamaica excepted." The ship was chartered from London to Teneriffe, there to take on board a certain number of pipes of wine and proceed therewith to Barbadoes, for which the owner was to receive "for the freight and hire of the ship for the said voyage" a certain sum per pipe. The ship sailed on the voyage and was captured before she reached Teneriffe. It was held that the interest in the freight attached on the sailing of the ship from London.

Barber v. *Fleming*, L. R., 5 Q. B. 59. Clause in the policy: "At and from Bombay to Howland's Island, while there and thence to any port in the United Kingdom." The ship, "now lying at Bombay," was chartered for a voyage from Howland's Island to a port in the United Kingdom. She sailed from Bombay in ballast for Howland's Island, but got on shore, and the voyage was abandoned. It was held that, as the ship had sailed in ballast from Bombay with the sole object of going to Howland's Island in order to earn the freight under the charter from thence to the United Kingdom, the interest in the chartered freight had commenced.

Risk.

258. The risk cannot commence until the interest has accrued.

[See "Insurable Interest" (*sup.*).]

Where the interest has accrued previously to the time fixed for the commencement of the risk, the commencement of the risk is determined by the same principles as in the case of insurances upon ship and goods.

[See "Cargo" (*ante*), and "Ship" (*post*).]

Eng. Mar. Ins. Co., 25 L. T. Rep., N. S. 739. The vessel was lost before she had shipped any of her homeward cargo, and the plaintiff was held precluded by the clause from recovering against the underwriters, notwithstanding the freight was chartered freight.

[NOTE.—(*b*) The policy providing that the risk shall commence from the loading of the goods on board, it would seem they must be completely loaded in order that the policy may attach.

Jones v. *Neptune F. & M. Ins. Co.*, L. R., 7 Q. B. 702; *Beckett* v. *West of England Mar. Ins. Co.* (*sup.*)]

AMERICAN LAW.—*Richards* v. *The Marine Ins. Co.*, 3 Johns. U. S. Rep. 306; *Gordon* v. *American Ins. Co. of N. Y.*, 4 Den. N. Y. 360. In *Gordon's case*, under the words "beginning the adventure on said freight from and immediately following the loading thereof on board the said vessel," the risk was held not to commence until the vessel had *begun* to load.

WHO HAVE AN INSURABLE INTEREST IN FREIGHT.

Owner and Charterer.

261. The shipowner *primâ facie* alone has an insurable interest in freight.

Camden v. *Anderson*, 5 T. Rep. 709; 6 Id. 723; *Morrison* v. *Parsons*, 2 Taunt. 407.

A part owner who charters the whole vessel, covenanting to pay the value in case of loss, can insure the whole of the freight without specifying what his interest in it is.

Oliver v. *Greene*, 3 Mass. 133.

[NOTE.—Semble, a part owner may insure the freight generally, without stating what his share is, and recover according to his interest. Shee's Marshall, p. 570.]

The charterer may have an insurable interest in freight:

1. If he either re-charters the ship or puts her

up as a general ship for the transport of other people's goods on freight at an amount exceeding the original freight;

1 Arn. 4th ed. 259; Parsons, Mar. Ins. 173:

2. If he agrees to pay dead freight, in the event of the ship being prevented discharging her outward and shipping her return cargo;

Puller v. *Stainforth*, 11 East, 232; *Puller* v. *Halliday*, 12 East, 494:

3. If he advances money in part payment of the freight for which the owner is not absolutely chargeable independently of the issue of the voyage;

The Karnak, L. R., 2 P. C. 505, 514; *Currie* v. *Bombay Nat. Ins. Co.*, L. R., 3 P. C. 72, 83. As to what constitutes a payment in advance of freight, see *Winter* v. *Haldimand*, 2 B. & Ad. 649; *Hicks* v. *Shield*, 7 E. & B. 633; 25 L. J., Q. B. 205, 208.

Creditors.

An assignee of freight which is being earned, having made advances, has an insurable interest.

Wilson v. *Martin*, 11 Ex. 684; 25 L. J., Ex. 217; *Lindsay* v. *Gibbs*, 22 Beav. 522; 2 Jur., N. S. 1039. See *Willis* v. *Palmer*, 29 L. J., C. P. 194; 7 C. B., N. S. 340.

Advancing freight of goods does not give the party making the advance any insurable interest in the freight so advanced, should he have a right to recover it back if the goods be not delivered according to the bills of lading.

Wilson v. *Martin*, 11 Ex. 684; *De Silvale* v. *Kendall*, 4 M. & S. 37; *Manfield* v. *Maitland*, 4 B. & Ald. 583, 585; *Kathman* v. *Gen. M. Ins. Co.*, 12 La. Ann. 35; *Minturn* v. *Warren Ins. Co.*, 2 All. Mass. 86. See *Sanson* v. *Ball*, 4 Dall. 459; *Griggs* v. *Austin*, 3 Pick. Mass. 20.

An obligor on a bond for the payment of the residue of the purchase-money of a vessel which has been sold to him, and of which he has the entire possession and use, has an insurable interest in the freight.

Simmes v. *Mar. Ins. Co. of Alexandria*, 2 Cranch, C. C. 618.

Mortgagee.

262. A mortgagee in possession of the ship has an insurable interest in the accruing freight.

[NOTE.—By taking possession a mortgagee acquires all the rights of an owner. (*Brown* v. *Tanner*, L. R., 3 Ch. App. 597).]

Vendor.

263. A vendor of a ship who reserves his right to the freight being earned at the time, is in the same position as an assignee of freight for valuable consideration.

Paradise v. *Sun Mutual Ins. Co.*, 6 La. Ann. 596; *Riley* v. *Delafield*, 7 Johns. U. S. 522.

Loss.

General Principles.

264. 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 ship.

Opinions of Kent, J., and Ch. J. Lewis and Justice Washington, in *Herbert* v. *Hallett*, 3 Johns. Cas. N. Y. 93.

[See "Ship," *post.*]

If there be a failure to earn freight by reason of the mistake of the master in failing to make damaged cargo fit to be carried, or to repair his vessel—even

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Under a policy on freight generally no loss is recoverable arising from the protraction of the voyage if freight be ultimately earned, even though expenses be incurred exceeding the amount of the expected freight.

Everth v. *Smith*, 2 M. & S. 278; *Anderson* v. *Wallis*, 2 M. & S. 240; *M'Carthy* v. *Abel*, 5 East, 388.

If the freight be earned the assured cannot recover, though, by the abandonment of ship, the freight pending at the time of the happening of the peril passes to the underwriters on ship.

Scottish Marine Ins. Co. v. *Turner*, 1 Macqueen's Sc. App. 334; *Lord* v. *Neptune Ins. Co.*, 10 Gray, 109; *Fielder* v. *N. Y. Ins. Co.*, 6 Duer, 282. Contrà—*Coolidge* v. *Gloucester Mar. Ins. Co.*, 15 Mass. 341.

[NOTE.—The policy being on freight generally, it is sufficient if any freight be earned. Arn. 4th ed. 962.]

This rule applies though the ship and freight be insured by the same person.

1 Macq. Sc. App. Ca. 334.

TOTAL—ABSOLUTE.

265. Nothing having been done at the time of the loss towards earning the freight of which the assured or the underwriters can avail themselves, the loss is total without abandonment.

Mount v. *Harrison*, 4 Bing. 388; *Potter* v. *Rankin*, L. R., 5 C. P. at p. 271.

If the owner or charterer is wholly prevented by the perils insured against from realizing the freight agreed for by a charterparty, or by the bills of

lading, for shipments by third parties to which the policy is applicable, it is an absolute total loss.

Potter v. *Rankin*, L. R., 3 C. P. 562; L. R., 3 C. P. 341; *Green* v. *Roy. Ex. Ass. Co.*, 6 Taunt. 68; *Idle* v. *Roy. Ex. Ass. Co.*, 8 Taunt. 755; *Wilson* v. *Forster*, 6 Taunt. 25; *Mount* v. *Harrison*, 4 Bing. 388; *Atty* v. *Lindo*, 1 Bos. & P., N. R. 236.

Both ship and cargo having been justifiably sold, the assured on freight may recover without notice of abandonment.

Parmeter v. *Todhunter*, 1 Camp. 541; *Green's case*, (*sup.*); *Idle's case* (*sup.*). See *Knight* v. *Faith*, 15 Q. B. 649.

Loss of and Damage to Ship.

There may be a total loss of homeward chartered freight [without abandonment] (*a*), by the constructive total loss of the ship on the outward voyage.

Rankin v. *Potter*, L. R., 6 P. C. 83. See *Silloway* v. *Neptune Ins. Co.*, 12 Gray, Mass. 73.

There may be a total loss of chartered freight when, owing to damage to the ship by perils insured against, repairs are rendered necessary, calculated to delay the voyage for an unreasonable time,—although such damage would not entitle the shipowner to abandon,—and the charterers throw up the charter.

Jackson v. *Union Marine Ins. Co.*, L. R., 8 C. P. 572.

[NOTE.—This case is appealed. The Court of Common Pleas was not unanimous, and in *Hudson and another* v. *Hill*,

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(*a*) This would appear to be established, but abandonment is advisable.

30 L. T. Rep., N. S., Brett, J., at p. 558, corrected a misapprehension at the bar as to the effect of the decision. The decision, he said, means this: "That where a delay has been so long as to frustrate, from a commercial point of view, the object of both parties (*i. e.*, charterer and shipowner), the contract is inapplicable, and cannot be enforced." The contract falling through, owing to perils insured against, there is then a loss of the contract freight.]

Where the voyage is justifiably abandoned there is a total loss of prepaid freight.

De Cuadra v. *Swann*, 11 C. B., N. S. 772.

An indefinite detention of the ship, or one for so long a period as to break up the voyage, is a total loss of freight.

Hypothecation.

Where, in consequence of damage to the ship, the ship, cargo and freight are hypothecated for the expense of repairs to an amount including the value of the freight, the loss of freight is not recoverable.

Benson v. *Chapman*, 2 H. of L. Ca. 696.

[NOTE.—The reason of this is that, in electing to repair, the master acts as the agent of the owner, and the latter is bound.]

Loss of Cargo.

The absolute total loss of the cargo is a total loss of freight, although the ship may be in a condition to continue the voyage.

Whitney v. *N. Y. Firemen's Ins. Co.*, 18 Johns. N. Y. 208; *Hugg* v. *Augusta Ins. Co.*, 7 How, 595.

TOTAL—CONSTRUCTIVE.

266. When, notwithstanding the happening of

object afterwards that the loss is partial [or that *pro ratâ* freight has been earned (*a*)].

The underwriters on a general policy on freight are entitled, after abandonment, to the benefit of other freight earned, instead of that insured if the ship be not insured, or, being insured, be not abandoned.

Green v. *Royal Ex. Co.*, 1 Marsh, R. 447; 6 Taunt. 48; *Everth* v. *Smith*, 2 M. & Sel. 372; *Brocklebank* v. *Sugrue*, 1 Moo. & Rob. 102; *Davidson* v. *Case*, 5 M. & S. 79.

GERMAN LAW.—The same. Germ. Merc. Law, art. 871.

But not to profits earned by the assured in carrying his own goods to their destination by other means than by the original ship.

Miller v. *Woodfall*, 8 E. & B. 493; *Thompson* v. *Rowcroft*, 4 East, 34; *Leatham* v. *Terry*, 3 B. & P. 479; *M'Carthy* v. *Abel*, 5 East, 388.

Effect of Abandonment of Ship.

268. An abandonment of the ship carries pending freight, subsequently earned by prosecution of the voyage.

Stewart v. *Greenock Mar. Ins. Co.*, 2 H. L. Cas. 159; *Scottish Mar. Ins. Co.* v. *Turner*, 1 Macq. H. L. App. 342; *Davidson* v. *Case* (*sup.*); *Brown* v. *North*, 8 Ex. 1; *M'Carthy* v. *Abel*, 5 East, 388; *Thompson* v. *Rowcroft*, 4 East, 34; *Leatham* v. *Terry*, 3 B. & P. 479; *Ker* v. *Osborne*, 9 East, 378; *Sharp* v. *Gladstone*, 7 East, 24.

Freight payable under an entire contract is never

(*a*) The American principle, *Buffalo City Bank* v. *North Western Ins. Co.*, 30 N. Y. 251. See "Partial Loss," *post.*

apportionable except by express stipulation, or by act of the parties.

Atty v. *Lindo*, 1 B. & P. N. R. 236.

American Law.—If there be an abandonment of ship during the voyage, the underwriters on freight are entitled to have the freight abandoned to them, and if it be subsequently earned, they may claim an apportionment. 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.

Phillips, s. 1502; *United St. Co.* v. *Lenox*, 1 Johns. Cas. N. Y. 377; 2 Johns. Cas. N. Y. 443. See notes to Ph. s. 1741, p. 413.

French Law.—Freight earned (which alone can be insured) does not pass to the underwriters to whom the ship is abandoned, unless expressly provided in the policy. Freight in process of being earned does pass on abandonment of ship if there is no clause to the contrary in the policy. The freight of goods saved, though paid in advance, goes upon abandonment of the ship to the insurer on ship.

Boulay-Paty, Cours de Droit Com., tom. 4, p. 393 *et seq.*; Code de Com., art. 386.

Underwriters on ship have no claim upon freight earned by a substituted ship:

Hickie v. *Rodocanachi*, 28 L. J., Ex. 273.

Partial Loss.

269. A partial loss of freight can only occur where there is a total loss of freight on part of the cargo.

Total loss of part for this purpose may arise:

(*a*) Where less than the full intended cargo out of which freight is expected is on

board or contracted for at the time of the loss;

(*b*) Where some part of the whole cargo separately valued or separately insured by the policy goes in bulk to the bottom of the sea;

Alison v. *British Mar. Ins. Co.*, 42 L. J. 334, C. P.; *Ralli* v. *Janson*, 6 E. & B. 422; 25 L. J., Q. B. 300; Arn. 4th ed. 729; *Livingston* v. *Columbian Ins. Co.*, 3 Johns. N. Y. 49. See also *Robertson* v. *Majoribanks*, 2 Stark. 573:

(*c*) (*Semble*) If a ship with a full cargo is so damaged that she can only be repaired at the port of distress so as to take on part of the cargo, and the residue is thereupon justifiably sold, there may be a total loss on that part of the freight which the ship is thus incapacitated from earning;

Arn. 4th ed., citing Maule, J., in *Moss* v. *Smith*, 9 C. B. 104. See *Mordy* v. *Jones*, 4 B. & C. 394; and *Philpott* v. *Swann*, 11 C. B., N. S. 270; 30 L. J., C. B. 358.

American Law.—Where the ship is wrecked or disabled, and by mutual consent of owner of cargo and ship-owner the cargo is detained at an intermediate port and *pro ratâ* freight earned, there is a partial loss of freight.

Merchant Ins. Co. v. *Butler*, 20 Md. 41.

[Note.—There may be a total loss of the whole and the part earned be considered as salvage. *Charleston Ins. & Trust Co.* v. *Corner*, 2 Gill, Md. 410; *Coolidge* v. *Gloucester Mar. Ins. Co.*, 15 Mass. Rep. 345.]

[See "Particular Average."]

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General Average.

Definition.

271. A contribution made by all the parties concerned in a sea adventure to make good a specific loss or expense incurred by one or more of them for the general benefit.

Stevens on Average, 3.

Semble, where there is a wilful loss incurred, or expenditure made for the benefit of the whole adventure, that gives rise to general average, whether the subject of the insurance forms a single interest or is owned by different parties.

Blackburn, J., in *Oppenheim* v. *Fry*. See report in 8 L. T. Rep., N. S., at p. 387.

LOSS.

Essential Elements.

272. The requisites necessary to make valid a claim to general average contribution are:—

(*a*) There must be an imminent maritime peril.

(*b*) The sacrifice must be extraordinary in its nature, and premeditated.

(*c*) The object must be the general preservation.

(*d*) The average act must be the proximate cause of loss.

Baily, Gen. Av. 24; Lowndes, Gen. Av. 34, 35; *Birkley* v. *Presgrave*, 1 East, 220.

273. *Observations.*

(*a*) It is not necessary that the sacrifice should be made at the supreme moment of distress; it is sufficient if at the time there is a moral certainty of total loss.

(*b*) Deliberation does not necessarily involve consultation between the master and crew. The act may be done by the master even in opposition to the wishes of the crew, or a crew may perform it in defiance of the orders of the master.

Birkley v. *Presgrave*, 1 East, 220; *Sims* v. *Gurney*, 4 Benn. Penn. 513; Phillips, s. 1279.

(*c*) It is now settled that if the general preservation be the object it is immaterial whether the object be attained or not.

See Lowndes, Gen. Av. 23, n. (*e*).

(*d*) If by vice inherent in the goods they become dangerous and are jettisoned, the loss is not contributed for. A good illustration was put in *Johnson* v. *Chapman*, 35 L. J., C. P. 523, of cotton put on board damp and bursting into flame on the voyage. Being jettisoned there is no claim to contribution. But if, as in that case, a storm makes the goods dangerous, and they are jettisoned, they are contributed for.

See *Plummer* v. *Wildman*, 3 M. & S. 482; *De Costa* v. *Edmunds*, 4 Camp. 142.

274. Losses may be by—

(1) Damage to the ship; and damage or loss of ship's tackle and furniture; and by

(2) Damage to or loss of cargo.

See Blackburn, J., in *Kemp* v. *Halliday*, 34 L. J., Q. B. 233; 6 B. & S. 746.

[NOTE.—Phillips, on the authority of Casaregis (Disc. 46, n. 45, 63), says there may be a loss by purposely injuring the property of others for preservation and safety of ship and cargo. Sect. 1311.]

I. SHIP, TACKLE AND FURNITURE, &C.

275. If any part of the ship or her tackle be cut up or lost in the rescue of the common adventure or applied to some purpose different from its ordinary use, the loss thence arising is a general average loss.

Stevens on Av. 15; 2 Ph. s. 1299; Baily, Gen. Av. 73, 74.

Examples.

Cutting a ship's sides or decks to facilitate a necessary jettison.

Marsham v. *Dutrey*, Marshall, Ins. (by Shee) 460.

Sails deliberately let go, or masts cut in order to right a vessel when she is on her beam ends.

Benecke, Pr. of Ind. 185; Baily, Gen. Av. 64; Phillips, s. 1284.

judicial decision on the point, the court would hold that there was contribution if the ship was recovered. His editor would seem to suggest that this view would now be carried to cover the total loss of the ship. He says, "the distinction made by the older authorities, and adopted by Mr. Arnould, between the case in which the ship perishes and that in which she is ultimately saved, seems to rest upon the view now discarded in modern practice, that success is a necessary condition of any sacrifice in order to its being allowed in general average." (Page 779.) The following are American decisions on the subject:—*Mutual Safety Ins. Co.* v. *Cargo of the Ship George*, Olc. Dist. Ct. 89; *Walker* v. *U. S. Ins. Co.*, 11 Serg. & R. Penn. 61; *Meech* v. *Robinson*, 4 Whart. Penn. 360.]

The intentional stranding must be under the particular circumstances the direct result of voluntary agency rather than of the action of the elements, and the actual stranding must not be the one impending or merely an incidental and inconsiderable modification of it.

Ph. s. 1313.

277. The following losses are *not* contributed for:—

Damage done to a ship and expenses incurred by fighting.

Taylor v. *Curtis*, 6 Taunt. 608; 2 Marsh, Rep. 309; 4 Camp. 334; Benecke, edit. 1824, p. 231; Pothier, tit. Ins. n. 144; Phillips, s. 1310.

[NOTE.—This is not altogether settled.]

Sails or spars carried away by the wind in consequence of crowding sail to escape an enemy or a lee shore.

Power v. *Whitmore*, 4 M. & S. 141; *Covington* v. *Roberts*, 2 B. & P., N. R. 378; Boulay-Paty on Emerig., vol. i. p. 620; *Shiff* v. *Louisiana State Ins. Co.*, 6 Mart. N. S. La. 629.

[NOTE.—The preponderance of Continental authorities is in favour of making such loss general average. See 2 Parsons, Mar. Ins. 227.]

Spars or sails cut away to save a wreck even though the total loss of the vessel and cargo may be reasonably expected to result from not doing so.

Benecke on Ins. 185.

Sails, spars and rigging cut away in a state of wreck.

Johnson v. *Chapman*, 35 L. J., C. P. 23; Lowndes, General Average, 49, 69, 70, 71.

Cables cut away or anchors abandoned to avoid separation from convoy.

FRENCH LAW.—They are allowed. Emerig. c. xii. s. 41, p. 606; Code de Com. art. 400.

AMERICAN LAW.—Unsettled, but considered the same as the French. 2 Phillips, Ins. s. 1308.

II. CARGO.

278. Losses incurred in the following manner are contributed for:—

By jettison:

[See "JETTISON," *infra*.]

By throwing goods out of a stranded ship in order to lighten her, under circumstances which would justify a jettison:

Lowndes, 170.

[NOTE.—Not extended to cases of actual wreck, nor to damage done in discharging a cargo at a port of refuge; *ibid.* 171, 172.]

By bringing goods on deck to allow the jettison of less valuable goods stowed below:

Benecke, Pr. of Ind. 213; Lowndes, 52.

By water getting in through hatches when opened to effect jettison:

[NOTE.—Upon this there is much conflict of opinion, Lowndes, 53.]

By water entering through an opening made in cutting away a splintered mast:

Maggrath v. *Church*, 1 Caines, N. Y. 196; approved by Lowndes, p. 54, note.

By water used in extinguishing a fire·

Stewart v. *West India and Pacific Steamship Co.*, L. R., 8 Q. B. 88 (doubt suggested by Brett, J., in Ex. Ch., *ibid.* 362). It has been allowed in Pennsylvania.

By loss of goods in lighters into which they are removed to float the ship or save her from foundering, or damage in removing them:

1 Em. c. xii. s. 41, p. 599; 4 Benecke, System des Assecuranz, 56, 57; Code de Com. l. 2, tit. 11, n. 238.

By surrender of goods to pirates by way of composition without fraud.

Hicks v. *Palington*, F. Moore, 297.

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Loss by being pumped up.

Lowndes, 168; *Hills* v. *London Assurance Company*, 5 M. & W. 569.

Loss of market for cargo resulting from a general average act.

Loss of goods by sale to pay the debt of the master arrested in the course of the voyage.

Dobson v. *Wilson*, 3 Camp. 480.

Loss by sale of cargo by the master to benefit a single interest, such as the ship herself.

Powell v. *Gudgeon*, 5 M. & S. 431; *Sarguy* v. *Hobson*, 4 Bing. 131; *Hallet* v. *Wigram*, 9 C. B. 580; 19 L. J., C. P. 281; *Dobson* v. *Wilson*, 3 Camp. 480.

Jettison.

Definition.

280. A heaving overboard of the goods in order to save the ship.

[Note.—It may be made when the ship is in the hands of captors.

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

Exceptions.

281. A jettison does not give rise to contribution:—

(1) (Semble) if the goods were fraudulently put on board and are not mentioned in the bill of lading.

French Law.—Goods of which there is no bill of lading are not contributed for under any circumstances.

Code de Com. sect. 420.

GERMAN LAW.—There is no contribution where no bill of lading of the goods has been signed, nor the same entered on the manifest or in the cargo book; and where the goods are valuables, specie and securities respecting which proper notice has not been given to the master.

Gen. Germ. Merc. Co. art. 710.

(2) If the goods are loaded on deck—unless in accordance with the usage or custom of the trade on the voyage for which they are shipped.

See *Johnson* v. *Chapman*, 35 L. J., C. P. 23; 19 C. B., N. S. 563; *Miller* v. *Titherington*, 30 L. J., Ex. 217; 6 H. & N. 954, and other cases cited in the notes, p. 766 of Arn. M. I. 4th ed.

[NOTE.—Phillips states the rule, on a general review of English and American jurisprudence, thus:—A jettison of a deck load is to be contributed for in general average where the stowing of the jettisoned 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. See *Taunton Copper Co.* v. *Merchants Ins. Co.*, 22 Pick., Mass. 108; *Lenox* v. *United Ins. Co.*, 3 Johns. Ca., N. Y. 178; *Smith* v. *Wright*, 1 Caines, N. Y. 43; *Johnson* v. *Crane*, Kerr, N. B. 356; *Cram* v. *Aiken*, 13 Maine, R. 229 (1 Shipley); *Lenox* v. *United Ins. Co.*, 3 Johns. c. 178, 179; *Smith* v. *Wright*, 1 Caines, R. 43; *Dodge* v. *Bartol*, 5 Greenleaf, R. 286.]

(3) If the danger which necessitated the jettison was occasioned by the original unseaworthiness of the vessel or the negligence or default of the master or crew.

Schloss v. *Heriot*, 14 C. B., N. S. 59.

[NOTE.—The loss is borne by the shipowner, but if he is insolvent, contribution may then be claimed as between the several owners of cargo. *Worms* v. *Story*, 25 L. J., 1 Ex. 427; *The Norway*, Brown & Lush. 377.]

Essential Conditions.

282. The jettison must have been a reasonable and prudent act under the circumstances.

Emerig. c. 12, c. 39; *Price* v. *Noble*, 4 Taunt. 123.

The motive of the act must have been to avert some danger threatening ship and cargo in common.

Butler v. *Wildman*, 3 B. & Ald. 398.

Goods in Boats or Lighters.

283. 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 or cargo, are jettisoned, they are contributed for.

Phillips, s. 1288; Gen. Germ. Merc. Code, art. 708, s. 2.

GERMAN LAW.—To general average belong as well the hire of the lighters as also the damage which may have been done to ship or cargo by discharging into the lighters or by reshipping into the vessel, as also any damage which may have been done to the cargo while in the lighters.

Gen. Germ. Merc. Code (*Ibid.*).

Goods being put into a lighter from a stranded ship, not to lighten it, but merely to save the goods, and part being jettisoned, the ship and cargo being saved do not contribute to the jettison.

Phillips, s. 1289.

If part of the goods on board of a boat are purposely sacrificed in an emergency by the person

come under this head, including port dues and charges, and sums paid for services rendered in bringing the ship into port, such as pilotage, towage, &c. Connected with raising money abroad for general average purposes the following expenses are allowed: Exchange, interest or discount of bills, maritime interest in case of bottomry, premiums to insure sums advanced by a stranger. St. on Av. 27; Benecke, Pr. of Ind. 283.]

Illustrations.

Floating stranded Ship.

287. Expenses incurred in floating a ship sunk with cargo in her, the proceeding being necessary for the common preservation of both interests.

Kemp v. *Halliday*, 34 L. J., Q. B. 233; L. R., 1 Q. B. 520; Lowndes, Gen. Av. 98; Ph. s. 1312.

A ship being stranded and her rescue hopeless, or if the cargo be not in danger when the expenses are incurred, the expenses will not be allowed.

Ben. P. of Indem. 215, 216, 217; 2 Ph. ss. 1312, 1313; 2 Parsons on Mar. Ins. 263; Lowndes, Gen. Av. 99; *Walthew* v. *Mavrojani*, L. R., 5 Ex. 116; *Job* v. *Langton*, 6 E. & B. 779; 26 L. J., Q. B. 97; *Moran* v. *Jones*, 7 E. & B. 523; 26 L. J., Q. B. 187; *Hall* v. *Janson*, 8 E. & B. 500.

American Law.—Goods safely landed from a stranded ship are liable to contribute to the expenses of getting her off subsequently incurred.

Bevan v. *Bank of U. S.*, Whart. Penn. 301 (*a*).

Such expenses *may*, as against the owner of cargo

(*a*) Phillips notices that *Bevan's case* was decided upon some dicta of Benecke, on supposed facts which he does not consider analogous to those in *Bevan's case*. The principle stated in the text, therefore, although acknowledged as "the American principle" in *Walthew* v. *Mavrojani*, must be accepted with caution. See *Nelson* v. *Belmont*, 21 N. Y. Rep. 30.

removed out of danger, be general average, if the cargo cannot be otherwise carried forward, or only at a greater expense, or after a delay which would deteriorate the goods.

Per M. Smith and Hannen, JJ., in *Walthew* v. *Mavrojani*, L. R., 5 Ex. 116, *semble*.

Expenses necessarily incurred in unloading and reloading the cargo for the purpose of repairing the ship to enable her to prosecute the voyage.

Hall v. *Janson*, 8 Ell. & Bl. 500; *Plummer* v. *Wildman*, 3 M. & S. 482.

Repairing Ship.

288. The expense of necessary repairs to a ship is not contributed for, unless incurred at an intermediate port as a temporary expedient to avoid delay which would be materially inconvenient to all concerned, and leaving the shipowner subject to the same expense of prosecuting the voyage and subsequently making repairs, as if the same had not been made.

Power v. *Whitmore*, 4 M. & S. 141; *Plummer* v. *Wildman*, 3 M. & S. 482; Phillips, s. 1300.

Working Disabled Ship.

289. The extra expense not extraordinary in its nature of working a ship disabled by perils of the sea, is not general average.

Wilson v. *Bank of Victoria*, L. R., 2 Q. B. 203, 212, 213; *Harrison* v. *Bank of Australasia*, L. R., 7 Ex. 40.

Hiring Convoy.

290. The expense of hiring convoy where justifiable, and where its protection is essential to the safety of the ship and cargo, is contributed for.

Emerigon, tom. 1, p. 626; Phillips, s. 1307.

Payments to obtain Release.

291. Money paid to pirates or other plunderers to induce them to liberate the ship and cargo, is apparently recoverable in general average.

Abbott on Shipping, Part iii. c. viii.

A compromise between belligerents and neutrals being lawful, money paid in pursuance of it is recoverable in general average.

Stevens on Av. 26; *Douglas* v. *Moody*, 9 Mass. Rep. 501; Ph. s. 1337; Benecke, Pr. of Indem. 250; 2 Ph. ss. 1359, 1360.

Salvage, Wages, &c.

292. Extraordinary wages and provisions expended whilst the ship is seeking and detained in a port of distress, whither she has gone to repair, are not contributed for.

Hallett v. *Wigram*, 9 C. B. 580.

American Law.—If a ship be injured by a peril of the sea, and be obliged to go into a port to refit, the wages and provisions of the crew during the detention are general average; 3 Kent, 235, notes (*c*), (*d*) and (*e*); 236, notes (*h*) and (*a*). See cases in n. 32, Par. M. I. 257.

French Law.—If the ship be freighted for the month they are allowed.

Code de Com. art. 400, s. 6.

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of the repairs, deducting one-third new for old materials (*a*).

Plummer v. *Wildman*, 3 M. & S. 482; *Power* v. *Whitmore*, 4 M. & S. 141; *Hallett* v. *Wigram*, 19 L. J., C. P. 281; 9 C. B. 580; Benecke, Pr. of Ind. 196—8.

[NOTE.—If the repairs are necessarily made at a port of refuge, the cost at that place, whatever it is, is the basis of adjustment. Lowndes, Gen. Av. 221.]

Where no repairs are made the damage is a subject of estimate in the absence of stipulation to the contrary.

Phillips, s. 1302. See Lowndes, Gen. Av. 226, 227.

Voluntary Stranding.

The value of the loss is not the value at the commencement of the risk, as in a case of total loss under a policy upon the ship, but the value at the time when the ship is run aground, *i. e.*, 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.

Phillips, s. 1302.

[NOTE.—This, it will be observed, is a citation from an American authority. There is no settled principle in this country.]

In a contribution for damage by voluntary

(*a*) No such deduction is allowed if the ship is on her first voyage. It is otherwise in the United States. See Lowndes, Gen. Av. p. 224. As to what is a "first voyage," see *Fenwick* v. *Robinson*, 3 C. & P. 323; *Pirie* v. *Steel*, 2 M. & R. 49; 8 C. & P. 200.

stranding the freight lost by the loss of the ship is to be included.

Columbian Ins. Co. v. *Ashby*, 13 Pet. Sup. Ct. 343; Ph. s. 1302.

Goods Lost and Damaged by Jettison.

294. Where, after a jettison of a portion of an entire cargo, the ship with the remainder of the cargo arrives, the contribution on the jettisoned goods is the sum which they would have realized had they been sold immediately upon arrival, deducting the expenses which would have been incurred by the owner, and which he escapes by the non-delivery of the goods.

Lowndes, Gen. Av. 215.

The market value at the date of discharge is, in all cases, the basis of compensation.

Id.

Goods of uncertain value are contributed for on the footing of the value which they are represented (*a*), or may reasonably be supposed by the master to bear.

Phillips, s. 1372; Arn. 802 (n. 7).

If the goods jettisoned were subject to leakage or breakage, the ordinary leakage or breakage is to be deducted.

Phillips, s. 1366.

If the goods jettisoned had previously been

(*a*) If by the bill of lading they are said to be of inferior value, that is conclusive in adjusting the loss.

damaged, or if, though not damaged at the time, it can be proved that, had they remained on shipboard with the rest of the cargo, they must inevitably have suffered damage before reaching their destination, the amount to be made good is to be reduced to their value in the damaged state.

Lowndes, pp. 22 and 216; *Fletcher* v. *Alexander*, L. R., 1 C. P. 376, approving this old-established rule of practice.

Jettisoned goods being recovered before adjustment, the amount of the general average contribution is estimated by taking the damage done to them by the jettison and the expense of recovering them.

Phillips, s. 370; Boulay-Paty Com. on Emerig. c. xii. s. 40, p. 597; Code de Comm. art. 429.

Freight.

295. The owner of the ship who loses his freight on the goods jettisoned, is entitled, if the ship arrive with the rest, to be paid such freight as the goods would have paid on arrival with the ship.

St. on Av. 20; Phillips, s. 1368; Lowndes, Gen. Av. 216.

The ship being condemned or wrecked at a port of refuge, the cost of forwarding cargo in another vessel is deducted from the original freight in estimating the freight lost by jettison.

Lowndes, Gen. Av. 218, 219. See *Kidston* v. *Empire Mar. Ins. Co.*, L. R., 1 C. P. 535; 2 Ibid. 357.

[NOTE.—If the forwarding charges are more than the original freight, there is no loss by jettison.]

Cargo jettisoned from a full-laden ship being replaced by other cargo at a port of refuge, the freight

person or forming part of the wearing apparel.

See note to No. 296 (*sup.*).

Provisions supplied by the shipper of passengers or animals and consumed on the voyage, where the passengers or animals arrive at the port of adjustment.

Phillips, s. 1399.

If there be two or more successive jettisons on distinct occasions, the goods first jettisoned contribute to the subsequent jettisons.

[NOTE.—This is the modern practice, the theory being that goods jettisoned are to be considered for the purposes of average as if they were still on board. See Arn. 4th ed. 791.]

Goods having been jettisoned in order to lighten a ship in danger, which is nevertheless wrecked, goods saved must contribute to the loss by the jettison.

Hughes Ins. n. 128, 414; Benecke, Lond. Ed. 1824, p. 178; 2 Phillips, p. 92.

Cargo saved contributes to loss by voluntary stranding, although it is not carried on.

Ph. s. 1314; *Reynolds* v. *Ocean Ins. Co.*, 22 Pick. Mass. 191.

Goods belonging to government contribute.

Goods landed before a jettison, and finally separated from the ship, or taken on board after a jettison, do not contribute to it.

Arn. 4th ed. 791.

Freight.

298. To constitute freight a contributing interest it must have been pending at the time of the sacrifice.

Arn. 4th ed. 807; Ph. s. 1385; *Dunham* v. *Commercial Ins. Co.*, 11 Johns. 315; *Strong* v. *New York Firemen's Ins. Co.*, Ibid. 323.

Freight paid in advance not to be recovered back in any event (*a*), contributes as an interest belonging to the shipper, realized in the value of cargo on arrival.

Trayes v. *Worms*, 34 L. J., C. P. 274.

[NOTE (*a*).—Where the charterparty provides for the shipper insuring the freight advanced, that is conclusive evidence that the freight advanced is not to be paid back. Per Willes, J.]

[NOTE (*b*).—Phillips points out that prepaid freight is not included in the insurable interest in adjusting a claim for a total loss (*Walter* v. *Haldiman*, 2 B. & Ald. 649), and argues that the shipper ought not to contribute in respect of it (s. 1404).]

Freight only *pro ratâ itineris* being earned, that alone contributes.

Maggrath v. *Church*, Caines, 196.

The charterparty providing for payment of freight on successive voyages or periods of time, the proportion of freight in process of being earned at the time of the sacrifice alone contributes.

Phillips, s. 1387, and authorities there cited.

(*a*) See *De Silvale* v. *Kendall*, 4 M. & S. 37; *The John*, 3 W. Rob. 171; *Hicks* v. *Shield*, 7 E. & B. 633; *Jackson* v. *Isaacs*, 3 H. & N. 405; *The Karnack*, L. Rep., 2 Adm. 289; 37 L. J., Adm. 41; *Byrne* v. *Schiller*, L. Rep., 6 Ex. 319.

A ship being chartered for one entire sum for freight out and home (which sum is earned and received) (*a*), the shipowner contributes in respect of it to an average loss happening on the outward voyage when the earning of freight was contingent only.

Williams v. *London Ass. Co.*, 1 M. & S. 318.

If a shipowner has contracted to carry goods out, and afterwards his ship is chartered for the homeward voyage, the chartered freight under the second charter-party does not contribute to an average loss on the outward voyage.

Baily, Gen. Av. 153.

If the freight receivable by the shipowner is swallowed up by wages of the crew owing to detention at sea, or by the hire of another ship by reason of his own being disabled, no contribution is payable.

Searle v. *Scovell*, 4 Johns. Ch. R. 218; Ph. s. 1388.

[The rules of average as to contribution of freight on speculative charters are so indefinite that it is not attempted to lay down any precise principle.]

The Contributory Value of Contributing Interests.

General Rule.

299. The contributory value of the different

(*a*) Although this was made the ground of decision in the case cited, some writers consider it unimportant. Lowndes thinks that whenever the interest in freight is insurable it should contribute. Maclachlan (n. 8, p. 808, 4th ed. Arn.) takes a different view, considering any argument with reference to insurable interest inapplicable.

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partial loss up to the time when the general average loss took place (p. 53).]

If the ship is saved in a damaged condition, the damage having been sustained before the General Average Act, and remained to that time unrepaired, the necessary cost of repairing her is to be deducted from her value when repaired.

[NOTE.—The damage having taken place subsequently to the General Average Act, the question whether the cost of repair is to be deducted from the value must depend upon whether the basis of adjustment is to be the value at the end of the voyage, or the value at the place where the general average expenditure is incurred. Lowndes, Gen. Av. 230, 231.]

If the general average loss be of some part of the ship, the sum paid to the ship by way of contribution must be added to her worth in her damaged condition, in order to make up her true value for the purposes of adjustment.

Stevens on Av. 54; 2 Ph. s. 1380; Lowndes, 23.

Freight.

303. The contributory value of freight is the actual sum finally received by the shipowner, after deducting the expenses of earning it incurred subsequently to the loss, exclusive of provisions.

Lowndes, Gen. Av. 233; Stevens on Av. 63; 2 Ph. s. 1385.

Prepaid freight. See *infra*, "Cargo."

Cargo.

304. Cargo contributes on its net market value at the date of delivery, or at the time and place which form the basis of adjustment.

Lowndes, Gen. Av. 231; Benecke, Pr. of Ind. 298.

When the average is by consent or of necessity adjusted at the port of loading and on the state of facts then subsisting, the value of the cargo at the port of loading must form the basis of contribution.

[NOTE.—That is to say, the cost price of the goods, with shipping charges and premiums of insurance. Stev. on Av. 47; Lowndes, 232.]

Cargo being damaged, the amount of the damage must be deducted in estimating the value for purpose of contribution.

Lowndes, Gen. Av. 232.

The contributory value of cargo on which freight is prepaid is enhanced by the amount of the freight when the adjustment is made on the invoice cost.

Lowndes, Gen. Av. 233.

If damaged by the sacrifice for which contribution is claimed, the goods are taken as sound.

Stev. on Av. 48.

Goods jettisoned contribute upon the same basis of value as that upon which they are contributed for.

[See "Value of Interests contributed for," *ante*.]

PLACE OF ADJUSTMENT.

305. The ship's destination at which she arrives is the place at which the adjustment of average must be made.

Simmonds v. *White*, 2 B. & C. 805; Lowndes, 189; Phillips, ss. 1413, 1414.

If, owing to sea peril, the voyage is broken up, and the cargo discharged at [an intermediate port, or] (*a*) the port of departure, the average is adjusted at such port according to the principles prevailing there.

See *Fletcher* v. *Alexander*, L. Rep., 3 C. P. 375.

(*a*) Per Bovill, C. J.

Recouping General Average Loss.

I. *Lien of Master.* II. *Legal Remedy by Owners.*

I. Lien of Master.

306. The master of a ship has a common law right of lien to secure payment of average contribution.

Birkley v. *Presgrave*, 1 East, 220.

[Note.—Practically the lien can only be used as a means for enforcing the giving of satisfactory security or other equivalent for a payment before delivery. Lowndes, 256.]

The consignee may obtain delivery on tendering the shipowner or captain a sum sufficient to meet his just demand.

Lowndes, 257, note (*a*).

And the consignee is entitled to set off against the claim of the shipowner any contribution due by the ship for loss of cargo by jettison or sale of the goods of the consignee.

The Norway, Br. & L. 410, 411; Lowndes, 258. See 25 & 26 Vict. c. 63, ss. 68—78.

domestic or to the foreign law, if the general average loss be not incurred, or the general average contribution be not made in order to avert a loss by a peril insured against.

Brett, J., in *Harris* v. *Scaramanga*, L. R., 7 C. P., at p. 497; 2 Ph. s. 1353.

But if by the law of a place of adjustment by which an underwriter has agreed to be bound the happening of a peril not within the policy according to his domestic law is a peril insured against according to the law of the place of adjustment, the underwriter is bound.

Harris v. *Scaramanga* (*ubi sup*); *Depean* v. *Ocean Ins. Co.*, 5 Cowp., N. Y. 63.

And if at a port of disaster the assured is compelled by competent authority to pay general average there adjusted, he is entitled to recover the amount so paid from the underwriters, although the principles upon which the average was adjusted are different from those prevailing in the home country of the parties to the policy.

See the authorities discussed in the arguments in *Dent* v. *Smith*, L. R., 4 Q. B. 414.

Foreign Adjustment.

309. When the underwriter agrees by the policy that average shall be payable "as per foreign statement," he is liable to the assured if the adjustment is correct according to the law of the foreign port, although such law is at variance with the law of England.

Illustrations.

Harris v. *Scaramanga*, L. R., 7 C. P. 481. Marginal note on the policy, "To pay general average as per foreign statement if so made up." During the voyage the ship was compelled by perils of the sea to put into several ports to repair, at each of which the captain, in order to obtain funds to put her in a condition to continue the voyage, gave a bottomry bond on ship, freight and cargo. The average was adjusted at Bremen; the consignees of cargo paid their shares, but the captain, being unable to give security for the contribution due in respect of ship and freight, the ship was sold by direction of the Tribunal of Commerce, realising, however, less than the amount due by 663*l.* A supplemental statement was made by an average-stater in which the owners of cargo were made liable for the 663*l.* as "additional bottomry debt." The statements were admitted to be correct according to the law at Bremen. The underwriters were held bound by such statements, and the assured recovered.

Mavro and another v. *The Ocean Marine Ins. Co.*, L. R., 9 C. P. 595. The policy contained the clause "general average as per foreign statement." During the voyage damage resulted to the ship from carrying a press of sail to avoid a lee shore; a leak was sprung and the cargo (wheat) damaged. The ship put into Constantinople, and surveyors recommended that the damaged cargo should be sold and the residue transhipped and sent on. An order of the Consular Court was accordingly made to that effect, and an adjustment of average in respect of ship and cargo was also made by order of the court. In such adjustment the damage which the cargo of wheat had sustained was treated as general average. In an action on the policy to recover the amount of the general average, it was held that the voyage being necessarily brought to an end at Constantinople, the defendants were bound by the average statement there made up.

See *Hendricks* v. *Australasian Ins. Co.*, L. R., 9 C. P. 460, where the agreement in the policy was "to pay all claims and losses on Dutch terms and according to statement made up by official dispacheur in Holland." The defendants were held bound to pay according to the foreign average statement. The case was held to be covered by *Harris* v. *Scaramanga* (*sup.*), and *Stewart* v. *West India and Pacific Steamship Co.*, L. R.,

8 Q. B. 88. In the latter case the clause was to pay "according to British custom." The custom was held binding, although contrary to the principles of English law.

A sacrifice vests in the assured an immediate right of action against his insurers to recover the amount insured on the property lost.

Dickinson v. *Jardine*, L. R., 3 C. P. 639; *Forbes* v. *Manufacturers' Ins. Co.*, 1 Gray, Mass. 371; *Lord* v. *Neptune Ins. Co.*, Phillips, ss. 1348 and 1410; Boulay-Paty, on Emerigon, vol. 2, p. 8.

Where the claim is for a general average loss resulting from perils insured against, the underwriter is liable to it, whatever its amount, but if the market value of the property saved exceeds the value stated in the policy, he will be liable only for the proportion which the policy value of the cargo bears to the market value.

Lowndes, Gen. Av. 292, 293.

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An illegal act which entails a penalty on the offender, and not a forfeiture of the property, does not vitiate an insurance if the assured be not privy to it.

Carruthers v. *Gray*, 15 East, 35; 1 Duer, 319.

It is sufficient to avoid the policy if the voyage is commenced with the design of committing an illegal act.

Lubbock v. *Potts*, 7 East, 449.

Where the design is conditional or may be abandoned, it has no effect on the character of the voyage or the validity of the insurance.

Sewell v. *Roy. Ex. Assur. Co.*, 4 Taunt. 856; 1 Duer, 331.

A contravention of law, though it have relation to the subject or the risk, will not affect the insurance if it be remote and distinct from the contract, or only collateral.

Phillips, s. 221.

Illegality is not to be presumed if the instrument can be read so as to be consistent with a legal object.

[NOTE.—Illegality may be proved by evidence, and need not appear upon the face of the policy.]

1 Duer, 368.

A violation of law from necessity does not vitiate the policy.

[NOTE.—"Moral coercion" (1 Duer, 346) is a sufficient excuse.]

Integral Voyages.

311. When the plan or scheme of a circuitous or successive voyage is, at its commencement, fixed and definite, and, so far as depends on the will of the master of the ship, unalterable, this unity of the original design connects together all the parts of the voyage, however separable in themselves, and consolidates them into one whole.

1 Duer, pp. 337, 338.

But successive voyages do not form an integral voyage if, previous to the commencement of the first, the order in which they are to be performed, and the objects in the prosecution of each, are not embraced in a general and definite plan.

Ibid.

Whether outward and homeward voyages are distinct is a question of construction: if they be, and one be legal and the other illegal, the former is not affected by the latter, and an insurance in connexion with it is valid.

Arn. 630, 631, 4th edit.; Phillips, s. 231; *Sewell* v. *Royal Exchange Assurance Co.*, 4 Taunt. 855.

[NOTE.—C. J. Mansfield, in the case cited, said, "It is not necessary now to decide what would be the consequence of a person entering into a charterparty for a voyage out and home, the voyage home being illegal, and of his separating it into two voyages by insuring the outward voyage separately." The voyage home was there held legal; but had it been illegal, it is difficult to suppose that the outward voyage could have been regarded as so distinct as to be free from the taint of illegality of the homeward voyage.]

Effect on the Contract.

312. Where the policy is avoided in consequence

of the illegality of the risk, the underwriter is entirely discharged from all liability, although he himself was aware of the illegal nature of the adventure.

Arn. 630, 4th edit., citing Bynkershoek, Quæst. Jur. Pub. lib. 1, c. 21; and *Holman* v. *Johnson*, 1 Cowp. (per Lord Mansfield) 341, 343.

But the rights of the insurer against the assured are not affected by the invalidity of the contract, if knowledge of the illegality cannot be imputed to him.

1 Duer, 368; *Jenkins* v. *Power*, 6 M. & S. 283.

Both parties being *in pari delicto*, neither can avail himself of the contract.

1 Duer, 368.

Waiver.

313. Where an insurance prohibited or void by the laws of the country in which it was made is sought to be enforced in the tribunals of another, the defence of illegality may be waived by the insurer.

1 Duer, 317.

Ship and Cargo.

314. An illegal act which avoids a policy on ship does not necessarily affect an insurance on goods.

[NOTE.—It must be admitted, says Duer (vol. i. p. 320), that there is not a perfect analogy between the case of a shipper of goods and that of the owner of the ship. The master is the agent of the owners, and hence, in many cases, the unauthorized acts of the master are imputed to the owners and operate to discharge the insurers.]

specification, the exportation of which is prohibited on pain of forfeiture of the goods.

Parkin v. *Dick*, 11 East, 502.

316. The policy may be illegal on the following grounds:—

(1) That the adventure is in contravention of the revenue, trade, or navigation laws of the home country.

(2) In contravention of the rights of the State as a belligerent power.

(3) In contravention of the duties of the State as a neutral power.

1 Duer, 315.

Revenue, Trade and Navigation Laws (*a*).

Prohibited Trading.

317. The export or import of goods being prohibited, a contract of insurance in respect of them is illegal and void, unless a licence to trade be first obtained.

See *Parkin* v. *Dick*, 2 Camp. 221; *Hagedorn* v. *Bazett*, 2 M. & Sel. 100.

[Note.—A contemplated violation of the laws of foreign countries does not affect the insurance. (Arn. 531, 4th edit.; 3 Kent, Comm. s. 263.) Kent says: "The principle does no credit to the commercial jurisprudence of the age."]

An informality in the mode of obtaining a licence for exporting prohibited goods makes it of no effect.

Camelo v. *Britten*, 4 B. & Ald. 184.

(*a*) See as to the construction to be put upon such laws, Sir William Scott, in *The Betty Cathcart*, 1 Rob. Adm. 220; and note xi. in 1 Duer, p. 407.

An abandonment of part of the voyage licensed does not affect the insurance.

Norville v. *St. Barbe*, 2 New Rep. 434.

A licence having been obtained, the contract is not void by reason of prohibited goods of other persons being on board, but may be invalid to the extent that the assured has exceeded his licence by shipping a surplus of prohibited goods.

Keir v. *Andrade*, 6 Taunt. 496; *Butler* v. *Allnut*, 1 Stark. 222.

Commercial Treaties and occasional Statutes.

318. All insurances on ships or goods navigated or conveyed contrary to the provisions of any commercial treaty to which the home country is a party, or to the provisions of municipal statutes, is void.

[NOTE.—Lord Stowell says, "Every treaty is part of the private law of each of the countries which are parties to it, and is as binding on the subjects of each as any part of their own municipal laws." *The Eenrom*, 2 C. Rob. Adm. R. 1.]

To avoid an insurance the breach must be of a provision in effect prohibiting the voyage.

1 Duer, 362.

[NOTE.—Where the prohibition of the statute does not apply to an act in itself immoral, and is not founded on any reasons of public policy, but is designed solely for the benefit of particular individuals, without affecting the general welfare, it is only those for whose protection or convenience it was passed who are entitled to complain of its violation. The prohibition of the act is not then construed as a prohibition of the voyage, that by rendering it illegal vitiates the policy.

Where the statutory provision, although sanctioned by a penalty, may be reasonably construed as merely directory, and not as intended to invalidate or render unlawful even the acts to which the penalty applies, its violation has no effect upon the contract of insurance.

1 Duer, 363, 364.]

A violation of statutory regulations as to the equipment of vessels would seem to be an illegality avoiding a contract of insurance.

Arn. 4th edit. 635; *Farmer* v. *Legg*, 1 T. R. 182.

[NOTE.—See *Suart* v. *Powell*, 1 B. & Ad. 266, where the circumstances were held to exempt the vessel from the operation of the statute. The judges all concurred that the statutory regulation alleged to have been violated, although in its language absolute and unqualified, was to be understood with a virtual exception of the cases in which a compliance with its terms was prevented by the act of God or inevitable necessity. Duer says, this principle should be applied to every statutory provision of a similar character. Vol. i. p. 357.]

II. IN CONTRAVENTION OF THE BELLIGERENT RIGHTS OF THE STATE.

Insuring Enemy's Property.

319. An insurance upon property liable to confiscation, as prize of war, by the government of the country to which the insurer belongs, is of necessity invalid.

Arn. 4th edit. 642.

[NOTE.—As to what is enemy's property, and when as such it is liable to confiscation, see 1 Duer, Mar. Ins. from p. 420, and titles "Capture, Arrest and Detention," *ante*, and "Warranties—Neutrality," *post*.]

An insurance made in a belligerent country upon the property of subjects of an opposite belligerent is void.

Trading with the Enemy.

320. All intercourse between the subjects and citizens of two belligerent countries is illegal, unless

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Semble, also sailing in violation of an embargo avoids the policy and discharges the underwriters.

1 Duer, 352.

III. In Contravention of Neutrality.

322. This may be—

(*a*) By a neutral supplying to a belligerent articles which are contraband of war.

(*b*) By violating blockade.

(*c*) By engaging in the privileged trade of the enemy.

(*a*) *Contraband of War.*

323. Insurances on contraband of war are void in the country of the hostile belligerent.

Arn. 4th edit. 649.

The insurance if made in a neutral country is valid.

See *Hobbs* v. *Hemming*, 34 L. J., C. P. 117. See "Cargo" and "Concealment—Liability to Capture," *ante*.

[Note.—Contraband of war includes:—Arms, warlike equipments and naval and military supplies. Provisions destined for a military force, or to a place which is seized or blockaded. Articles of ordinary convenience or necessity if going to a belligerent port where such articles are used for warlike purposes. Raw materials capable of being turned to the purposes of war. See fuller enumeration of particular goods, Arn. 4th edit. pp. 647, 648; Marshall, Ins. 54, 55.]

An insurance on contraband of war consigned to a neutral port in juxtaposition to belligerent terri-

tory is valid, and a loss by seizure of belligerents may be recovered.

Hobbs v. *Hemming* (*ubi sup.*).

[NOTE.—The port in this case was close to belligerent territory, but the court declined to assent to the mental operation by which it was proposed to affect the assured with an illegal intent and so avoid the insurance.]

324. (*b*) *Violating Blockade.*

[NOTE.—Text writers generally place violation of blockade under the head of illegality. Doubtless it is a violation of the duty of a neutral to trade with a blockaded port, but the insurance on an adventure having that object is not illegal. The insurer, if ignorant, might resist a claim for a loss on the ground of concealment, or, if an innocent voyage were insured, on the ground of an alteration of the risk.]

[See "Concealment," *ante*, and "Risk," *post*.]

(*c*) *Engaging in the Privileged Trade of an Enemy.*

325. An insurance effected in the country of a belligerent by a neutral on an adventure in the coasting or colonial trade of an enemy, not open to foreigners during peace, is void.

Berens v. *Rucker*, 1 W. Bl. 314; Arn. 4th edit. 621.

[NOTE.—The coasting trade of this country was thrown open to foreign ships by 17 & 18 Vict. c. 5.]

Insurable Interest.

What it is.

326. An interest to be insurable must be such that the happening of the peril or event insured against may bring upon the assured a pecuniary loss.

Lucena v. *Craufurd*, 2 Bos. & P. p. 301.

The interest may be legal or equitable, absolute or contingent, and may exist in the insurer not only as absolute owner, but also as mortgagor or mortgagee, borrower or lender, consignee, factor or agent.

3 Kent, Comm. s. 262; *Locke* v. *North American Ins. Co.*, 13 Mass. at p. 67. See *Palmer* v. *Pratt*, 2 Bing. 185; *Aldrich* v. *Equitable Safety Ins. Co.*, 1 Woodb. & M., C. C. 272; Phillips, s. 203, n. 6.

An expectancy founded on an existing legal title is insurable; but the mere expectation of an expectation is not insurable.

Knox v. *Wood*, 1 Camp. 542 (commissions); *Stockdale* v. *Dunlop*, 6 M. & W. 224, and *M'Swiney* v. *R. Ex. Ass. Co.*, 14 Q. B. 634; 16 L. J., Q. B. 193; 19 L. J., Q. B. 222 (profits); Ph. s. 183; *Devaux* v. *Steele*, 6 Bing. N. C. 358 (expectation of bounty from government, where bounty given before under similar circumstances, no insurable interest); Bayley, J., in *Frangano* v. *Long*, 4 B. & Cr. 222 (goods).

where there is a reservation as to prior insurances, so as to entitle him to make double insurances.

Phillips, s. 206; *Wiggin* v. *Suffolk Ins. Co.*, 18 Pick. Mass. 145; *Godin* v. *London Ass. Co.*, 1 Burr. 489.

In what it may exist.

328. Insurable interest may arise from chattels, profits, freight, or commissions, or other lawful business. It varies with the terms of particular bargains:

[See "Cargo' and "Freight," *ante*, and "Ship," *post*, tit. "Insurable Interest;" and a very recent case as to interest in cargo agreed to be loaded on board a specified ship. *Anderson* v. *Morice*, 31 L. T. Rep., N. S.]

An assuree has an insurable interest in the solvency of his underwriters.

Emerigon, tom. 1, c. 1, s. 2.

A shipowner who has entered into a recognizance for salvage of ship and cargo has an insurable interest in the average contribution due to him from the owners of cargo.

Captured Property.

329. Where the expectation of a grant of captured property by the crown is made as nearly a certainty as possible by a long course of practice, the interest of the captors is insurable.

Le Cras v. *Hughes*, 1 Marsh. Ins. 105; 2 Park, Ins. 568; 3 Doug. 81 (doubted in *Lucena* v. *Craufurd*, 2 B. & P. N. R. 323, by Lord Eldon); *Routh* v. *Thompson*, 11 East, 433, 434; *Deveaux* v. *Steele*, 6 Bing. N. C. 358; *Boehm* v. *Bell*, 8 T. R. 154, 161; *Stirling* v. *Vaughan*, 11 East, 619; *The Joseph*, 1 Gallison, 558.

Captors have an insurable interest in ships taken as prize, before condemnation, in case the Prize Act vests the property subject only to the right in the Crown to release the prize, and to the effect of a sentence of the Court of Admiralty restoring it to the owners.

Stirling v. *Vaughan*, 11 East, 619.

The Crown has an insurable interest in ships lawfully detained and captured under the laws of war.

[NOTE.—Under a count averring the interest to be in the monarch, the Crown could recover without express subsequent ratification by him.

Routh v. *Thompson* (*sup.*); *Lucena* v. *Craufurd* (*sup.*); *Stirling* v. *Vaughan* (*sup.*).]

How Extinguished and Divested.

330. The insurable interest in property may be extinguished by a prohibition of insurance upon it.

Phillips, s. 209.

[See "Illegality," *ante*.]

331. Where property is forfeited to the government by some illegal act, but still remains in possession of the owner as his, and is not illegally employed or exposed to illegal risks in the adventure upon which an insurance is made, the owner still continues to have sufficient insurable interest.

Phillips, s. 195; *Wilkes* v. *People's Ins. Co.*, 19 N. Y. 184.

But from the time of the seizure for the forfeiture

his insurable interest ceases in case the proceedings are thereupon prosecuted to final condemnation.

Phillips, s. 195.

Neutral property taken by a man-of-war, though the Court of Admiralty pronounce for good cause of seizure, but ordered to be restored, is lawful subject of insurance.

Visger v. *Prescott*, 5 Esp. 184.

The illegal capture of a subject, and the purchase of it by the captor at a sale under condemnation in a foreign court, does not divest the owner of his insurable interest.

See *The Arrogantes Barcelones*, 7 Wheat. 496; *The Santa Maria*, Ib. 490; *The Santissima Trinidad*, Ib. 283; *The Grand Para*, Ib. 471; *The Bello Corunneo*, 6 Wheat. 152.

A mere pledge of the property as a collateral security does not divest the assured of his insurable interest.

Hibbert v. *Carter*, 1 T. R. 745; *Alston* v. *Campbell*, 4 Br. P. C. 476, Tomlin's edit.

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Jettison.

[See "General Average."]

Loss.

Definition.

329. A loss within the meaning of the policy must be the immediate consequence of the violent or direct action of a peril insured against, and must happen to the subject-matter of the insurance while it is at risk.

Loss is either:

(1) TOTAL, or (2) PARTIAL.

TOTAL LOSS.

330. Total loss is either (1) absolute or (2) constructive.

Absolute total loss occurs—

(1) When the subject is lost or destroyed beyond the possibility of recovery or restoration.

(2) When the identity of the subject is gone (*a*).

(3) When the subject is placed in such a position that its arrival at its destination becomes impossible (*b*).

Constructive total loss occurs where the subject-matter, though existing in fact, is lost for any beneficial purpose to the owner.

An insurance against "total loss" only, covers a constructive total loss:

Adams v. *M'Kenzie*, 13 C. B., N. S. 442; 32 L. J. 92, C. P.

The underwriters may convert a constructive total loss into a total loss by inducing the assured to repair at their expense, and not to abandon.

De Costa v. *Newnham*, 2 T. R. 407.

Partial Loss.

331. A partial loss is one which casts upon the underwriters a liability to pay an amount less

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(*a*) 2 Emerigon, 213; *Cambridge* v. *Anderton*, 2 B. & C. 691; *Irving* v. *Manning*, 1 H. of L. Cas. 287. In *Cambridge* v. *Anderton*, Lord Mansfield uses the expression, if a ship is reduced to a mere "congeries of planks," the vessel is a mere wreck, and "the name which you may think fit to apply to it cannot alter the nature of the thing." In a case in Maine (U.S.) it was decided to be a total loss if the vessel is in such a condition that she cannot be brought into port, and is of no value where she lies (*Walker* v. *Protection Ins. Co.*, 29 Me. 317).

(*b*) *Roux* v. *Salvador* (Lord Mansfield), 3 Bing. N. C. 266, 286; *Barker* v. *Janson* (Willes, J.), L. Rep., 3 C. P. 303, 305; *Judah* v. *Randall*, 2 Caines' Cas. N.Y. 344; *Am. Ins. Co.* v. *Francia*, 9 Penn. St. 390.

than that insured for damage happening to the subject, or expense occasioned by the perils insured against and incurred by the assured, in distinction from a total loss.

Phillips, s. 1422. [See "Particular Average."]

Cause of Loss.

332. The proximate, not the remote cause of loss, is looked to in determining whether a loss is within the policy.

This doctrine prevails although the loss result from a peril insured against induced by the negligence or mistake of the master and crew, they being reasonably competent and acting in good faith.

See Phillips, s. 1049; Arn. 4th edit. 668; *Walker* v. *Maitland*, 5 B. & A. 171; *Bishop* v. *Pentland*, 7 B. & C. 214.

Examples.

Negligent loading of cargo whereby the ship became leaky, and, being pronounced unseaworthy, was run ashore to prevent her from sinking. Loss by perils.

Redman v. *Wilson*, 14 M. & W. 476; 14 L. J., Ex. 333.

Masters and mariners wilfully (but not barratrously) throwing overboard so much of the ballast that the ship became unseaworthy and was lost by perils of the sea which otherwise she would not have encountered. Loss by perils.

Sadler v. *Dixon*, 8 M. & W. 895.

A policy insuring against fire and barratry of the master and mariners, underwriters were held liable for a loss by fire occasioned by the negligence of the master and mariners.

Busk v. *Royal Ex. Ass. Co.*, 2 B. & Ald. 73.

captured by the enemy. Loss of the goods was by perils of the sea.

Hahn v. *Corbett*, 2 Bing. 205. Compare with *Livie* v. *Janson*, 12 East, 648. See Willes, J., in *Ionides* v. *Universal Marine Ins. Co.*, 32 L. J., C. P. 170.

A ship being wrecked on an island inhabited by savages, who plundered the goods, the wreck was held to be the proximate cause of the loss.

Bondrett v. *Hentigg*, Holt, N. P. C. 149.

A loss of goods by a ship going ashore owing to a beacon light being extinguished by one of two belligerents, is a loss by perils of the sea. There was an exception in the policy of all consequences of hostilities, but the putting out the light held too remotely connected with the loss to bring it within the exception.

Ionides v. *The Universal Marine Ass. Co.*, 32 L. J., C. P. 170; 14 C. B., N. S. 259.

Animals on board died from the agitation of the ship in a storm. Held a loss by perils insured against, notwithstanding a warranty free of mortality.

Lawrence v. *Aberdein*, 5 B. & Ald. 107.

A vessel laden with hides and tobacco shipped large quantities of sea water, which rendered the hides putrid, and this putrefaction imparted an ill odour to the tobacco, and thereby injured it. This damage a loss by perils of the sea.

Montoya v. *Lond. Ass. Co.*, 6 Ex. 451; 20 L. J., Ex. 254.

Horses, in consequence of the labouring of the vessel, broke the slings that supported them and the partitions which separated them, and kicked each other so severely, that in consequence of the injuries thus sustained they died during the continuance of the storm. The loss was by perils of the sea.

Gabay v. *Lloyd*, 3 B. & C. 793.

A policy insuring against loss by pirates, thieves, &c., and all other losses and misfortunes, certain emigrants on board murdered the captain and took possession of the ship, and refused to proceed on the voyage. The piratical act was held

the proximate cause of loss: not the refusal to proceed on the voyage.

Palmer v. *Naylor*, 10 Exch. 382; 23 L. J., Ex. 323.

Where a vessel under a misapprehension produced simulated papers, and was taken in tow by a man-of-war, and sustained sea damage by reason of carrying a press of sail to keep up with her tow, this was held a loss by perils of the sea.

Hagedorn v. *Whitmore*, 1 Starkie, 157.

A ship was driven on an enemy's coast by stress of weather and captured. Capture held the proximate cause of loss.

Green v. *Elmslie*, Peake's N. P. Ca. 212.

Cargo damaged by a discharge pipe being left open, either by a splinter being in the valve, or owing to the negligence of the crew, which in the course of loading was brought below the water line.

Davidson v. *Burnand*, L. R., 4 C. P. 117.

[NOTE.—See as to exception in bill of lading, *Grill* v. *Iron Screw Colliery Co.*, L. R., 1 C. P. 600; 3 Ib. 476.]

A vessel being stranded at a foreign port (not the port of destination), gold forming part of the cargo was landed, and got into the hands of authorities who were held entitled to keep it until certain claims upon it were paid. Such claims being paid the amount was held a loss by perils.

Dent v. *Smith*, L. R., 4 Q. B. 414.

Damage below the water line from violent grounding as the result of a storm.

Harrison v. *Universal Marine Ins. Co.*, 3 F. & F. 191.

334. *Cases illustrating the Doctrine of Remoteness.*

A ship and goods were damaged by the perils of the seas and were afterwards seized by the American government (an excepted peril) and condemned. The loss was held to have been caused by the excepted peril, nothing being properly imputable to the sea damage but the *deterioration* of the ship and cargo.

Livie v. *Janson*, 12 East, 648. See *Hahn* v. *Corbett* (*infra*), and *Ionides* v. *Universal Marine Ins. Co.*, 32 L. J., C. P. 170.

Loss by payment to another ship under an award of half the damage done in a collision, neither party being in fault, not a loss by perils of the sea.

De Vaux v. *Salvador*, 4 A. & E. 420. See *Peters* v. *Warren Ins. Co.*, 3 Sum. Mass. Rep. 38, *contrà;* 3 Kent Com. 307; Phillips, s. 1416.

Loss of voyage by interdiction of commerce, blockade or hostile possession of the port of destination, not a loss within an ordinary policy.

Lubbock v. *Rowcroft*, 5 Esp. 67; *Hadkinson* v. *Robinson*, 3 B. & P. 388; *Foster* v. *Christie*, 11 East, 205; *Parkin* v. *Tunno*, 11 East, 22; 2 Camp. 57; *Blackenhagen* v. *London Ass. Co.*, 1 Camp. 454.

Sale of goods to obtain funds to repair a ship disabled by the perils of the sea from pursuing her voyage. Underwriters not liable.

Powell v. *Gudgeon*, 5 M. & S. 431; *Sarguy* v. *Hobson*, 4 Bing. 131. See *Benson* v. *Duncan*, 3 Ex. 644.

Slaves thrown overboard owing to scarcity of water, ship having missed the land. No loss by perils of the sea.

Gregson v. *Gilbert*, 1 Park, 138.

Slaves dying for want of food owing to extraordinary prolongation of voyage. Loss by natural death and not by perils of the sea.

Tatham v. *Hodson*, 6 T. R. 656.

Meat becoming putrid by prolongation of voyage owing to storm and tempest and thrown overboard. Not a loss by perils of the sea, or within the words "all other perils," &c.

Taylor v. *Dunbar*, L. Rep., 4 C. P. 206.

Freight lost by master prudently going to sea to avoid a storm. Not a loss by perils of the sea.

Philpott v. *Swann*, 30 L. J., C. P. 358; 11 C. B., N. S. 270.

Ship hove down on a tideway to repair, supports being carried away by the tide, and ship thereby bilged and damaged. Not a loss by perils of the sea.

Thompson v. *Whitmore*, 3 Taunt. 227.

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butions which are the direct legal consequence thereof.

Cary v. *King*, Ca. temp. Hardwicke, 304; *McMasters* v. *Shoolbred*, 1 Esp. 237; *Gracie* v. *New York Ins. Co.*, 8 Johns. Rep. 237.

Amount Recoverable.

336. The amount recoverable in respect of a loss is such as will indemnify the assured.

Therefore a loss happening during a voyage which justifies the assured in giving notice of abandonment, may, if abandonment be not accepted by the underwriters, prove only a partial loss at the termination of the voyage. [*Ex. gr.*, in the case of capture and recapture.]

Patterson v. *Ritchie*, 4 M. & S. 393; *Brotherston* v. *Barber*, 5 M. & S. 418; *Bainbridge* v. *Neilson*, 10 East, 329; 1 Camp. 237.

"Lost or not Lost."

[See "Policy: Usual Clauses."]

Excepted Losses.

[See several Titles and "Policy," Sub-tit. "Memorandum."]

Master.

General Authority to deal with Ship and Cargo.

337. On occasions of disastrous circumstances and extraordinary impediments to the voyage, the master is authorized to manage or dispose of the ship, freight and cargo in the same manner as a prudent owner would do in like circumstances, being influenced by predominating motives to prosecute the voyage.

Duncan v. *Benson*, 1 Ex. 537; 3 Ex. 644; *Hunter* v. *Parker*, 7 M. & W. 322; *The Gratitudine*, 3 Rob. 240.

[NOTE.—The mate in the master's absence has the same authority. And any person in charge has a similar authority, but of a more restricted nature.]

The extent of the authority conferred on the master of a vessel to bind the owners either of the ship or cargo is derived from and governed by the law of the flag, in the absence of express agreement to the contrary; and the existence of the necessity which the maritime law requires to validate the hypothecation of the ship and cargo by bottomry is to be ascertained by evidence in the usual manner.

Lloyd v. *Guibert*, L. R., 1 Q. B. 394; *The Karnak*, L. R., 2 C. P. 505.

[NOTE.—In *Lloyd* v. *Guibert*, it was found, that by the French law the master could not make the shipowner liable for more than the value of the ship and freight, and as the owner had abandoned both he was held exempt from further liability.]

Underwriters are not affected by the acts of the master not within his discretion or duty or the authority conferred upon him by circumstances, 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.

To sell or hypothecate the Vessel.

338. A sale can only be justified by extreme necessity and the most pure good faith.

Robertson v. *Clark*, 1 Bing. 445, and cases cited, p. 450; Lord Ellenborough in *Hayman* v. *Molton*, 3 Esp. 65.

[NOTE.—According to the following authorities the master must have special authority to enable him to sell: Consolato del Mare, ch. 253; Laws of Oleron, art. 1; of Wisbuy, art. 13; Ordonance de la Mar., liv. 8, tit. 1, Du Capitaine, art. 165; Ordinance of Rotterdam, art. 165; Magens, 107. According to Ord. Mar., liv. 2, tit. Du Capitaine, A. 192, the master could not sell the ship in any case; but by the Code de Commerce, liv. 2, tit. 4, art. 48, he may sell in case the ship cannot be made seaworthy. See 2 Boulay Paty, Droit Mar. 88.]

What is a case of necessity depends upon the particular circumstances.

See cases cited, Arn., 4th edit., p. 333; *Knight* v. *Faith*, 15 Q. B. 649; *Stephenson* v. *Pacific Ins. Co.*, 7 All. Mass. 232; *Idle* v. *Roy. Ex. Ass. Co.*, 8 Taunt. 755; *Van Omeron* v. *Dowick*, 2 Camp. 42.

The decree of a vice-admiralty court ordering a sale is not conclusive evidence of its necessity.

Reid v. *Darby*, 10 East, 143; *Morris* v. *Robinson*, 3 B. & C. 196; Abbott on Shipping, 5th edit., 11. As to Condemnation, see *Bernardi* v. *Motteux*, 3 Doug. 575.

If the master has funds of the owners, or can avail himself of their credit, or can raise funds by

to communicate with the owner, so as to give him his election to pay for the repairs, or to leave the master to raise money.

The Panama, L. R., 3 P. C. 199.

To sell or hypothecate Cargo.

339. The master of a ship being only the agent of the cargo in special cases of necessity (*a*), is bound, when the circumstances permit, to communicate with the owner of the cargo before he does any act which seriously affects the value of the cargo.

The Onward, L. R., 4 A. & E. 38.

To justify selling the cargo the master must establish,

(1) A necessity for the sale; and

(2) Inability to communicate with the owners.

Australian Steam Navigation Co. v. *Morse*, L. R., 4 P. C. 222.

The possibility of communicating with the owner depends on the circumstances of each case, involving the consideration of the facts which create the urgency for an early sale, the distance of the port from the owner, the means of communicating which may exist, and the general position of the master in the particular emergency.

Idem.

Such a communication need only be made when an answer can be obtained or there is a reason-

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(*a*) *The Zephyr*, 3 Mas. C. C. 341.

able expectation that it can be obtained before the sale.

Idem.

A sale is authorized in case of the cargo being so damaged that it cannot be carried on and be of any value on arrival, or if it cannot arrive in specie.

Sale held not justified in *Freeman* v. *East India Co.*, 5 B. & Ald. 617; *Van Omeron* v. *Dourck*, 2 Camp. 42; *Wilson* v. *Millar*, 2 Stark. 1; *Underwood* v. *Robertson*, 4 Camp. 138; *Jordan* v. *Warren Ins. Co.*, 1 Stor. C. C. 342; *Pope* v. *Nickerson*, 3 Ibid. 465.

But if any part of a cargo (having suffered sea damage) is practically capable of being sent on in a marketable state to its port of destination the master cannot sell.

Rosetto v. *Gurney*, 11 C. B, 176.

To justify a master in giving a bottomry bond on cargo, where the communication with the owners is necessary, a mere statement of injuries sustained by the ship and of the consequent necessity for repairs entailing considerable expense, unaccompanied by a statement that a bottomry bond is proposed, is not a sufficient communication.

The Onward, L. R., 4 A. & E. 38.

His Duty to Tranship and send on Cargo.

340. In the matter of transhipment the master is to be taken as representing all parties, but if the motives of the course pursued by the master are

wholly on the side of one party, he must be presumed to have acted on behalf of such party.

Phillips, p. 1634, and note (1).

The master is not bound, as the agent of the shipowner, to send goods on in another bottom where his own ship is incapacitated from prosecuting the voyage.

De Cuadra v. *Swann*, 16 C. B., N. S. 772. See *O'Morris* v. *Robinson*, 3 B. & C. 196; 5 Dow. & R. 35; *Cannan* v. *Meaburn*, 1 Bing. 243; *Arthur* v. *Schooner Cassins*, 2 Stor. C. C. 81.

In considering the circumstances under which the duty of the master arises to send on cargo, regard must be had to 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.

Hunt v. *Roy. Ex. Ass. Co.*, 5 M. & S. 47; *Thompson* v. *Roy. Ex. Ass. Co.*, 16 East, 214; *Milles* v. *Fletcher*, 1 Dougl. 231a (doubted, Arn. p. 951); *Hudson* v. *Harrison*, 3 B. & B. 97; 6 J. B. Moore, 288; *Natura* v. *Henderson*, L. R., 5 Q. B. 346; *Niagara* v. *Cordes*, 21 Howard, U. S. R. 728; *King* v. *Shepherd*, 3 Story, U. S. R. 349; *Delaware Ins. Co.* v. *Winter*, 38 Penn. St. 176.

When Justified in Delaying and Deviating.

341. A master, on the receipt of credible information that his vessel will be exposed to imminent peril by continuing his voyage, is justified in deviating or pausing for a reasonable time to avoid that peril or to make inquiries.

The Teutonia, L. R., 4 P. C. App. 171; 1 Asp. Mar. Law Ca. 214.

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Mutual Insurance Associations.

Their Policies.

348. Policies issued by these associations to their own members must be stamped.

In re London Marine Ins. Ass. (*Smith's case*), L. R., 4 Ch. 611; 30 & 31 Vict. c. 23, ss. 7 and 9.

[NOTE.—The stamp act provides, however, that any policy of mutual insurance having a stamp or stamps impressed thereon, may, if required, be stamped with an additional stamp or stamps, provided that, at the time such additional stamp or stamps shall be required, the policy shall not have been signed or underwritten to an amount exceeding the sum or sums which the stamp or stamps previously impressed thereon will warrant. Sect. 9.]

Liability of Members.

349. The members are severally liable upon the association policy for their own proportion of the sum insured only, unless otherwise provided by the rules.

Lees v. *Smith*, 7 T. R. 338; *Borrell* v. *Moore*, 4 Camp. 166. See Phillips, Mar. Ins. 523a.

The amount of liability on policies may be limited by the rules. Any further limitation in the policy not provided for by the rules must be plainly expressed on the face of the policy.

Gray v. *Gibson*, L. R., 2 C. P. 120.

The members of a mutual marine insurance association may make rules providing that members shall not sue the other members on policies granted by the association.

Wright v. *Ward*, 1 Asp. M. L. Ca. 25.

A member having done all required of him by the rules in the way of providing for payment of his share of a loss, is not liable to an action by another member to recover for a loss under a policy.

Redway v. *Sweeting*, L. R., 2 Ex. 400.

The managers of an association have no right of action against a member for premiums, or for his contribution to losses paid.

Gray v. *Pearson*, L. R., 5 C. P. 568.

Clauses in the policies of mutual associations providing for arbitration will not exclude members from submitting points of law to the courts, unless the intention so to do is clearly expressed.

Alexander v. *Campbell*, 1 Asp. M. L. Ca. 373.

Stipulations.

350. A rule of a mutual insurance association, merely directory to its committee in examining vessels, is not an express warranty.

Harrison v. *Douglas*, 5 Nev. & M. 180; 3 Ad. & E. 396.

Neutral.

351. A neutral, though residing in an enemy's country and in partnership with an alien enemy, may insure his own interest in the joint property.

Rotch v. *Edie*, 6 T. R. 413.

A fortiori, a neutral residing in an enemy's country may insure goods consigned to a neutral port on behalf of a neutral.

Bromley v. *Hesseltine*, 1 Camp. 75.

Goods of a neutral in a neutral ship, destined for an enemy's port, may be insured.

Barker v. *Blakes*, 9 East, 283.

The mere existence of a trading establishment in a hostile state, though unaccompanied with residence, gives a belligerent a right to treat all the property of the neutral connected with the hostile firm as enemy's property.

The Vigilantia, 1 Rob. Rep. 1; *The Portland*, 3 Rob. Rep. 41; *The Herman*, 4 C. Rob. Ad. Rep. 228; *The Jonge Klassina*, 5 C. Rob. Ad. Rep. 297.

The neutral character of a consignee is not affected by the circumstance that the port of consignment, being in neutral dominion, is occupied by enemy's troops.

Bromley v. *Hesseltine*, 1 Camp. 75.

Over and Double Insurance.

Over Insurance.

352. There is an over insurance if it turns out that the whole amount insured in the different policies is greater than the whole value of the interest at risk.

Arn. 4th edit. 309; *Columbian Ins. Co.* v. *Lynch*, 11 Johns. Rep. 233.

Double Insurance.

353. Double insurance takes place when the assured makes two or more insurances on the same subject, the same risk and the same interest.

Ibid.

Adjustment.

354. In case of over insurance the different policies are considered as making but one insurance, and are good to the extent of the value first at risk. The assured can recover no more than such value, but he may sue the underwriters on any one or more of the policies, and recover to the full extent of his loss, supposing it to be covered by the policy or policies on which he elects to sue; leaving the underwriters so sued to recover a rateable sum by way of contribution from the underwriters on the other policies.

Newby v. *Reid*, 1 W. Bl. 416; *Rogers* v. *Davis* and *Davis* v. *Gildart*, 1 Marsh. Ins. 140; 2 Park, Ins. 600, 601.

AMERICAN RULE.—The same.

[NOTE.—Policies have sometimes a clause introduced into them to prevent the rule of contribution, and to make the insurers responsible according to the order of date of their respective policies. See 3 Kent, at p. 368; *Columbian Ins. Co.* v. *Lynch*, 11 Johns. 233; *Lucas* v. *Jefferson Ins. Co.*, 6 Cowen, 635; *Thurston* v. *Koch*, 4 Dall. 348.]

FRENCH RULE.—If there be several contracts of insurance effected without fraud on the same subject, and the first contract insures the total value of the subject at risk, it alone shall be enforced. The insurers who have signed the subsequent contracts are freed from liability, and receive only ½ per cent. on the sum insured. If the whole value of the subject insured is not covered by the first contract, those insurers who have signed the subsequent contracts are responsible for the surplus, in the order of the date of their respective signatures.

Code de Com. Art. 359.

GERMAN RULE—*Over Insurance.*—Insurance has no legal validity so far as it exceeds the insurable value. In the case of simultaneous conclusion of various insurance contracts, if the total amount of the sums assured exceeds the insurable value, all underwriters together are only answerable to the extent of the insurable value, each of them being liable for such a percentage of the insurable value as the sum he has insured represents in proportion to the total of the amounts insured.

Gen. G. M. Law, Art. 791.

Double Insurance.—When an interest which has already been insured to its full value is again insured, the latter insurance is legally invalid so far as the interest has already been insured for the same time and against the same danger. If the full value is not covered by the earlier insurance, the latter insurance is only valid for that part of the value not previously insured, so far as the insurance has been taken for the same time and against the same danger.

Id. Art. 792.

[See the subsequent provisions of this law.]

Valuation.

355. The valuation is binding between the parties, and if the assured have recovered under another policy the amount of the valuation, he can recover nothing under the policy in suit. If he have recovered less, the amount so recovered goes in reduction of the amount recoverable under the valued policy.

Bruce v. *Jones*, 1 H. & C. 769; 32 L. J., Ex. 132; *Irving* v. *Richardson*, 1 Moo. & R. 153; 2 B. & Ad. 193; *Morgan* v. *Price*, 4 Ex. 615; 19 L. J., Ex. 201.

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The repairing or replacing of parts of the ship injured or destroyed by the perils insured against is particular average, though such parts may previously have become deteriorated by age and use, provided the ship was seaworthy at the commencement of the risk.

Phillips, s. 1425.

If a ship is repaired at a port of distress and totally lost before arriving at her destination, the cost of the repairs is recoverable in addition to the total loss.

Livie v. *Jansen*, 12 East, 655 (per Lord Ellenborough). See *Le Cheminant* v. *Pearson*, 4 Taunt. 367.

If not repaired when lost, the repairs form no ground of claim (*a*). But if the ship is sold unrepaired, the average loss is recoverable (*b*).

(*a*) See *Knight* v. *Faith*, 15 Q. B. 668, per Lord Campbell.
(*b*) *Stewart* v. *Steele*, 5 Scott's N. R. 927.

The underwriter is liable to repair the damaged or destroyed portion of the ship with materials, &c., corresponding to its original character.

Phillips, s. 1428.

ADJUSTMENT.

358. The owner of the particular interest which has suffered the average loss is entitled to claim against his underwriter in proportion to the sum which the underwriter by the policy has agreed to insure on the property insured.

Ship.

359. Under *valued policies* the basis of adjustment is the value of the ship in the policy, unless manifestly fraudulent.

Barker v. *Janson*, L. R., 3 C. P. 303; *Shawe* v. *Felton*, 2 East, 109; *Haigh* v. *De la Cour*, 3 Camp. 319.

Under *open policies* it is the value of the ship at the commencement of the risk.

Stevens on Average, 190; Beneke, Pr. of Ind. 133.

[Note.—In open policies, therefore, the underwriter pays the same aliquot part of the sum he has agreed to insure, as the particular average is of the ship's value at the commencement of the risk. In valued policies he pays the same proportion of the valuation in the policy.]

From the cost of repairs, in the absence of any stipulation in the policy, one-third new material for old is deducted (*a*); unless the ship be on her first voyage out and home (*b*).

(*a*) *Da Costa* v. *Newnham*, 2 T. R. 407; *Poingdestre* v. *Corporation of the Royal Exchange*, Ry. & Moo. 378. It is doubtful whether this could apply to an iron ship. See *Lidgett* v. *Secretan*, L. R., 6 C. P. at p. 623.

(*b*) *Fenwick* v. *Robinson*, 3 C. & P. 323; *Pirie* v. *Steele*, 2 Mood. & Rob. 49; 8 C. & P. 200.

[Note.—The question whether a ship is on her first voyage is not determined by the policy. *Pirie* v. *Steele*, *ubi sup.*]

American Law.—The deduction is made though the ship be new.

Nickels v. *Maine Fire and Mar. Ins. Co.*, 11 Mass. Rep. 253; *Dunham* v. *Commercial Ins. Co.*, 11 Johns. N. Y. 315; Phillips, s. 1431.

The value of the old materials is deducted from the nett expense of the repairs, after deducting the one-third.

Arn. 4th ed. 840.

AMERICAN RULE.—The value of the old materials is applied towards the payment of the new. The third is then deducted from the balance.

2 Phillips, p. 181.

Repairs at a port of distress are paid for by underwriters at their cost at that port.

Benecke, Pr. of Ind. 459—461; *Center* v. *American Ins. Co.*, 7 Cow. N. Y. 564.

Goods sold to pay for repairs at a port of distress are paid for according to their clear value at the port of destination, including freight.

Arnould, 4th ed. 841 (n. 3).

FREIGHT.

[See this title, sub-title "Partial Loss."]

360. The goods loaded falling short by reason of the perils insured against of the full intended cargo, the underwriter on a valued policy is liable to pay only as particular average such proportion of the value in the policy as that part of the cargo for which freight would have been payable but for the intervention of the perils insured against, bears to the full intended cargo.

Forbes v. *Aspinall*, 13 East, 323.

Under open policies the loss is adjusted upon the gross proceeds of the freight at the port of

sales are added to the amount of the particular average after its quantum has been ascertained, and the whole is then apportioned on the underwriters in the usual way. Stevens on Average, 148—150; Benecke, Pr. of Indem. 436, 437.]

If the assured puts an end to the voyage at a port short of the destination, the loss the goods may have sustained by sea damage should be adjusted on the same principles as at the port of destination.

2 Phillips, s. 1467.

To make the underwriter liable under the memorandum the loss must amount to the stipulated per-centage on the insured value.

Particular Charges.

[See "Suing and Labouring," *post*.]

Perils of the Sea.

Definition.

362. Perils of the sea include all fortuitous occurrences which are incident to navigation, and the extraordinary action of the winds and waves proximately causing loss or damage to the subject insured.

If the damage or loss arises from no unusual cause, though the winds and waves may be concerned in it, the loss is to be attributed to wear and tear, for which the underwriters are not responsible.

See the judgment in *Dudgeon* v. *Pembroke*, L. R., 9 Q. B. 581; more fully reported 31 L. T. Rep., N. S. 31. To the same effect, Lush, J., upheld by the Court of Common Pleas, in *Merchants' Trading Co.* v. *Universal Marine Ins. Co.*, unreported (*a*), but referred to in *Dudgeon* v. *Pembroke* and *Anderson* v. *Morice*, 31 L. T. Rep., N. S. 605; L. R., 10 C. P. 58.

[Note.—The words "perils of the sea" are terms of general import upon which the Court is to put a construction. See *Crofts* v. *Marshall* (*ubi infra*). Story, J., in 2 Sumner, 567, says perils of the sea must be clearly understood to include only such losses as are of an extraordinary nature, or arising from irresistible force or some overwhelming power which cannot be guarded against by ordinary skill and prudence.]

(*a*) I have been favoured with the shorthand writer's transcript of the judgment delivered by the Court of Common Pleas on the 25th of November, 1870, on an application for a new trial. The facts are thus stated:—

By the policy the vessel was insured on a voyage from the Mersey to Cardiff, while there, and thence to Alexandria, while there, and then home to a port, &c.

Having taken on board a few hundred tons of coal at Liverpool, the vessel proceeded to Cardiff, where she shipped a cargo

A vessel which is proved to have been in good repair as a seagoing ship at the commencement of the risk, but which, nevertheless, without any apparent cause, founders during the voyage, must be taken

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of over 2,000 tons of coal for Alexandria. She left the Cardiff Docks on the morning of the 10th of September, 1869, with this full cargo on board, and on the night of the same day, whilst riding at her anchor in Cardiff Roads, foundered. There was no stress of weather or heavy sea, there were no rocks, and nothing to account for her going down.

The judgment then proceeds thus :—"The account given by those on board was, that the water came in rapidly in one place and in considerable quantities, that there was a noise as of the crashing or rending of iron at or near that place, and that the vessel quickly filled with water and sunk. The substantial defence set up by the underwriters was that the vessel was not seaworthy, and that the loss was occasioned by the inherent weakness of the vessel caused by an originally weakly construction, or by deterioration the result of neglect, and her consequent inability to carry the full cargo with which she was finally laden, and that she broke up from that cause alone and not from any extraordinary or unusual peril. The question was discussed at the trial, and endeavoured to be solved by evidence given on both sides as to the cause of the sudden irruption of the water in Cardiff Roads. It was contended for the plaintiffs that the vessel was proved to have been thoroughly repaired and to have been seaworthy on leaving Birkenhead, and that the foundering or sinking of the vessel at Cardiff could, therefore, only have resulted from some inexplicable and extraordinary accident, which must, therefore, be the cause of the foundering, which was a peril insured against. It was contended for the defendants that no extraordinary perils were proved, that the fact of this vessel having sunk without any apparent or adequate cause almost immediately after her full cargo was on board, was the strongest evidence of her not having been fit to encounter the ordinary perils of the voyage; that, under the circumstances which were proved, nothing whatever having been shown to account for the vessel sinking whilst riding at anchor in smooth water and so soon after she left Cardiff, the natural presumption would arise that the vessel was not seaworthy and that the loss had arisen from that cause. The warranty or condition of seaworthiness was explained by the learned judge to the jury as follows: namely, 'That the assured undertakes in a voyage policy that the vessel shall start upon the voyage in all respects fit to encounter the ordinary perils incident to such a voyage,' and he told them that if the vessel did not start upon the voyage in that condition then the policy did not attach at all, and the underwriters were free

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363. *Examples of what are Losses by Perils of the Sea.*

Stranding, where it is fortuitous and not arising in the ordinary course of the voyage.

Fletcher v. *Inglis*, 2 B. & Ald. 315. Ebbing tide, hard and uneven bottom, swell in harbour.

Loss of ship by running her ashore, being waterlogged, and incapable of pursuing the voyage, although no unusual cause.

Dudgeon v. *Pembroke* (*sup.*).

Sinking in harbour from no apparent cause, ship being proved seaworthy.

Anderson v. *Morice* (*sup.*); L. R., 10 C. P. 58.

[See further examples, "Loss: Cause of Loss," *ante*.]

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must have been in such a condition when she left the dock as that she could not encounter the ordinary perils of the voyage—she could not ride at anchor in still water.' After some further observations, the learned judge concluded as follows: 'As I have said, the two questions are so mixed up together, that if it was not a peril of the sea there is an end of it in that way. If not, this occurring so soon after she left the dock, the inference seems irresistible that she must have been in a very infirm state, although not known to the parties when she left the dock, to have been the subject of such a catastrophe within twelve hours after she sailed.' As to the first alleged misdirection, the question at the trial was whether the vessel sank through unseaworthiness or from some extraordinary and unaccountable accident, and the learned judge compendiously expressed this contention in the question which he left to the jury of whether the leak was attributable to injury and violence from without or to weakness within. It is quite true that the perils mentioned by the learned judge do not include all the risks and perils covered by the policy; but from the nature of the question that was raised in this case, which was as to the cause of the sudden rushing of the water into the vessel, whether it was the inherent weakness of the vessel in consequence of original defects and construction, or neglected rust, or some unaccountable accident resulting in foundering, and with reference to the evidence, the attention of the jury was, in our opinion, properly called to such of the perils as were material to the point raised for their consideration." See 2 Asp., M. L. Ca. 431.

364. *Examples of what are not.*

Ship damaged by being necessarily aground when the tide was low. Nothing fortuitous.

Magnus v. *Buttemer*, 11 C. B. 876; 21 L. J., C. P. 119.

Ship in graving dock damaged by being blown over by a violent gust of wind.

Phillips v. *Barber*, 5 B. & Ald. 161.

Leakage of oil by pitching of ship: but stowage not disturbed.

Crofts v. *Marshall*, 7 C. & P. 597.

Loss of goods by the ship being sunk by the fire of another vessel of the same nation mistaking her for an enemy.

Cullen v. *Butler*, 5 M. & Sel. 461.

Electric cable insufficiently insulated; expense of laying it down lost through the chemical action of the salt water on the wire.

Paterson v. *Harris*, 1 B. & S. 336; 30 L. J., Q. B. 354.

Destruction of ship's bottom by worms in seas where worms ordinarily assail ships, unless sheathing be torn off by violent action of the sea and the bottom thus exposed.

1 Ph. s. 1101; Kent, 3, p. 305, 306; *Rohl* v. *Parr*, 1 Esp. 444; *Martin* v. *Salem*, 2 Mass. Rep. 420; *Hazard* v. *N. Eng. Ins. Co.*, 8 Pet. Sup. C. Rep. 557.

Damage by rats.

Hunter v. *Potts*, 4 Camp. 203; *Laveroni* v. *Drury*, 8 Exch. 166; 22 L. J., Ex. 2; *Kay* v. *Wheeler*, L. R., 2 C. P. 302.

Commingling of goods on ship being wrecked and marks of identification obliterated by sea water. The owners refused to accept an apportionment.

Spence v. *Union Marine Ins. Co.*, L. R., 3 C. P. 427.

[See "Loss: Cause of Loss," *ante*.]

Pirates, Rovers, and Thieves.

Pirates and Rovers.

365. This term covers piracy and robbery by force by persons not belonging to the vessel (*a*):—

An enforced sale of a cargo of a ship ashore at a low price by a mob (*b*):

A seizure and carrying away of the ship by the mutinous crew (*c*):

Or by mutinous passengers (*d*).

[Note.—The peril is by many authorities considered covered by the term, perils of the sea. See 3 Kent, Com. 303, note.]

Thieves.

366. "Thieves" in the English policy is taken to include only theft from without, accompanied by violence.

[No authority need be cited for this principle earlier than *Taylor and others* v. *The Liverpool and Great Western Steam Co.*, L. R., 9 Q. B. 546, where it was fully recognized.]

(*a*) *Harford* v. *Maynard*, 1 Park, Ins. 36. See *Dean* v. *Hornby*, 3 E. & B. 180.

(*b*) *Nesbitt* v. *Lushington*, 4 T. R. 783.

(*c*) *Brown* v. *Smith*, 1 Dow. P. C. 349. *Dixon* v. *Reid* declared this a loss by barratry, 5 B. & Ald. 597.

(*d*) *Naylor* v. *Palmer*, 8 Ex. 739; 10 Ib. 382; 22 L. J., Ex. 329; 23 Ib. 323. Held to be a loss within a warranty "free of seizure," *Kleinwort* v. *Shepard*, 1 E. & E. 447.

Policy.

367. Every contract of sea insurance must be expressed in a policy.

30 & 31 Vict. c. 23, s. 7.

Definitions of the Stamp Act (30 *& 31 Vict. c.* 23).

"Sea insurance" means any insurance (including re-insurance) made upon any ship or vessel, or upon the machinery, tackle, or furniture of any ship or vessel, or upon any goods, merchandise, or property of any description whatever on board of any ship or vessel, or upon the freight or any other interest which may be lawfully insured in or relating to any ship or vessel.

"Policy" means any instrument whereby a contract or agreement for any sea insurance is made or entered into.

Classification.

368. Policies are thus classified:—

Open and valued. On a voyage or for a time, or both. On interest, or without interest, *i. e.*, wagers.

Open and Valued Policies.

369. Valued policies differ from open policies in this:

A claim being made upon an open policy the value must be proved:

As to what constitutes a valued policy, see *Wilson* v. *Nelson*, 5 B. & S. 354; 33 L. J., Q. B. 220; *Bousfield* v. *Barnes*, 4 Camp. 228; *Anderson* v. *Morice*, 31 L. T. Rep., N. S. 286;

Being made upon a valued policy the valuation is binding, the transaction being *bonâ fide*.

Barker v. *Janson*, L. R., 3 C. P. 303; *North of England Iron Steamship Ins. Assoc.* v. *Armstrong*, L. R., 5 Q. B. 244; *Ionides* v. *Pender*, L. R., 9 Q. B. 531.

FRENCH LAW.—The value in the policy is taken to be true as against the insurer, till he proves the contrary. If he proves a considerable over valuation the policy will be opened, though there was no intention to deceive.

See authorities collected, Arn. 4th ed. 288; Phillips, s. 1183, n. 2.

Time Policies.

370. Time policies are independent of the voyage of the ship.

Consequently there may be a policy even on freight for a time within which the voyage could not be completed.

Michael v. *Gillespy*, 26 L. J., C. P. 306; 2 C. B., N. S. 627.

From the instant that the policy attaches the insurer's right to the full premium is complete, and the assured is entitled to indemnification in case of loss.

Tyrie v. *Fletcher*, 2 Cowp. 666; *Lorraine* v. *Tomlinson*, 2 Dougl. 585.

A time policy may be made to commence from a period anterior to its date, and such a policy will cover a loss which has already happened, though the words "lost or not lost" be not in the policy.

Hucks v. *Thornton*, Holt's N. P. 30.

Mixed Policies.

371. These are policies in which not only time but the termini of the voyage are specified.

A loss to be recoverable under such a policy must be the result of a peril occurring during the time fixed and whilst the ship is on her voyage from one terminus to another.

Interest.

372. Policies on British ships or on goods or effects laden on board such ships, "interest or no interest," or "without further proof of interest than the policy," or "by way of gaming or wagering," or "without benefit of salvage to the insurer," are void.

19 Geo. 2, c. 37, s. 1; *Lowry* v. *Bourdilieu*, 2 Doug. 468; *Kent* v. *Bird*, 2 Cowp. 583; *Kulen Kemp* v. *Vigne*, 1 T. R. 304; *Murphy* v. *Bell*, 4 Bing. 567.

FOREIGN LAW.—Wager policies are prohibited almost universally.

Arn. 4th ed. 117, 118.

If a policy contains words to the same effect as those enumerated in the Act, the case is within it, although it may be manifest that it is not a gaming insurance.

Best, C. J., in *Murphy* v. *Bell* (*ubi sup.*).

Exceptions.

(1) Policies on private ships of war fitted out to cruise against the Queen's enemies.

19 Geo. 2, c. 37, s. 2.

(2) Policies on effects from any ports or places in Europe and America in the possession of the crowns of Spain and Portugal.

19 Geo. 3, c. 37, s. 2; *Da Costa* v. *Frith*, 4 Burr. 1966.

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The contract is not complete until the policy is executed and delivered to and accepted by the assured, or some agent for him.

Xenos v. *Wickham*, L. R., 2 H. of L. 296.

Stamp.

374. The policy must be stamped before execution, and dated.

Stamp Law, 30 & 31 Vict. c. 23, ss. 9, 13. As to stamping policies made abroad, see 28 & 29 Vict. c. 96, s. 15; 30 & 31 Vict. c. 23, s. 9, par. 2.

Statements.

375. The policy should state—

1. The name of some party either really or nominally insured. 2. The voyage or risk insured. 3. The subject insured. 4. The perils insured against. 5. The name of the ship and master where known. 6. The premium. 7. The sums insured. 8. The subscription of the underwriter.

A policy not containing (2) (3) (4) (7) and (8) is absolutely null and void.

30 & 31 Vict. c. 23, s. 7. See *Edwards* v. *Aberayron Mutual Ship. Ins. Soc.*, 31 L. T. Rep., N. S. 779.

Time.

376. No policy shall be made for any time exceeding twelve months.

30 & 31 Vict. c. 23, s. 8.

The Ship; and Master.

377. The ship must be correctly described, but a mistake in her name which does not mislead the underwriter will not avoid the policy.

Ionides v. *Pacific Fire and Marine Ins. Co.*, L. R., 7 Q. B. 517; *Le Mesurier* v. *Vaughan*, 6 East, 382; *Hall* v. *Molineaux*, 6 East, 385.

[NOTE.—Consent or necessity justify the employment of a ship other than that described. Arn. 4th ed. 323.]

The ship upon which goods may be shipped being uncertain, the clause "ship or ships" is allowed.

Arn. 4th ed. 318, note.

A subsequent incorrect declaration as to the ship on a policy containing this clause will not avoid the policy.

Ionides v. *Pacific Fire and Marine Ins. Co.* (*sup.*); *Robinson* v. *Touray*, 3 Camp. 158.

Master.

It is no implied condition that the master should be correctly named, or that the same master should continue on board throughout the voyage.

The master, however, must not be changed if the effect is to increase the risk, *ex. gr.*, by employing a belligerent instead of a neutral.

Arn. 4th ed. 324.

In making such a change the assured must act *boná fide*, and provide a competent substitute.

Walden v. *Firemen Ins. Co.*, 12 Johns. 138 (per Judge Platt.)

[NOTE.—See as to the effect of employing uncertificated masters, &c., *Farmer* v. *Legg*, 7 T. R. 186; *Cunard* v. *Hyde*, 27 L. J., Q. B. 408; 29 id. 6; *Wilson* v. *Rankin*, 34 L. J., Q. B. 62; L. R., 1 Q. B. 162.]

Parties.

378. No policy shall be effected without first inserting therein the name or names, or the usual style and firm of dealing of—

(1) One or more of the persons interested; or of

(2) The consignor or consignee of the property to be insured; or of

(3) The persons resident in Great Britain who shall receive the order for and effect the policy; or of

(4) The persons who shall give the order to the agent immediately employed to effect it.

28 Geo. 3, c. 56; *Hibbert* v. *Martin*, 1 Camp. 538; *Mellish* v. *Bell*, 15 East, 4; see *Watson* v. *Swann*, 11 C. B., N. S., 756; 31 L. J., C. P. 210.

[NOTE.—Part owners should separately insure their separate interests. *Bell* v. *Humphries*, 2 Stark. 345; *Roberts* v. *Ogilby*, 9 Price, 269. See *Robinson* v. *Gleadow*, 2 Bing. N. C. 156.]

The indorsement of a declaration in favour of a stranger to an underwriter on a general policy gives no right of action to the stranger against the underwriter.

Watson v. *Swann* (*ubi sup.*).

[In this case the person insuring was not at the time of the execution of the policy an agent for the owner of the interest subsequently declared. There was, therefore, no privity whatever between the owner and the underwriter.]

Whether the broker making the indorsement can sue for the benefit of the person interested, is not decided. *Semble*, he may.

Erle, C. J., p. 213 of 31 L. J., C. P.

Mistakes in declarations of interest (which may be verbal) may be rectified by parol.

See *Ionides* v. *Pacific Fire and Marine Ins. Co.*, L. R., 7 Q. B. 50; *Robinson* v. *Touray*, 3 Camp. 158.

To be material an alteration must change the sense or in some degree affect the substance of the contract.

Examples.

Material Alterations.

Alteration of destination (*a*), and addition of alternative destination (*b*).

(*a*) *Laird* v. *Robertson*, 4 Br. P. C. 488; (*b*) *Campbell* v. *Christie*, 2 Stark. 64.

Insertion of a specific subject of insurance in a policy which had been executed without any such description.

Langhorn v. *Cologan*, 4 Taunt. 330.

Alteration of a specified day in the warranty as to time of sailing.

Fairlie v. *Christie*, 7 Taunt. 416.

Addition of a place of call in a policy giving leave to touch and stay at all ports whatever, such place of call being out of the course of the voyage insured.

Forshaw v. *Chabert*, 3 Br. & B. 158.

Immaterial Alterations.

The addition of the name of the ship in Spanish and of the words "both or either" to the two ports of destination.

Clapham v. *Cologan*, 3 Camp. 382.

Adding the words "and trade" to a policy giving leave to touch and stay, sell, barter and exchange, load, unload or reload, such policy in effect giving liberty to trade.

For cases and authorities, see n. 1, p. 253, Arn. 4th ed.

Alterations and the Stamp Act.

380. An alteration made in the policy requiring the consent of the underwriter at common law, and receiving it, is nevertheless void *without a fresh stamp* if—

(1) Made after the determination of the risk originally insured;

[NOTE.—As to what is a determination of the risk, see Lord Ellenborough in *Kensington* v. *Inglis*, 8 East, 273.]

(2) It prolongs the time covered by the policy beyond the period of six months in the case of a policy made for a less period than six months, or beyond the period allowed by the Stamp Act in the case of a policy made for a greater period than six months;

(3) It changes the property in the articles insured;

(4) It adds a sum to that insured.

30 & 31 Vict. c. 23, s. 10. See, on the construction of prior similar statutes, *Ridsdale* v. *Shedden*, 4 Camp. 107; *Hubbard* v. *Jackson*, 4 Taunt. 169; *Ramstrom* v. *Bell*, 5 M. & S. 267; *Brocklebank* v. *Sugrue*, 1 B. & Ad. 81; *Hill* v. *Patten* (Lord Ellenborough), 8 East, 373, 376.

A policy void under the stamp law, by reason of an alteration, is void altogether.

Example.

The original insurance being on "outfit," the policy was altered to "goods." The assured was held disentitled to recover either on outfit or goods.

Hill v. *Patten* (*sup.*), and *French* v. *Patten*, 1 Camp. 72; 9 East, 351.

Neither an alteration of an express warranty nor a waiver of an implied warranty can affect the policy.

Hubbard v. *Jackson*, 4 Taunt. 174; *Weir* v. *Aberdein*, 2 B. & Ald. 320.

The mere correction of a mistake does not affect the policy.

Cole v. *Parkin*, 12 East, 471; *Sawtell* v. *Loudon*, 5 Taunt. 359.

The insurance being on goods by "ship or ships" to be declared, the wrong ship being declared, a memorandum correcting the mistake does not require a fresh stamp.

Robinson v. *Touray*, 3 Camp. 158; 1 M. & S. 217.

Forfeiture and Rescission.

381. A policy may be avoided by failure of the assured to perform conditions precedent or to comply with express or implied warranties.

Hughes v. *Tindall*, 18 C. B. 98; *Turnbull* v. *Woolfe*, 9 Jur., N. S. 57. And see "Warranties," *post.*

The rescission of the contract must be the act of both parties to it.

See *Ionides* v. *Harford*, 29 L. J., Ex. note at p. 39; *Baines* v. *Woodfall*, 6 C. B., N. S. 657; 28 L. J., C. P. 338.

An insurance broker has not power to demand or consent to the cancellation of the policy, although it has been left in his hands.

Xenos v. *Wickham*, L. R., 2 H. of L. 296.

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Continuing Policies.

383. A policy to be renewed from year to year is a continuing policy.

Michael v. *Gillespy*, 2 C. B., N. S. 627; 26 L. J., C. P. 306; and see *Philadelphia Ins. Co.* v. *American Ins. Co.*, 23 Phil. St. 65.

It is a question of construction and of evidence whether the contract has terminated or is continuing.

Principles governing the Construction of Policies.

384. The ordinary principles upon which mercantile instruments are construed are applicable to policies of marine insurance.

Where the contract can be shown to have been made in contemplation of particular usages, such usages will be considered as forming a part of and controlling the meaning of the policy.

[See "Usage," *post.*]

The policy being a printed form with certain blanks filled up in writing, then if there is any doubt about the sense or meaning of the whole, the words superadded in writing are entitled to have a greater effect attributed to them than the printed words.

Robertson v. *French*, 4 East, 130 (Lord Ellenborough); *Gumm* v. *Tyrie*, 33 L. J., Q. B. 97.

Written portions of printed forms are also more strictly construed.

Arn. 4th ed. 280.

Scope of the Policy.

385. The policy applies only to maritime risks, unless otherwise declared by the parties.

Rhodoconachi v. *Elliott*, L. R., 4 C. P. 649; *Harrison* v. *Ellis*, 7 E. & B. 465. See *Pelly* v. *Royal Exchange Ins. Co.*, 1 Burr. 341.

The courts will ascertain who has an insurable interest, and construe the policy in favour of those for whose benefit it may appear to have been effected.

Routh v. *Thompson*, 11 East, 428; 13 East, 274.

The intention of the party directing the insurance to be effected determines whose interest the policy can be applied to protect.

Grant v. *Hill*, 4 Taunt. 380; *Irving* v. *Richardson*, 2 B. & Ad. 193.

Any party to whom an interest in the property insured "doth, may, or shall appertain," at any time during the pendency of the risk may, under the general words, by subsequent adoption, take advantage of the policy to protect such interest, unless it appears from extrinsic evidence that the person directing the policy to be effected intended at the time so to confine the insurance as not to embrace such interest.

When the Policy takes Effect.

386. A policy takes effect from the day of its date.

Lightbody v. *North American Ins. Co.*, 23 Wend. N. Y. 18; *Philadelphia Ins. Co.* v. *American Ins. Co.*, 23 Penn. St. 65.

"On" a certain day extends to all losses happening during any part of the day.

Jackson v. *Ramsay*, 3 Cowen, 75.

"From the day" and "from the day of the date" mean the same thing, and are both exclusive.

Pugh v. *Leeds*, Cowp. 714.

Postponing the risk by making a compulsory intermediate passage does not prevent its attaching, if the voyage is pursued without unnecessary delay.

Ph. s. 924; *Driscol* v. *Passmore*, 1 Bos. & P. 200.

Where the policy does not attach at the outset for want of a subject coming within the description in the policy, an indorsement of liberty to touch at another port will not cause it to attach, the underwriters not knowing that the risk had not commenced.

Scriba v. *Ins. Co. of North America*, 2 Wash. C. C. 107; Ph. s. 947.

A policy may relate to a risk and cover losses anterior to its date if there be no concealment or misrepresentation by either party.

Mead v. *Davison*, 3 Ad. & E. 303; *Hallock* v. *Commercial Ins. Co.*, 2 Dutch, N. Y. 268; *Commercial Ins. Co.* v. *Hallock*, 3 Dutch, N. Y. 645.

Usual Clauses.

387. The usual clauses in a policy now are as follow:—

(1) An assignment clause; (2) a clause providing "lost or not lost;" (3) a statement of the *ter-*

A policy may be assigned under this act after loss so as to entitle the assured to sue in his own name.

By an assignment including "all rights accrued under the policy," the assignee obtains an interest in the thing lost, and is therefore "entitled to the property insured" within the terms of the act.

Loyd v. *Fleming*, *Loyd* v. *Spence*, L. R., 7 Q. B. 299; *Alexander* v. *Campbell*, 1 Asp. M. L. C. 373.

The consent of the underwriters is not necessary to the validity of an assignment.

Sparkes v. *Marshall*, 2 Bing. N. C. 761.

American Law.—The Boston policy contains a clause "that an assignment shall avoid the policy without the previous consent in writing of the assured," Duer. vol. 2, pp. 62, 63; the Philadelphia policy, "that no assignments shall be valid unless the premium be first paid or secured to the satisfaction of the underwriters." *Ibid.* pp. 68, 69. By the usage in Boston, if the insurers consent to the assignment, the assignee is entitled to exactly the same extent of indemnity as the party originally insured. Arn. 4th ed. 106, note.

The assignment may be made any time before action brought.

Sparkes v. *Marshall* (*ubi sup.*).

Where the assignee sues in his own name or in the name of his broker, it is open to the defendant

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make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom, or for whose account, the policy sued upon was effected.

Sect. 2: It shall be lawful to make any assignment of a policy of insurance by indorsement on the policy in the words, or to the effect set forth in the schedule, viz., "I do hereby assign the within policy on," &c.

to make any defence which he would have been entitled to make if the action had been brought in the name of the person by whom or for whose account the policy sued upon was effected.

De Pothonier v. *De Mattos*, E. B. & E. 461; *Gibson* v. *Winter*, 5 B. & Ad. 96; *Banerman* v. *Radenius*, 2 Sm. L. C. 343.

In the case of absolute sale or transfer of the subject-matter of insurance there must be an assignment of the policy by the vendor to the vendee, or an agreement to keep it alive for the benefit of the latter, to enable the vendor to sue as trustee for him.

Powles v. *Innes*, 11 M. & W. 10; *Hibbert* v. *Carter*, 1 T. R. 745.

Lost or not Lost.

389. This clause creates a contract of indemnity against all past loss where the assured had an insurable interest at the time of the loss, but against past partial loss only where the assured acquires his interest subsequent to the loss.

Sutherland v. *Pratt*, 11 M. & W. 296; 2 Duer, p. 7; *Hastie* v. *Couturier*, 9 Ex. 109, Coleridge, J.

The contract is binding where both parties were aware of the loss when they executed the policy, the insurance having been accepted and the premiums paid previously.

Mead v. *Davison*, 3 A. & E. 303; *Gledstanes* v. *Royal Exchange Ass. Co.*, 34 L. J., Q. B. 30.

Sue and Labour.

390. This clause runs thus: "And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel for, in and about the defence, safeguard and recovery of the said goods and merchandises, and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured."

[See title "Suing and Labouring," *post.*]

Memorandum.

391. The memorandum in the policy is in this form:—Corn (*a*), fish (*b*), salt (*c*), fruit, flour, and seed are warranted free from average unless general or the ship be stranded.

(*a*) Includes malt, *Moody* v. *Surridge*, 2 Esp. 633; peas and beans, *Mason* v. *Skurray*, 1 Marsh. Ins. 223; 1 Park, 245, 253; but not rice, *Scott* v. *Bourdillon*, 2 B. & P., N. R. 213.

(*b*) *Barker* v. *Ludlow*, 2 Johns. Ca. 289, "dried fish" held not to include other kinds, such as "pickled fish." See, as to "roots," *Colt* v. *Commercial Ins. Co.*, 7 Johns. Rep. 385; "skins," *Bakewell* v. *United Ins. Co.*, 2 John. Ca. 246.

(*c*) Does not include saltpetre, *Journu* v. *Bourdieu*, Marsh. on Ins. 216; 1 Park, 245.

Sugar, tobacco, hemp, flax, hides and skins (*a*) are warranted free from average under 5*l.* per cent.

(*a*) Held in the United States not to include furs. *Astor* v. *Union Ins. Co.*, 7 Cowen's Rep. 202.

And all other goods, and also the ship and freight,

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All other goods are taken as forming together one mass of property, and the percentage of damage is calculated on the aggregate value of it, unless (*a*) the articles not enumerated are separately valued in the policy.

Phillips, s. 1786; Arn. 4th ed. 747.

Where large quantities of the same description of articles, whether enumerated or unenumerated, are made up in separate packages, the damage must amount to 5 per cent. or 3 per cent. of the whole aggregate of packages of the same class of goods, and cannot be calculated upon each separate package.

Arn. 4th ed. 747.

[NOTE.—(*a*) Stipulations are sometimes introduced providing for the payment of average on each species or on given numbers of packages, "as if separately insured." The assured may then claim the percentage on each package, though in the aggregate it fall below the percentage on the whole cargo. Arn. 4th ed. 748.

(*b*) If the damage exceed the required percentage on the whole amount, the assured may calculate the percentage on the whole amount, or on the damaged packages. *Hagedorn* v. *Whitmore*, 1 Stark. 157; Arn. 4th ed. 479].

The premium is not included in estimating the value of the goods.

AMERICAN RULE.—It is included.

Phillips, s. 1790.

Where the loss exceeds the excepted amount of percentage, the underwriter is liable for the full amount of the loss, and not only for the excess.

(*a*) 2 Parsons, 411; *Ocean Ins. Co.* v. *Carrington*, 3 Conn. Rep. 357; Phillips, s. 1788.

The Premium.

392. In the common forms of policy, the underwriter expressly acknowledges the receipt of the premium from the assured—"Confessing ourselves paid the consideration due unto us for the assurance by the assured."

This acknowledgment is binding on the underwriter in the absence of fraud.

[See "Return of Premium."]

All other Perils, &c.

393. This clause covers all other cases of marine damage of the like kind with those specifically named and occasioned by similar causes.

See *Cullen* v. *Butler*, 5 M. & Sel. 461; *Butler* v. *Wildman*, 3 B. & Ald. 398; *Phillips* v. *Barber*, 5 B. & Ald. 161; *Devaux* v. *I'Anson*, 5 Bing. N. C. 519; *Powell* v. *Hyde*, 25 L. J., Q. B. 65; 5 E. & B. 607; *Davidson* v. *Burnand*, L. R., 4 C. P. 117; *Taylor* v. *Dunbar*, L. R., 4 C. P. 206.

[See "Loss," and "Perils of the Sea," *ante*.]

Premium.

[See "Policy: Usual Clauses."]

394. The beneficial owner of the property or interest insured is bound to pay the premium.

Recovery of Premium.

[See "Agents," *ante.*]

Return of Premium.

[See this title, *post.*]

board (*a*), unless the policy by its terms provide otherwise (*b*).

(*a*) *Halhead* v. *Young*, 6 E. & B. 312; 25 L. J., Q. B. 290.
(*b*) *M'Swinney* v. *Royal Exchange Ass. Co.*, 14 Q. B. 646. The insurance was on cargo loaded or to be loaded.

An interest in shares, the value of which is dependent on the success of an adventure, is insurable as being an interest in profits.

Wilson v. *Jones*, L. R., 2 Ex. 139.

[See "Insurable Interest," *ante*.]

How Insured.

396. An insurance may be effected on profits generally without more description, and engrafted upon a policy on ship and goods in the common printed form for a certain voyage. The policy may be either valued or open.

Eyre v. *Glover*, 16 East, 218.

Valuation.

397. Profits must, when valued in the policy, be estimated at an amount which may reasonably be expected to be earned.

Ionides v. *Pender*, L. R., 9 Q. B. 531.

There being an excessive valuation which is concealed from the underwriter, the loss is irrecoverable.

Id.

[NOTE.—It would seem that an excessive valuation would make the policy a wager policy. See Blackburn, J., in *Ionides* v. *Pender*.]

Loss.

398. If the goods are prevented from arriving there is a total loss of profits.

Arn. 4th ed. 911.

There can be no abandonment of profits on a small part of the goods arriving so as to enable the assured to recover for a constructive total loss.

Phillips, s. 1503.

Where the loss on goods is by expenditure and not by damage to them, it is not a loss on profits, unless specifically so agreed in the policy.

Phillips, s. 1475.

Adjustment.

399. 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, 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.

Under an open policy upon profits the assured must prove what amount of profit would have accrued on the goods had they arrived sound.

Phillips, s. 1473.

Re-Insurance.

Definition.

400. Re-insurance is the process by which an insurer secures himself against risks which he has accepted from his assured.

30 & 31 Vict. c. 23, s. 3; *Gledstanes* v. *The Royal Exchange Ass. Co.*, 34 L. J., Q. B. 30.

How effected.

401. The re-insurance need not be described as such in the policy, but the original insurer may insure the subject-matter itself against the risks undertaken by him as if it were an original insurance.

Phillips, s. 498, vol. 1, p. 255.

[NOTE.—Mr. Phillips considers it expedient that the nature of the insurance should be stated in the policy.]

Its Operation.

402. The original contract and the re-insurance are separate and distinct. The re-assured remains solely liable on the original contract, and alone has any claim against the re-insurer.

Arn. 4th ed. 94; 1 Emerig. c. viii. s. 14, p. 252.

FRENCH LAW.—The original insurer in making re-insurance must deduct the amount of premium paid by his assured in estimating his insurable interest.

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Return of Premium.

General Principles.

405. The premium paid (*a*) is returnable under the circumstances stated below (I.), (II.), (III.), (IV.).

Phillips, s. 1847.

[See "Agents," *ante.*]

If an insurance be effected by one as agent, who becomes responsible for the premium, and the supposed principal does not adopt the transaction, the agent cannot recover back the premium, the insurers having incurred the risk.

Hagedorn v. *Oliverson*, 2 M. & S. 485; *Finney* v. *Fairhaven Ins. Co.*, 5 Met. 192.

When a total loss of goods is recovered, there cannot also be a return of premium, *ex. gr.*, for convoy.

Langhorn v. *Allnutt*, 4 Taunt. 511.

[Note.—The reason is that the loss includes the entire premium, added to the invoice price.]

When the assured claims and receives the return premium due upon the arrival of the vessel, and

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(*a*) This means either literal payment, or something equivalent to it.

the policy is adjusted upon that footing, he cannot, without an express stipulation, resort again to the underwriter in any contingency of the adventure.

May v. *Christie*, Holt's N. P. Rep. 67.

Premiums paid upon a policy the subject of which is illegal cannot be recovered back in any event.

Lowry v. *Bourdieu*, Doug. 468; *Andrée* v. *Fletcher*, 3 T. R. 266; *Vandyck* v. *Hewitt*, 1 East, 96; *Morck* v. *Abel*, 3 B. & P. 35.

But if a policy is void in its inception owing to a state of things unknown to the agent at the time of paying the premium, the premium so paid may be recovered back.

Oom v. *Bruce*, 12 East, 225.

So if the parties contemplated obtaining a licence for the voyage insured, which without it would be illegal, the premium paid is recoverable in the event of the licence not being obtained.

Henry v. *Staniforth*, 4 Camp. 270.

Where there is an insurance on ship and freight, and the ship has arrived in safety, and earned freight, the assured cannot afterwards claim a return of premium on the ground that he had no insurable interest, on account of a defect in his title to the ship.

M'Culloch v. *Royal Exchange Ass. Co.*, 3 Camp. 406.

If a policy be assigned the right to a return of premium does not pass with it.

Castelli v. *Boddington*, 1 E. & B. 66; 23 L. J., Q. B. 31.

I.—Where there is no Risk.

406. For example: The adventure not being begun.

[Note.—The risk having attached for however short a period, the premium is irrecoverable. *Moses* v. *Pratt*, 4 Campb. 297; *Tyrie* v. *Fletcher*, 2 Cowp. 666; Phillips, s. 1820.]

The insurance failing from misdescription of the subject.

1 Emerigon, p. 161; *Robertson* v. *United Ins. Co.*, 2 John. N. Y. Ca. 250.

The insured having no interest in the subject.

Routh v. *Thompson*, 11 East, 428.

The insurance being void for mutual mistake of fact.

Phillips, s. 1829.

Proportional Return.

407. Where only a part of the value insured is ever at risk under the policy, the assured is entitled to a return of a part of the premium, called a return of premium for short interest.

Phillips, s. 1829; *Stevenson* v. *Snow*, 3 Burr. 1238.

Exception.

Unless the policy is for an entire period at one entire premium.

Bernsont v. *Woodbridge*, 2 Doug. 781; Phillips, s. 1832; *The Columbian Ins. Co.* v. *Lynch*, 11 Johns. Rep. 232.

though the contract contains no provision for such return.

2 Phillips, p. 497, s. 1836.

When by several policies made without fraud the total sum insured exceeds the whole value at risk, and the risk attaches on all on the same day, all the underwriters on the several policies are equally bound to make a return of premium for the sum insured above the value of the effects, in proportion to their respective subscriptions.

Marsh. on Ins. 649; Arn. 4th ed. 313.

If two sets of policies of different date are effected on the same property, and the entire risk attaches on the earlier, whilst the latter are not yet executed, although the amount insured in the prior set is not equal to the value of the risk, but the aggregate sum insured in the two exceeds it, the underwriters on the latter, in point of date, can alone be called on for a rateable return of premium.

Fisk v. *Masterman*, 8 M. & W. 165.

[NOTE.—Mr. Phillips deduces the following as being in harmony with jurisprudence generally:—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 rata* return must be made on all the insurances which take effect simultaneously, provided the policies contain no express provision for the case. 2 Phillips, p. 502.]

II.—IN PURSUANCE OF STIPULATIONS.

409. Stipulations for the return of premiums are the subject of express agreement.

The condition on which the return is to depend is satisfied by the underwriters being exonerated.

[NOTE.—It is not settled, however, that a return can be claimed where the stipulated event is prevented by a peril not insured against.]

Kellner v. *Le Mesurier*, 4 East, 396; *Dalgleish* v. *Brooke*, 15 East, 295.

410. *Examples.*

"If she sails with convoy and arrives;" the ship herself must arrive, but not necessarily with convoy.

Simond v. *Boydell*, 1 Doug. 268; *Leevin* v. *Cormac*, 4 Taunt. 482, n. (the insurance was on goods which arrived damaged); *Audley* v. *Duff*, 2 B. & P. 111.

[NOTE.—This stipulation is satisfied, though the ship arrive after capture and re-capture. *Aguilar* v. *Rodgers*, 7 T. R. 421. The circumstances of the arrival must be such as to discharge the underwriters from loss. *Dalgleish* v. *Brooke* (*ubi infra*).]

The ship being captured after arrival, and the cargo thus a total loss, the assured is entitled to the stipulated return of premium in addition to the whole sum insured.

Horncastle v. *Haworth*, Marshall Ins. (by Shee), 539.

The underwriters being discharged by breach of warranty before she sails, the assured is nevertheless (*semble*) entitled to the stipulated return.

Meyer v. *Gregson*, Marshall Ins. (by Shee), 538.

"If sold or laid up."

Hunter v. *Wright*, 10 B. & C. 714.

"To return 7 per cent. for arrival."

Dalgleish v. *Brooke*, 15 East, 295.

American cases.—Robertson v. *Columbian Ins. Co.*, 8 John. N. Y. 491; *Pontz* v. *Louisiana Ins. Co.*, 4 Mart. N. S. La. 80.

III.—For Misrepresentation, Concealment or Breach of Warranty.

411. A return of premium may be claimed when the insurance fails owing to concealment or misrepresentation without fraud (*a*) or non-fulfilment of warranty (*b*).

(*a*) *Feise* v. *Parkinson*, 4 Taunt. 640; *Anderson* v. *Thornton*, 8 Exch. 425.

(*b*) *Colby* v. *Hunter*, M. & M. 81.

If a ship seaworthy to lie in port sails without being made seaworthy for the voyage, upon a policy "at and from," there can be no return of premium.

Annen v. *Woodman*, 3 Taunt. 299.

IV.—For Fraud on the part of the Insurer.

412. When the insurer obtains the insurance by fraud the premium paid may be recovered.

See Arn. 4th ed. p. 1007.

Recovery of the Premium paid.

413. In an action by the assured against an underwriter for a return of premium, the policy is conclusive evidence of the receipt of the premium by him.

Anderson v. *Thornton*, 8 Exch. 435; *Dalzell* v. *Mair*, 1 Camp. 532. See *Gaminde* v. *Pigon*, 4 Taunt. 246.

Deduction for the Underwriter.

414. Where the premium is returnable, either wholly or in part, it is customary to allow the underwriter one-half per cent., unless there be an express stipulation in the policy against it.

Stev. on Average, 206; Arn. 4th ed. 1006, 1007.

[Note.—The underwriter may lose his right to this by his own fraudulent conduct. Arn. 1007.]

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Salvage.

416. The part or remnant of the subject insured which survives the peril in a total loss is called salvage.

Payment of a total loss by the underwriter entitles him to all salvage.

Stewart v. *Greenock Marine Ins. Co.*, 2 H. of L. Ca. 159; 1 M'Queen, H. of L. Ca. 382; *Brooks* v. *Macdonnell*, 1 Y. & C. 500.

[NOTE.—If he makes a compromise, the salvage belongs to the assured unless otherwise agreed.]

On abandonment, the assured is bound to assign the salvage to the underwriter.

If, in case of abandonment, the salvage has been lost, or is incumbered 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 be charged, in his adjustment of a total loss, with the amount by which the salvage has been diminished.

Phillips prefers the latter rule, sect. 1716.

Lien.

417. Where the salvage is incumbered with a lien arising out of the perils insured against, the insurers take it subject to such charge.

In the case of property recovered which has been captured, abandoned, or wrecked, the salvors have a lien upon it.

Hartford v. *Jones*, 1 Ld. Ray. 393; 2 Salk. 654.

Where there is a lien on the subject matter by a bottomry lender, the better opinion is, that he must share equally in the salvage with the underwriter—the former in proportion to his capital, and the latter in proportion to the amount insured.

[See "Cargo" and "Freight," *ante*, and "Ship," *post*, tit. "Total Loss—Constructive."]

Salvage Services.

418. Payment made for salvage services rendered to a subject insured is recoverable against the insurers

See 1 Parsons' M. Ins. 590.

Ship.

Clause in the Ordinary Policy.

419. Upon the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture of and in the good ship or vessel called the ——.

[NOTE.—When the insurance is intended to be confined to the ship alone, this is generally effected by inserting, either at the foot or in the margin of the policy, the words "on ship;" or by stating in the valuation clause that as between the assured and underwriters on the particular policy the subject of insurance is agreed to be the ship, or as many sixty-fourth shares thereof as the assured owns. Arn. 4th ed. 19; *Robertson* v. *French*, 4 East, 130.]

Whatever is on board a ship for the object of the voyage and adventure on which she is engaged, belonging to the owners, constitutes a part of the ship and her appurtenances.

Gale v. *Laurie*, 5 B. & C. at p. 164.

[NOTE.—This definition was given with reference to a particular statute (53 Geo. 3, c. 159), and a shipowner's liability for damage done to another vessel in the manner described by the Act. But it may be adapted to policies of insurance, subject to the operation of particular usages. See "Usages," *post.*]

Ex. gr., the boats, stores and provisions; and in fishing voyages all necessary implements and accessories.

See Arn. 4th ed. pp. 20, 21.

"Furniture" includes "provisions"

Brough v. *Whitmore*, 4 T. R. 206.

A ship being condemned as prize by an incompetent tribunal, the interest remains unchanged.

Lucena v. *Craufurd*, 3 Bos. & P. 75.

A vessel being captured, and recaptured before being taken *infra præsidia*, the property is not changed.

Assievedo v. *Cambridge*, 10 Mod. 77.

The fact of the ship having been damaged and repaired at the expense of the underwriters does not affect the amount of insurable interest at their risk.

Livie v. *Janson*, 12 East, 648; *Le Cheminant* v. *Allnutt*, 4 Taunt. 367; *Peele* v. *Merchants' Ins. Co.*, 3 Mass. C. C. 27.

Bottomry—Effect of.

422. The owner of a vessel bottomried for more than her full value has no insurable interest in her in respect of the perils assumed by the lender.

Arn. 4th ed. 79; Phillips, s. 307; *Williams* v. *Smith*, 2 Caines, N. Y. 119.

[NOTE.—There is a special provision as to money lent on ships bound to and from the East Indies, 19 Geo. 2, c. 37. See Arn. 4th ed. 79, n. 3.]

The vessel being bottomried for less than its value, the owner has an insurable interest in the excess.

Ib.

The parties to a hypothecation may agree that the lender shall assume only the sea risks or the risk of capture. The borrower in such case retains an insurable interest in the property to its full value in relation to the risks not assumed by the lender.

Phillips, s. 308.

Captors.

423. The interest of captors having only an expectation of the grant of the property must be specifically described.

Routh v. *Thompson*, 11 East, 423.

Crown.

424. The crown having lawful possession through its agents or servants may adopt a captor's insurance, and the interest is covered by the common policy.

Id. 13 East, 274.

Charterer.

425. The charterer of a ship who contracts to pay the owner for the ship in case of loss, has an insurable interest in her, and may effect insurance upon her in his own name.

Oliver v. *Greene*, 3 Mass. Rep. 133; *Bartlett* v. *Walter*, 13 Id. 267.

Creditors.

426. Advances for repairs of a ship, or for her use, if not secured by a lien, by law or contract, give no insurable interest.

Stainback v. *Fenning*, 11 C. B. 51; *Buchanan* v. *Ocean Ins. Co.*, 6 Co. N. Y. 318; *Folsom* v. *Merchants' Mutual Marine Ins. Co.*, 38 Maine, 414.

FRENCH LAW.—See *Castrique* v. *Imrie*, 8 C. B., N. S. 405.

Mortgagor.

427. The mortgagor who remains in possession has an insurable interest to the full value.

Provincial Ins. Co. of Canada v. *Leduc*, 43 L. J., P. C. 49; 2 Asp. M. L. Ca. 338; *Alston* v. *Campbell*, 4 Br. P. C. 476; *Ladbroke* v. *Lee*, 4 De G. & Sm. 106; *Hutchinson* v. *Wright*, 25 Beav. 444; 27 L. J., Ch. 834; *Ward* v. *Beck*, 32 L. J., C. P. 113; *Gardner* v. *Cazenove*, 1 H. & N. 423.

[NOTE.—See 17 & 18 Vict. c. 104, ss. 55, 56; 25 & 26 Vict. c. 63, s. 3.]

Mortgagee.

428. A mortgagee has an insurable interest to the extent of his mortgage debt, but he may insure the whole property where it is intended that the insurance should cover his interest and that of the mortgagor.

Irving v. *Richardson*, 2 B. & Ad. 193.

Trustee.

429. A trustee may insure, and the policy may be in his own name.

Lucena v. *Craufurd*, 3 B. & P. 75; *Crawfurd* v. *Hunter*, 8 T. Rep. 23; *Pratt* v. *Phœnix Ins. Co.*, 1 Browne's Penn. Rep. 267.

Vendor.

430. A vendor of a ship who, under his contract of sale, assumes a risk in connection with her, has an insurable interest.

Reed v. *Cole*, 3 Burr. 1512.

RISK.

Commencement and Duration.

431. In time policies the termini may or may not be named, and the risk commences from the commencement of the time specified in the policy.

Geographical limits being specified in a policy for a certain time, the vessel is covered only so long as she is within such limits.

Pearson v. *Commercial Union Ins. Co.*, 33 L. J., C. P. 85; L. R., 8 C. P. 84.

In voyage policies the usual commencement of the risk is "at and from" or "from" a certain

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at the time of executing the policy is already at the place.

Hull v. *Cooper*, 14 East, 479.

It is an implied understanding that the ship shall be at the port within such a time that the risk shall not be materially varied.

Id.; *De Wolf* v. *The Archangel Maritime Bank and Ins. Co.*, L. R., 9 Q. B. 451.

"At" means from the first arrival.

Motteux v. *London Ass. Co.*, 1 Atk. 545.

The ship being at home, this term includes such a reasonable time after the policy is subscribed as she remains in port preparing for the voyage.

Grant v. *King*, 4 Esp. 175; *Palmer* v. *Marshall*, 8 Bing. 79; *Palmer* v. *Fenning*, 9 Bing. 462; *Seamans* v. *Loring*, 1 Mass. C. C. 128; *Kemble* v. *Brown*, 1 Caines, N. Y. 75.

Insurance at and from a port can commence only at such port, and such places as are comprehended as part of it.

Robertson v. *French*, 4 East, 130; *Constable* v. *Noble*, 2 Taunt. 403; *Payne* v. *Hutchinson*, 2 Taunt. 405, n.; *Brown* v. *Tayleur*, 4 A. & E. 241.

[NOTE.—As to the meaning of the word port, *Hull Dock Co.* v. *Browne*, 2 B. & Ad. 43; *Stockton and Darlington Railway Co.* v. *Barrett*, 7 M. & Gr. 870; *Roelandts* v. *Harrison*, 9 Ex. 444; *Van Baggen* v. *Baines*, 9 Ex. 523.]

The port may be an open roadstead, if it is usual for vessels to load and unload there.

Cockey v. *Atkinson*, 2 B. & Ald. 460; *Kingston* v. *Knibbs*, 1 Camp. 508, n.; *De Longuemere* v. *Firemen's Ins. Co.*, 10 Johns. Rep. 120; *Sea Ins. Co.* v. *Gavin*, 2 Dow. & Clark, 125.

If the vessel sail on the voyage from the place named in the policy, though with an intention to deviate, the risk attaches.

Hare v. *Travis*, 7 B. & C. 14.

If, however, she sails from the place at which the risk is to commence, but does not sail on the voyage insured, the policy will not attach.

Phillips, s. 930; *Sellar* v. *M'Vicar*, 1 Bos. & P., N. R. 23; *Hare* v. *Travis*, 7 B. & C. 14; *Tasker* v. *Cunningham*, 1 Bligh, H. of L. Cas. 87.

If the ship be lying at a foreign port without reference to any particular voyage, the policy will attach only from the time that preparations are commenced with a view to the voyage insured.

Lambert v. *Liddiard*, 1 Marsh. Rep. 149; 5 Taunt. 479.

Under a policy on a ship at and from a foreign port the risk does not commence, in the absence of usage, until she is within the geographical limits of the port (*a*) in a state of sufficient seaworthiness to be enabled to lie there in reasonable security till properly repaired and equipped for her voyage (*b*).

(*a*) See *Bell* v. *Marine Ins. Co.*, 8 Serg. & R., Penn. 98.
(*b*) All the authorities will be found cited in *Haughton* v. *Empire Marine Ins. Co.*, L. R., 1 Ex. 206. See as to usage, in particular trade, tit. "Usage," *post*.

[NOTE.—The old doctrine that the vessel must be safely moored before she can be said to be "at" a port, is exploded.]

The insurance being at and from "a port or ports," or "ports or places," the greater risk of

letting the ship sail to several places in order to take in her cargo must be implied.

See cases cited in *Brown* v. *Tayleur*, 4 A. & E. 241.

At and from a port of loading in an island covers the ship at all the ports in the island to which she may go for legitimate purposes.

Cruickshank v. *Janson*, 2 Taunt. 301.

The circumstance that the vessel may be in great danger of condemnation, from political causes, does not affect the risk if she be in physical safety.

Bell v. *Bell*, 2 Camp. 475.

But an incipient seizure ending in condemnation does.

Minett v. *Alderson*, Peake's Rep. 211; *Horneyer* v. *Lushington*, 15 East, 46.

Termination.

At Port of Departure.

434. The risk on ship ends immediately the owners have definitively determined to abandon the voyage insured.

Arn. 1st ed. 465; Phillips, s. 965.

If all preparations for the voyage be suspended, so that an abandonment of the adventure may be inferred, the risk will cease.

Chitty v. *Selwyn*, 2 Atk. Ch. 359.

If the ship, without giving up all hope of ultimately proceeding to her final port of discharge,

wreck. The word "safety" refers to the ship and not to the moorings.

Lidgett v. *Secretan*, L. Rep., 5 C. P. 190; *Shawe* v. *Felton*, 2 East, 109; *Angerstein* v. *Bell*, 1 Park, Ins., 8th edit., 54; *Samuel* v. *Royal Exchange Ass. Co.*, 8 B. & C. 119.

The insurer continues liable where the ship, immediately after being moored, is ordered away into quarantine.

Waples v. *Eames*, 2 Str. 1243.

The vessel is safe within the terms of the policy, until she suffers a loss insured against.

Bill v. *Mason*, 6 Mass. 313, Parsons, C. J.

Where a policy is to terminate on the ship having arrived at a certain island or district, and been moored twenty-four hours in safety, it terminates at the first port within such limits at which the master voluntarily arrives, and so remains moored.

Leigh v. *Mather*, 2 Esp. 412; Park, Ins. 64 (last edit. 74).

The insurance being on ship and goods, then by touching at any port and remaining there twenty-four hours, the policy is discharged.

Id. Finding of special jury, approved by Lord Kenyon.

What constitutes the Port of Destination or Discharge.

437. A time policy on a vessel covering her arrival at a port of destination extends only to her next port of destination for the purposes of the voyage.

Gookin v. *New England Ins. Co.; Cole* v. *Union Ins. Co.*,

12 Gray Mass. 501; *Wales* v. *China Ins. Co.*, 8 All. Mass. 380.

Insurance on a vessel until its return to a place does not terminate until its arrival in the harbour proper of such place.

Phillips, s. 954; *Ellery* v. *New England Ins. Co.*, 8 Pick. Mass. 14; *Leigh* v. *Mather*, 2 Esp. 412; Park, Ins. 64; *Camden* v. *Cowley*, 1 W. Bl. 417; *Barras* v. *London Ass. Co.*, Park, Ins. 64; Marsh. Ins. 266.

Entering a port other than the port of destination with an intention to discharge if the market is favourable, does not terminate the risk.

Lapham v. *Atlas Ins. Co.*, 24 Pick. Mass. 1.

"Final port" means the port which is final with reference to the goods taken on board.

Moore v. *Taylor*, 1 A. & E. 25; *Oliverson* v. *Brightman*, 8 Q. B. 781; *Inglis* v. *Vaux*, 3 Camp. 437.

The port of discharge is that of the actual discharge of the cargo, notwithstanding a different one, or more than one, may have been intended.

Moffatt v. *Ward*, 4 Doug. 31, n.; *Preston* v. *Greenwood*, 4 Dougl. 28; *Clason* v. *Simmonds*, 6 T. R. 533; *Coolidge* v. *Grey*, 8 Mass. R. 527; Phillips, Ins. s. 962.

A vessel being insured to a port of discharge, if she arrives in port and there voluntarily and without cause of necessity breaks bulk and discharges any part of her cargo, she thereby makes such port her port of discharge;

Yet, if such vessel while waiting for orders at her port of arrival has goods on board in a perishing

condition, the landing of such goods at that port will not make it a port of discharge.

Sage v. *Middletown Ins. Co.*, 1 Conn. Rep. 239.

The last port of discharge means the last practicable friendly port of discharge.

Browne v. *Vigne*, 12 East, 283; *Neilson* v. *Delacour*, 2 Esp. 619. As to what is to be considered a port in hostile occupation, *Oliverson* v. *Brightman*, 8 Q. B. 781.

When it is illegal to enter the port of destination, the risk ends at the port into which the vessel puts, although the captain does not abandon the intention of going on to his original destination.

Browne v. *Vigne*, 12 East, 283.

LOSS.

Total—Absolute.

438. There is an absolute total loss of ship when by the happening of a peril insured against the ship ceases to exist, or becomes a mere wreck.

Bell v. *Nixon*, Holt's N. P. 423; Emerigon, c. xvii. s. 3, vol. ii. p. 213, edit. 1827.

The ship having got on to the rocks and been actually sold by the master owing to his inability to get her off, the loss is total.

Fleming v. *Smith*, 1 H. of L. Cas. 513; *Cambridge* v. *Anderton*, 2 B. & C. 691.

[See "Sale—Conditions which justify," *post.*]

The loss is total when from lapse of time the presumption arises that a missing ship has foundered at sea.

Green v. *Browne*, 2 Strange, 1199; *Newby* v. *Reid*, 1 Marsh.

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[NOTE.—The right to abandon may be more fully said to arise:—

(*a*) When there is a forcible dispossession or ouster of the owner of the ship.

(*b*) Where there is a restraint or detention which deprives the owner of the free use of his ship.

(*c*) Where there is a present total loss of the physical possession and use of the ship.

(*d*) Where there is a total loss of the ship for the voyage.

(*e*) Where the injury is so extensive that by reason of it the ship is useless and the making repairs would exceed her value.

Per Story, J., in *Peele* v. *The Merchants' Ins. Co.* (3 Ma. Rep. 27), approved by Phillips (sect. 1519), and Arnould (p. 1059, 1st edit.).]

[NOTE.—In considering the question of total or partial loss, the jury ought to look at all the circumstances attending the ship, and to judge whether under all those circumstances a prudent owner, if uninsured, would have declined to repair the ship, and, if so, they may find it a case of total loss. *Young* v. *Turing*, 2 Sc., N. R. 752; 2 M. & G. 593.]

Acceptance of abandonment by the insurers precludes them from disputing the right of the assured to abandon.

[See tit. "Abandonment: Acceptance," *ante*.]

If the master elects to repair he deprives his owner of the right to abandon and claim for a total loss.

See *Benson* v. *Chapman*, 2 H. of L. Ca. 696, and *Dickey* v. *New York Ins. Co.*, 4 Cowen, 222 (where all the authorities are discussed).

The fact that the expenses of repair ultimately prove to be greater than the value of the ship is not sufficient to show that the master acted beyond the scope of his authority.

See *Benson* v. *Chapman* (*ubi sup.*).

[NOTE.—The duty of the master, in case of damage to the ship, is to do all that can be done towards bringing the adventure to a successful termination, to repair the ship if there be reasonable prospect of doing so at an expense not ruinous, and to bring home the cargo and earn freight if possible. *Benson* v. *Chapman* (*ubi sup.*).]

The mere existence of a ship after abandonment will not make the loss partial only.

M'Iver v. *Henderson*, 4 M. & S. 576; *Cologan* v. *The London Ass. Co.*, 5 M. & S. 447.

The ship must be *in esse* in the country of the owner under such circumstances that he may, if he please, have possession, and may reasonably be expected to take it.

Bailey, J., *Holdsworth* v. *Wise*, 7 B. & C. 794; *Lozano* v. *Janson*, 28 L. J., Q. B. 337, 342; 2 E. & E. 190.

AMERICAN LAW.—Where a ship has sustained damage by the perils insured against to more than half her value, her restoration, in order to divest the right of abandonment, must be complete and perfect, and if, though in fact restored, she still remain subject to a lien for the expenses of her repairs to more than half her value, this is not such a full and beneficial restoration as to take away the right to abandon.

Dickey v. *New York Ins. Co.*, 4 Cowen, 222.

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.

A constructive total loss is recoverable under a policy providing for total loss only.

Adams v. *McKenzie*, 32 L. J., C. P. 92.

[NOTE.—What is usually termed a constructive total loss, is in law as much a total loss as if the ship had actually ceased to exist. Willes, J.]

BOTTOMRY: ITS EFFECT ON THE LOSS.

440. The existence of a bottomry bond is not *per se* a cause of abandonment. The vessel is not technically or physically lost by it.

See Story, J., in *Humphreys* v. *Union Ins. Co.*, 3 Sumn. C. C. p. 436.

Whenever by express agreement or by implication from the policy the underwriters have undertaken to indemnify the assured for the cost of repairing the ship, the underwriters are liable to pay the amount, which they may do by discharging the bottomry bond, or leaving the assured to recover for a partial or total loss upon the policy.

The ship being sold by the bottomry lender, in consequence of the underwriters failing to pay the amount of the bond, they are liable for all loss flowing from such sale to the amount of the insurance.

Da Costa v. *Newnham*, 2 T. R. 407.

But a general authority to do the necessary repairs being given by the underwriters, they are liable only to pay a bond of such an amount as will defray the cost of such repairs, and if a bond is given including items for which the underwriters would not be liable under such instructions, the refusal of the underwriters to discharge the bond will not make them liable for more than the average loss.

Bradlie v. *Maryland Ins. Co.* 12 Pet. Rep. pp. 406—409, where *Da Costa* v. *Newnham* is distinguished.

Capture, Arrest, and Detention.

441. The assured on ship has a right to give notice of abandonment immediately he hears that his vessel has been forcibly taken out of his possession and control by seizure or capture.

Goss v. *Withers*, 2 Burr. 683; *Brown* v. *Smith*, 1 Dow's App. Ca. 349. See *Ionides* v. *Universal Marine Ins. Co.*, 32 L. J., C. P. 170.

assured at once to give notice of abandonment, and if the embargo continues down to the time of action brought to recover as for a total loss.

Rotch v. *Edie*, 6 T. Rep. 413.

[NOTE.—If the arrest be only momentary in its duration, creating a temporary obstruction of the voyage, without giving rise to any permanent loss of control over the ship, there is no right to abandon. See 2 Burr. at p. 1210; *Foster* v. *Christie*, 11 East, 205.]

Neutral ships seized by belligerents on suspicion and carried into a hostile port may be abandoned:

Fowler v. *English and Scotch Marine Ins. Co.*, 34 L. J., C. P. 253; *Barker* v. *Blakes*, 9 East, 283.

In the case of capture, condemnation and sale of the ship, if the master buys it and the owner adopts the purchase, the loss will be the amount so paid.

Wilson v. *Forster*, 6 Taunt. 25; 1 Marsh. Rep. 425; *M'Master* v. *Shoolbred*, 1 Esp. 237; *Queen* v. *Union Ins. Co.*, 2 Wash. C. C. 331; *Abbott* v. *Sebor*, 3 John. Ca. N. Y. 39; *Story* v. *Strettell*, 1 Dall. 10; *Oliver* v. *Newburyport Marine Ins. Co.*, 3 Mass. 37; *United Ins. Co.* v. *Robinson*, 2 Caines, N. Y. 280.

Money paid to recover a ship illegally taken or condemned cannot be recovered against the insurers.

Parsons v. *Scott*, 2 Taunt. 363; see *Havelock* v. *Rockwood*, 8 T. R. 268.

[See tit. "Capture, Arrest and Detention," *ante*.]

COLLISION (*a*).

442. The damage which the ship sustains by

(*a*) There are four possibilities under which an accident of this sort may occur. In the first place, it may happen without

fortuitous collision with another is a loss by perils of the sea.

Buller v. *Fisher*, 3 Esp. 67; *Smith* v. *Scott*, 4 Taunt. 126.

[NOTE.—Loss by collision has been held not to be a loss by perils of the sea, within the exceptions of a bill of lading, where it is the consequence of negligence of the crew. *Grill* v. *General Iron Screw Collier Co.*, L. R., 1 C. P. 600, and cases there cited. See "Barratry," *ante*.]

But the assured cannot recover the amount which he is compelled to pay to another vessel on an equal apportionment of damages, in the absence of express agreement.

De Vaux v. *Salvador*, 4 Ad. & E. 420.

Expenses arising from delay caused by collision are not recoverable.

Ibid.

Damages which the assured is compelled to pay to the owner of another ship as a consequence of collision are generally provided for by a "running down clause."

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blame being imputable to either party, as where the loss is occasioned by a storm or any other *vis major*. In that case the misfortune must be borne by the party on whom it happens to light, the other not being responsible to him in any degree. Secondly, a misfortune of this kind may arise where both parties are to blame, where there has been a want of due diligence or of skill on both sides. In such a case the rule of law is that the loss must be apportioned between them as having been occasioned by the fault of both. Thirdly, it may happen by the misconduct of the suffering party only, and then the rule is that the sufferer must bear his own burden. Lastly, it may have been the fault of the ship which ran the other down; and in this case the injured party would be entitled to an entire compensation from the other. Sir William Scott, in *The Woodrop Sims*, 2 Dods. Adm. Rep. 85.

By this clause the underwriters usually undertake to recoup the assured such proportion of three-quarters of the sum which he may become liable to pay and shall pay to the persons interested in such other vessel or in the goods or effects on board thereof as their subscriptions bear to the value of the ship, calculated at 8*l.* per ton, or to such larger sum as may be declared by the policy.

Arn. 4th ed. 228. See Merchant Shipping Act Amendment Act, 1862, ss. 54, 55.

[See "Shipowner," *post.*]

This clause does not extend to damages recovered against the shipowner for personal injury caused to persons on board a ship with which the ship insured has come into collision.

Taylor v. *Dewar*, 5 B. & S. 58; 33 L. J., Q. B. 141.

The costs of defending a suit for damage by collision are not recoverable under a running down clause whereby the insurers agreed to pay a proportion of what the insured might pay as damages.

Xenos v. *Fox*, L. R., 3 C. P. 630.

A ship having done damage to another, and been sold under a decree of a court of admiralty for less than she is worth, the owner can only claim for a proportion of the amount actually paid under the decree, and cannot claim for loss by reason of the forced sale.

Thompson v. *Reynolds*, 7 E. & B. 172; 26 L. J., Q. B. 93.

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A total loss is recoverable notwithstanding pre-existing defects, unless they were so great as to render the vessel unseaworthy.

Millar on Insurance, p. 138; *Manning* v. *Newnham*, *ibid.* 303; *Depean* v. *Ocean Ins. Co.*, 5 Cowen, 63.

And though by reason of such defects she may demand repairs on the voyage, if she perish in its prosecution, the amount of the repairs required for such anterior defects cannot be deducted from the amount of a verdict for a total loss.

De Peyster v. *Columbian Ins. Co.*, 2 Caines, N. Y. 85.

Total Loss—Constructive.

444. If the ship is in a reparable condition, and can be repaired at the place of disaster, so as to be seaworthy to take another cargo or to return in ballast to her home port by expense and sacrifice, including the home passage, not exceeding her whole value by the English rule, or half of her value by the American rule, the loss cannot be made total by abandonment.

Bell v. *Nixon*, Holt, N. P. 423; *Doyle* v. *Dallas*, 1 Moo. & R. 48; see *Ruckman* v. *Merchants' Ins. Co.*, 5 Du. N. Y. 342.

Whether the impossibility of putting the vessel in a condition to resume her voyage arises from the extent of the damage, the want of necessary materials, of workmen, or of the necessary funds, is immaterial.

Ruckman's case (*ubi sup.*).

Repair being possible, though at an expense ex-

ceeding the value of the ship, there is no total loss without abandonment.

Willes, J., in *Barker* v. *Janson*, L. Rep., 3 C. P. 303; *Rosetto* v. *Gurney*, 11 C. B., N. S. 176; *Allen* v. *Sugrue*, 8 B. & Cr. 561.

If the master has reason to believe that damage has been sustained sufficient to warrant an abandonment, he loses his right to abandon by attempting to prosecute the voyage, and omitting at the earliest practicable moment to ascertain the extent of the damage.

Cockburn, C. J., in *Potter* v. *Rankin*, L. R., 5 C. P., at p. 373.

If the ship arrives in port so damaged by the perils insured against that she cannot be restored to a navigable condition for the service to which she was before adapted, or is not worth repairing, it is a total loss by abandonment.

Shawe v. *Felton*, 2 East, 109; *Allen* v. *Sugrue*, *ubi sup.*; *Cazalet* v. *St. Barbe*, 1 Term Rep. 187.

[NOTE.—If it is found that by perils insured against an average loss only has been sustained, the fact that the ship is old and not worth repairing will not entitle the assured to abandon. *Cazalet* v. *St. Barbe*, *sup.*]

AMERICAN LAW.—If the vessel actually performs her voyage, there will not be a constructive total loss because repairs have been rendered necessary by the happening of perils insured against, which will cost more than half her value.

2 Parsons, M. Ins. 128.

Where the injury which the insurers are obliged to make good is the cause of the decayed parts requiring repairs to an extent creating a constructive total loss, the assured may abandon.

Phillips v. *Nairne*, 16 L. J., C. P. 194; *Hyde* v. *La. State Ins. Co.*, 2 Mart., N. S. La. 410.

But if the damage caused by the happening of the peril can be repaired, so as to put the ship in *statu quo* at a cost not exceeding her value, the assured cannot abandon on the ground of the unsoundness of other parts of the ship.

Hyde v. *La. State Ins. Co.* (*sup.*); see *Phillips* v. *Nairne* (*ubi sup.*).

If after notice of abandonment duly given the insurers take possession of a damaged ship for the purpose of repairing her, and detain her for an unreasonable time, without giving notice to the assured that they are acting on his behalf, and that they do not accept the abandonment, this amounts to a constructive acceptance of the abandonment.

Provincial Ins. Co. of Canada v. *Leduc*, 43 L. J., P. C. 49.

Negligence, &c. of Master and Crew.

445. 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, nor will their fraud have that effect where the policy is against barratry.

Shore v. *Benthall*, 7 B. & C. 798, n.

If a ship which is broken up might have been repaired but for the negligence of the agents of the assured, he cannot recover for a total loss.

Tanner v. *Bennett*, Ry. & Moo. 182.

Estimate of Damage—How made.

446. The right of abandonment on the ground of damage to the ship is to be regulated by the

naturally be made, and the expense of the repairs at that place must be added to the cost of those which could be made at the port of necessity.

American Ins. Co. v. *Center*, 4 Wend. N. Y. 45; *Orrock* v. *Commonwealth Ins. Co.*, 21 Pick. Mass. 456; *Lincoln* v. *Hope Ins. Co.*, 8 Gray, Mass. 22; *Hall* v. *Franklin Ins. Co.*, 9 Pick. Mass. 466.

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.

Center v. *American Ins. Co.*, 7 Cow. N. Y. 564; *Sewall* v. *United States Ins. Co.*, 11 Pick. Mass. 90.

[NOTE.—The opinions of experienced masters of vessels is admissible to prove the probable expense of repairing a damaged vessel, and the practicability of saving her. 1 Gr. on Ev. ss. 4 and 40; *Walker* v. *Protection Ins. Co.*, 29 Maine, 317. See also *The Phœnix Insurance Co.* v. *Copelin*, 1 Asp. Mar. L. Ca. 14.]

Though the damage to a vessel by perils insured against 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] (*a*) the value of the vessel, the assured may abandon.

Peele v. *Merchants' Ins. Co.*, 3 Mas. C. C. 27.

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 damage.

Sewall v. *United States Ins. Co.*, 11 Pick. Mass. 90; *Bradlie* v. *Maryland Ins. Co.*, 12 Pet. 378.

(*a*) American rule.

A sacrifice which is general average is to be included.

See *Kemp* v. *Halliday* (*infra*); and conf. *Dickenson* v. *Jardine*, L. R., 3 C. P. 639.

[NOTE.—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. Phillips, s. 1545. In the following cases a general average loss was excluded, the policy containing a clause providing against abandonment for damage merely unless amounting to 50 per cent. *Ellicott* v. *Alliance Ins. Co.*, 14 Gray, Mass. 318; *Fielder* v. *New York Ins. Co.*, 6 Du. N. Y. 282; *Reynolds* v. *Ocean Ins. Co.*, 22 Pick. Mass. 191.]

Expenses having been incurred in floating a stranded ship containing cargo under circumstances giving rise to general average contribution, the loss for the purposes of abandonment must be estimated after deducting the amount of general average so to be contributed by the cargo and freight.

Kemp v. *Halliday*, 34 L. J., Q. B. 233; L. R., 1 Q. B. 520.

[NOTE.—The Court of Exchequer Chamber in this case say: —We do not lay down a rule that all claims for contribution to the ship from any other interest ought to be taken into the account in determining whether the ship was worth raising. But we hold that the plaintiff, in considering whether the submersion of his ship containing a cargo as stated in the case was a constructive total loss, was bound to take into his estimate the fact that cargo would be saved by the operation which raised the ship, and would contribute to the expense thereof, and that the circumstances which would go to increase or diminish the outlay required for raising and repairing the ship, and the circumstances which would go to increase or diminish the benefit to be derived from that outlay, are elements in calculating whether the cost of raising would exceed the value when saved. L. R., 1 Q. B. 527.]

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.

Hall v. *Ocean Ins. Co.*, 21 Pick. Mass. 472.

[NOTE.—So far as they were employed in the repairs, their wages will constitute a part of the expense.]

Desertion.

447. Justifiable desertion of a ship by its crew entitles the assured at once to give notice of abandonment.

Cases *infra.*

To make desertion justifiable and the loss total it must appear that the ship could not have been brought into port.

Id.; *Walker* v. *Protection Ins. Co.*, 29 Maine, 317.

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 (*a*), unless she comes in so damaged and encumbered with salvage and repairs that the loss is still thereby total (*b*).

(*a*) *Thornley* v. *Hebson*, 2 B. & Ald. 513, discussed in *Parry* v. *Aberdein*, at 9 B. & C., p. 417. See *Thomas* v. *Rockland Ins. Co.*, 45 Me. 116.

(*b*) *Holdsworth* v. *Wise*, 7 B. & C. 794.

[Note.—In *Thornley* v. *Hebson* the ship had never been really deserted, as the salvors, who went on board directly the crew left, became the agents of the owners, and the Court held that there was no total loss independently of the sale, which the owners might have prevented by paying the salvage.

The right of the assured to recover is not affected by the ship being afterwards repaired at an expense equal to her value. *Holdsworth* v. *Wise* (*sup.*).]

Sale—Conditions which justify.

448. Where a ship is sold, the character of the loss as being total does not result from the sale, but

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The mere fact that the expense of repairs is excessive, and the rate of bottomry interest extravagantly high at the place of the casualty, will not justify a sale; nor will a mere difficulty in procuring materials.

Furneaux v. *Bradley*, Park on Ins. 365. And see *Knight* v. *Faith* (*sup.*):—there was no dockyard available or materials; nor could the ship be taken to any port where she could have been prudently repaired.

If the master can communicate with the owners and neglects to do so, or if the owner or his agents be culpably negligent, the loss as against the underwriters will be adjusted in the same manner as if there had been no proceeding purporting to be a sale.

Tanner v. *Bennett*, 1 Ry. & M. 182; *Stephenson* v. *Pacific Ins. Co.*, 7 All. Mass. 232.

If after a justifiable sale the assured takes to the proceeds, thereby affecting the interest of the underwriters, he cannot recover for a total loss.

Mitchell v. *Edie*, 1 T. R. 608; *Roux* v. *Salvador*, 3 Bing. N. C. 266; *Allwood* v. *Henckell*, 1 Park, Ins. 399.

Sale under Direction of a Court.

449. In case of a decree for sale of the vessel by an Admiralty Court of competent jurisdiction at the suit of salvors, the sale will not constitute a total loss if the owner has an opportunity of discharging 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.

Williams v. *Suffolk Ins. Co.*, 3 Sumn. C. C. 510.

Though the decree of a prize court is reversed, yet if the subject has not been restored to the owner before action, there is a total loss.

Mullett v. *Shedden*, 13 East, 304; *Stringer* v. *English Marine Ins. Co.*, L. R., 4 Q. B. 676; 5 Q. B. 599.

Repurchase by Master.

450. If after abandonment and sale the master repurchases the vessel, he acts as the agent of the insurers, and their refusal to adopt the repurchase does not affect the right of the assured to claim for a total loss.

The sale having taken place before abandonment, the master in repurchasing acts as the agent of the owners, who may adopt his repurchase.

Per Kent, C. J., *Jumel* v. *Marine Ins. Co.*, 7 Johns. N. Y. at p. 423.

If the assured neglects to adopt the master's purchase, and thereby the loss is made total, the underwriters will be liable only as they would have been had the assured adopted the purchase.

M'Masters v. *Shoolbred*, 1 Esp. 238; *Wilson* v. *Foster*, 6 Taunt. 25.

Shipwreck, Stranding, and Submersion.

451. Shipwreck or stranding, occurring without such injury to the ship as to prevent it from being got afloat and repaired at an expense less than her value, the assured has no right to make an abandonment, but is entitled to recover for a partial loss only.

Arn. 4th ed. 684; *Peele* v. *Merchants' Ins. Co.*, 3 Mass. C. C. 27; *Patrick* v. *Commercial Ins. Co.*, 11 Johns. N. Y. 9;

Sewall v. *United States Ins. Co.*, 11 Pick. Mass. 90; *Phœnix Ins. Co.* v. *Copelin*, 1 Asp. Mar. L. Ca. 14.

[NOTE.—Story, J., in *Peele's case* (p. 42) gives this example of a stranding justifying abandonment: "If she should be driven by a violent hurricane upon a high and sandy beach, or other place so distant from the shore or the means of adequate relief, that the expense of removal would exceed the value of the ship."]

In determining whether the expenses of repairing a ship which has been stranded amount to [half] her value, so as to constitute a constructive total loss, the expense of getting the ship afloat is to be included.

Ibid.

Cargo being on board which will contribute to the expense of getting off the ship, the contribution to be expected must be deducted from the total expense in estimating the amount of the loss.

Kemp v. *Halliday*. See p. 279, *ante*.

The right to abandon must be determined by the judgment of experts, applied to the condition of the vessel at the time of abandonment.

Phœnix Ins. Co. v. *Copelin* (*ubi sup.*).

The submersion of a ship insured does not de facto amount to a total loss—it is or is not a total loss according to circumstances.

Sewall's case and *Patrick's case*, Kent, C. J. (*ubi sup.*). Emerigon, c. 12, ss. 12 and 13.

[NOTE.—The prominent circumstances to be considered are —the depth of water; the distance from the shore; the condition of the bottom; the roughness or smoothness of the sea; and whether means of relief are at hand. The ultimate question is, can the ship be raised at a reasonable expense of time and money? See *Wood* v. *Lincoln and Kennebeck Ins. Co.*, 6 Mass. Rep. 479.]

Willes, J., in *Lidgett* v. *Secretan*, L. R., 6 C. P. at pp. 628, 629.

A ship insured in a valued time policy having sustained damage previous to the insurance being effected, the underwriters cannot deduct from the valuation the sum it would have cost to make the vessel fit for sailing.

Barker v. *Janson*, L. R., 3 C. P. 303.

A ship being valued at different sums in different policies, and an action brought upon one, the sum recoverable is liable to be diminished by the sum already recovered under other policies on the same risk for the same loss.

Bruce v. *Jones*, 1 H. & C. 769; 32 L. J., Ex. 132; *Bousfield* v. *Barnes*, 4 Camp. 227; *North of England Iron Steamship Co.* v. *Armstrong*, L. R., 5 Q. B. 244; Arn. 4th ed. 292 *et seq.*

Under Open Policies.

454. The insurance being in an open policy, the value of the ship must be proved.

[See this tit., "Damage: Estimate how made."]

Partial Loss.

[See "Particular Average: Ship," *ante.*]

Acceptance of abandonment is irrevocable and makes a partial loss a total loss.

Provincial Ins. Co. of Canada v. *Leduc*, 43 L. J., P. C. 49; 2 Asp. M. Law Ca. 338.

Insurance against his Liabilities.

455. A shipowner may protect himself by insurance against the casualties enumerated in Part IX. of the Merchant Shipping Act of 1854, ss. 503—506, as amended by the Act of 1862 (25 & 26 Vict. c. 63, ss. 54, 55) (*a*).

Taylor v. *Dewar*, 5 B. & S. 58; 33 L. J., Q. B. 141.

He may also insure against liabilities imposed by the Passengers Act. (18 & 19 Vict. c. 119.)

Examples.

Expenses incurred in forwarding passengers from a British colony where the ship was wrecked to their destination, held recoverable under a policy on passage money against all charges

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(*a*) These Acts impose upon a shipowner a limited liability in respect of the following losses occurring without his actual fault or privity:—(1) Loss of life or personal injury caused to any person, and damage or loss caused to goods, merchandise or any other things whatever carried on board his ship. (2) Loss of life or personal injury caused by improper navigation to any person carried on any other ship or boat, and loss or damage caused to any other ship or boat, or to any goods, wares or merchandise or other things whatever on board any other ship or boat. In respect of loss of life or personal injury, either alone or together with damage to goods, the extent of the liability is 15*l.* for each ton of the ship's tonnage; and in respect of loss to ship or goods, whether there be loss of life or personal injury or not, the extent is 8*l.* for each ton of the ship's tonnage.

and liabilities to which owner or charterer might be subject, under ss. 46 to 51 inclusive of the Passengers Act, 1852 (15 & 16 Vict. c. 44).

Gibson v. *Bradford*, 4 E. & B. 586.

The expense of keeping emigrants on shore while the ship was being repaired, she ultimately completing the voyage, held not within the Act.

Willis v. *Cooke*, 5 E. & B. 641.

Average Contribution.

456. A shipowner who has entered into a recognizance for salvage of ship and cargo has an insurable interest in the average contribution due to him from the owners of cargo.

Briggs v. *The Merchant Traders' Ass.*, 13 Q. B. 167.

[The subject-matter was described in the policy as "average expenses per J. A." The shipowner had to pay the whole salvage, and he was held to have a lien on the cargo, and therefore an insurable interest, and he recovered.]

Slip.

[See "Concealment," and "Policy," *ante*.]

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water, such an event is not a stranding within the sense of the memorandum.

Ibid.

The mere fact of a vessel sustaining an unexpected injury by reason of the hardness of the bottom (provided it be in a place where she is properly laid in the ordinary course of the voyage) will not turn the taking the ground into a stranding.

See Willes, J., in *De Mattos* v. *Saunders* (*ubi sup.*); *Magnus* v. *Buttemer* (*infra*).

458. *Occurrences held to constitute a Stranding.*

Striking upon a rock and remaining fixed for fifteen or twenty minutes, by which material injury was sustained.

Baker v. *Towry*, 1 Stark. 436.

Ship, under charge of a pilot, fastened at the pier of the dock basin by a rope to the shore and left there, and she took the ground, and when the tide left her fell over on her side and bilged.

Carruthers v. *Sydebotham*, 4 M. & S. 77.

In the course of a voyage along a canal it became necessary, in order to repair the canal, to draw off the water. The ship having been placed in what appeared to be a safe situation, when the water was drawn off impinged upon some piles, the existence of which was not previously known.

Rayner v. *Godmond*, 5 B. & Ald. 225.

Ship driven by stress of weather into a harbour at the mouth of which she struck upon an anchor and was in danger of sinking, to prevent which she was warped higher up in the

harbour, where she took the ground and remained fast half an hour.

Barrow v. *Bell*, 7 D. & R. 244; 4 B. & C. 736.

Vessel in a tide harbour. At the first low tide she grounded on the mud, but on a subsequent ebb the rope by which her head was moored to the opposite side of the harbour stretched, and the wind blowing at the same time, she did not ground entirely on the mud, which it was intended she should do, but her fore part got on a bank of stones, rubbish and sand near to the quay, and the vessel was strained.

Wells v. *Hopwood*, 3 B. & Ald. 20.

A ship ran on some wooden piles four feet under water in a river, erected about nine yards from the shore to keep up the banks of the river, and lay on these piles till they were cut away.

Dobson v. *Bolton*, Shee's Marsh. Ins. 171.

A ship proceeding down river, a moderate wind suddenly took her ahead, and she went ashore stern foremost. There she remained fast for two hours until the tide flowed, when she got off and proceeded on her voyage.

Harman v. *Vaux*, 3 Camp. 429.

459. *Occurrences held not to constitute a Stranding.*

A ship, having struck upon a sunken rock and received damage, was run ashore by direction of the pilot, was repaired and afterwards proceeded on her voyage.

Burnett v. *Kensington*, 7 T. R. 210.

The striking of a ship on a rock, where she remained a minute and a half, and was laid on her beam ends.

M'Dougle v. *Royal Ex. Ass. Co.*, 4 M. & S. 503; 4 Camp. 283.

A vessel took the ground on two successive days in going into harbour, under direction of a pilot, and being afterwards

moored, in the usual course, was thrown on her broadside by the receding of the tide.

Hearn v. *Edmunds*, 4 Moore, 15; 1 B. & B. 388.

Taking the ground on the falling of the tide in a tide harbour, in a spot where the ship is properly placed for the purpose of unloading, whereby she was hogged and strained.

Magnus v. *Buttemer*, 11 C. B. 876; 21 L. J., C. P. 119.

Upon the ebbing of the tide a vessel took the ground in a tide harbour in the place where it was intended she should, but in so doing struck against some hard substance, by which two holes were made in her bottom.

Kingsford v. *Marshall*, 8 Bing. 458.

surance, or perils that are insured against if they do not threaten loss or misfortune to the subject insured.

The Great Indian Peninsular Railway Co. v. *Saunders*, 1 B. & S. 41; 30 L. J., Q. B. 218; in error, 2 B. & S. 266; 31 L. J., Q. B. 206; and *Both* v. *Gair*, 15 C. B., N. S. 291; 33 L. J., C. P. 99; *Xenos* v. *Fox*, L. R., 3 C. P. 630; 4 C. P. 665. (Costs of defending a collision suit.)

Expenses incurred under this clause are not particular average, but are recognized by usage as "particular charges."

Kidstone v. *Empire Marine Ins. Co.*, L. R., 1 C. P. 535; 2 C. P. 357.

The application of it therefore to such expenses is not precluded by the warranty against particular average.

Kidstone v. *The Empire Marine Ins. Co.* (*ubi sup.*); Arn. 4th ed. 725.

If there are two modes of saving the subject-matter of the insurance, that which is the most reasonable must be adopted; and if that which is the more expensive be adopted, the insurers will be liable only for the smaller expense.

Lee v. *The Southern Insurance Co.*, L. R., 5 C. P. 397.

Expenditure to be recoverable under this clause must be shown to have been reasonably necessary to the whole extent of the claim sued for, and must

represent so much labour beyond and besides the ordinary labour of the voyage.

Arn. 4th ed. 725.

The expense of repairs rendered necessary by damage to the ship, resulting from the happening of perils insured against, is more properly recoverable as particular average; but it has been suggested that when followed by a total loss such expenditure is recoverable under this clause.

Livie v. *Jansen*, 12 East, 655.

Observations.

In *The Great Indian and Peninsular Railway Co.* v. *Saunders*, the insurance was upon iron against total loss only. Expenses were incurred in forwarding the iron to its destination, when it was not in any peril of total loss either actual or constructive. The assured received his goods in specie, and the expenses were held irrecoverable.

In *Booth* v. *Gair*, the insurance was upon bacon upon a voyage from Liverpool to New York free from average, unless general, or the ship be stranded, sunk or burnt. The ship on her voyage was not stranded, sunk or burnt, but was disabled by other perils, and became a constructive total loss in port. The bacon was landed without material damage. Expenses in the way of extra freight, transhipment, warehousing, surveying and cooperage were incurred by the master in the ordinary course of his duty; there being no peril creating a risk of total loss, they were held irrecoverable.

In *Kidstone* v. *The Empire Marine Insurance Co.*, the insurance was upon the agreed freight of a cargo of guano; the policy containing a warranty free from particular average, also from jettison, unless the ship be stranded, sunk or burnt. The vessel was so damaged during the voyage that she put into a port and was sold. The cargo was landed and warehoused and no abandonment made. The master engaged another vessel

to carry it on, and, besides the freight, paid other expenses of landing, warehousing and reloading. The expenses and the freight of the substituted vessel were held recoverable under this clause. The ground of the decision was, that if the expenditure had not been made, the subject-matter of insurance (the agreed freight) would never have had any existence.

In *Lee* v. *The Southern Insurance Co.*, the insurance was on the freight of a cargo of oil. The ship was stranded during the voyage, and the oil landed and sent to its destination by railway at a cost of 212*l.* The ship was repaired in a short time and made fit to complete the voyage. The oil might have been kept and reshipped at a cost of 70*l.* This was considered by the court the reasonable course to adopt, and the insurer was held liable to pay that amount only.

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Underwriter (or other Insurer).

His Solvency.

462. The solvency of an underwriter is insurable.

Arn. 4th ed. p. 96; Ord. de la Mar., liv. 3, t. vi. art. 20.

[Note.—Such an insurance is rarely resorted to in any country.]

How discharged.

463. The underwriter or other insurer may be discharged by any act of the assured which materially varies the risk.

He is not discharged by an act on the part of the assured which to a certain degree increases the risk, if it does not amount to palpable negligence.

Toulmin v. *Inglis*, 1 Camp. 421.

Breach by the insured of express and implied warranties and agreements as to the conduct of the ship discharges the underwriter.

Denison v. *Modigliani*, 5 T. R. 580.

Also non-compliance with statutory provisions rendering the voyage illegal.

Wilson v. *Rankin*, L. R., 1 Q. B. 162; *Cunard* v. *Hyde*, E. B. & E., 670; 27 L. J., Q. B. 408; *Dudgeon* v. *Pembroke*, L. R., 9 Q. B. 581.

Failure to provide proper national documents for the ship, by reason of which she is captured, discharges the insurer on ship.

Bell v. *Carstairs*, 14 East, 374; *Christie* v. *Secretan*, 8 T. R. 192; *Dawson* v. *Atty*, 7 East, 367.

There being no express warranty in the policy that the nationality of the vessel shall continue unchanged, a change of nationality which cannot affect the contract does not discharge the underwriter.

Dent v. *Smith*, L. R., 4 Q. B. 414.

If after a constructive total loss and notice of abandonment, the insurer, with full knowledge of all the facts, accepts the notice of abandonment, he cannot, when called upon to pay the amount insured, rely upon a breach of warranty.

Provincial Ins. Co. of Canada v. *Leduc*, 43 L. J., P. C. 49; 2 Asp., Mar. L. Ca. at p. 349.

After loss the underwriter is not discharged from the claim of the assured, except by actual payment to the assured or his agent.

Russell v. *Bangley*, 4 B. & Ald. 395; *Todd* v. *Reid*, 4 B. & Ald. 210; *Scott* v. *Irving*, 1 B. & Ad. 605; *Bartlett* v. *Pentland*, 10 B. & C. 760; *Ovington* v. *Bell*, 3 Camp. 237; *Jell* v. *Pratt*, 2 Stark. 67.

Under authority to an agent of the assured to receive payment of a loss, or a return of 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.

Idem; Phillips, s. 1883.

The fact of the name of the underwriter having been struck off the policy may discharge him if it be shown to have been done with the consent of the assured.

Bartlett v. *Pentland*, 10 B. & C. 760; *Scott* v. *Irving*, 1 B. & Ad. 605; and other cases (*sup.*).

[See "Agents," *ante.*]

usage, when the facts are undisputed, is a question of law; *i. e.*, whether the facts proved constitute a usage valid in law.

1 Duer, 278.

General.

466. "General" may refer to persons, or locality or trade; *ex. gr.*, at ports, among merchants, or among the majority of those engaged in a particular trade.

A practice may be so general as to constitute a usage, though unknown to particular individuals engaged in the business to which it relates.

[NOTE.—Cockburn, C. J., put very clearly the effect which such a circumstance should have upon the mind of the jury, in summing up the case in *Achard* v. *Ring*, 31 L. T. Rep., N. S., at p. 649: "If you are perfectly satisfied that this practice did exist, although it has now undergone a change, then although the fact that a certain number of the members of Lloyd's knew nothing about it might very legitimately tend to shake your confidence in the evidence by which it is sought to establish the practice or the custom; yet if the evidence in favour of the custom so completely satisfies your minds of the existence of the custom, then the ignorance of a particular individual of its existence would not be an answer to the affirmative evidence, if that affirmative evidence brought conviction to your mind."]

Uniform.

467. This term denotes a constancy in the observance of the usage in the form that properly belongs to it and according to its character and extent—without interruption of time or change of material circumstances.

1 Duer, 264. See Arn. 4th ed. 269, n. 4.

[NOTE.—There may, it would seem, be exceptions, if the ordinary course is in accordance with the alleged usage. *Vallance* v. *Dewar*, 1 Camp. 503, per Lord Ellenborough.]

Notorious.

468. A usage is sufficiently notorious if it be known to all who are concerned or employed in the trade to which the usage relates and to all whose interest or duty it is to acquire the knowledge of its existence.

Smith v. *Wright*, 1 N. Y. T. Rep. 45; 1 Duer, 267, n. (*a*).

Reasonable.

469. A usage must not lead to consequences that could not have been contemplated by the parties, but must be consistent with the risk and indemnification forming the subject of the policy.

See *Stephens* v. *The Australasian Ins. Co.*, L. R., 8 C. P. 18; *Ougier* v. *Jennings*, 1 Camp. 506, *in notis*.

Usages inconsistent with Established Rules of Law.

470. A usage inconsistent with an established rule of commercial law cannot be admitted in evidence, and is wholly void unless the parties plainly contemplated adopting the usage, and, so far as permissible, setting aside in the particular case the rule of law.

[NOTE.—Duer says: In the only cases in which the evidence has been admitted to supersede a rule of law the usage was solely derived from a use and practice between the assurers and the assured, and they contain no intimation that when the usage is of a different character the evidence could be justly received. See his note xxii., vol. i., p. 275.]

A usage which by its mere existence governs the construction of the policy, as by imposing a loss upon the insurer, his consent to bear which cannot

be justly inferred and is not expressed, must be absolutely consistent with the rules of law.

How proved.

471. The evidence of the essential requisites of a valid usage may consist of proof that in numerous instances and for a long period the usage has been observed by a succession of persons without any intermission of time or variation of circumstances; and upon such evidence, if uncontradicted, the jury will be warranted to find that the usage is in truth general, uniform and notorious.

1 Duer, 269.

[NOTE.—It is not enough to constitute a practice that a certain number of individuals should entertain a belief that that practice or custom exists and act accordingly, because they may be mistaken; and in a great establishment like the commercial institutions of this country, a practice in derogation of the law, unless it is of general application in that particular department to which it is sought to be applied, ought not to be acted upon. Cockburn, C. J., in *Achard* v. *Ring*, 31 L. T. Rep., N. S., at p. 650.]

A binding usage may be proved by the practice uniformly observed by particular insurers, where it can be proved to have been known to both parties.

When the evidence is conflicting and various, the usage can seldom with justice be admitted or established.

And there being an equal conflict of credible testimony, the question of the existence of the usage should not be left to the jury.

1 Duer, p. 278.

The opinions of witnesses and text writers, what-

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"until the ship was moored twenty-four hours in safety," the intention of the parties being clearly expressed.

Parkinson v. *Collier*, 2 Park, Ins. 653; Marshall, Ins.

Usage at Lloyds' inadmissible to show that a clause "upon the body tackle, apparel, ordnance munition, boat and other furniture of, &c.," did not include boats slung on the ship's quarter.

Blackett v. *Royal Exchange Ass. Co.* (*ubi sup.*).

To exclude the liability of underwriters for leakage of oil by violent labouring of the ship as a loss by perils of the sea.

Crofts v. *Marshall*, 7 C. & P. 597, 607.

To exclude a general average loss on freight contrary to the plain terms of the policy.

Hall v. *Janson* (*ubi sup.*).

No usage, whatever its antiquity or however invariable it may have been, can render valid an insurance that the law prohibits.

But insurers, with their own consent, may be charged with a loss resulting from the observance of such a usage, unless the effect of thus charging them would be to give such an interpretation to the policy as would render the contract itself illegal and void.

1 Duer, 273, 274.

An illegal usage becomes a part of the contract when the effect of the contract is to sanction and encourage a practice which the law condemns, and in such cases the insurance is void.

Ibid.

The consent of the insurers to assume the risk of an illegal usage cannot be inferred from the mere existence of the usage.

Classification.

473. Usages are either—

(1) General; or

(2) Particular.

General usages are such as can be proved by the evidence of all persons indiscriminately.

Particular usages are such as can be proved only by the evidence of persons engaged in a particular trade or calling or resident in a particular locality.

A local usage of trade may be binding upon insurers who have frequently made insurances to which the usage would apply.

1 Duer, 265.

The usage of a particular trade with reference to which the underwriter insures overrides the general usages of maritime trade.

Ibid.

Examples of particular Usages.

For ships engaged in the China trade to store their rigging and furniture in houses built on sandbanks.

Pelly v. *Royal Exchange Ass. Co.*, 1 Burr. 341.

For cargoes insured in the Newfoundland and Labrador trades to be taken out as wanted, and not landed on arrival.

Noble v. *Kennoway*, 2 Doug. 510.

For ships engaged in the Newfoundland trade to make intermediate voyages.

Vallance v. *Dewar*, 1 Camp. 503. See further Arn. 4th ed. 265, 266.

A usage in the Oporto trade for ships to complete their loading for the homeward voyage outside the bar in the Tagus, when inconvenient to do so within.

Kingston v. *Knibbs*, 1 Camp. 508.

A usage in the Florida trade to take in homeward cargoes at Tigre Island, in St. Mary's River, and then drop down to Æmelia Island, a little lower down the river, for the purpose of paying dues and clearing.

Moxon v. *Atkins*, 3 Camp. 200.

A custom at the port of Leghorn, that certain goods at that port should be landed at the Lazaretto.

Gracie v. *Maryland Ins. Co.*, 8 Cranch's Sup. C. Rep. 75.

A usage in the Mauritius for vessels to anchor at the Bell buoy outside the harbour of Port Louis, and then to be considered at the Mauritius.

Janson v. *Lindsay*, 23 L. J., Ex. 315; 4 H. & N. 699.

A usage in a particular trade to carry cargo on deck, contrary to general practice.

[See "Cargo," *ante*.]

To return a proportionate part of a premium in trade between London and Jamaica.

Long v. *Allen*, 4 Doug. 276.

A usage by which "liberty to touch" included taking in cargo.

Urquhart v. *Bernard*, 1 Taunt. 450.

Usages at Lloyds'.

474. The usages at Lloyds', in order to affect the assured, must be shown to have been brought

ing was that the particular usage was to form no part of the contract.

1 Duer, 276.

It must be a usage in the course and prosecution of the voyage insured, or in the ports or places to which the vessel by the terms of the policy is destined or authorized to proceed.

1 Duer, 204.

A usage prevailing in a port into which the vessel puts in distress cannot affect the contract, there being no ground to suppose that it was known to the parties, or that the contract was made with reference to its existence.

1 Duer, 204.

Usages explaining the meaning of Words in a Policy.

476. When the terms of a clause in their plain and ordinary sense exhibit a consistent meaning, that meaning must prevail, unless it can be shown that it ought to be modified and controlled by a positive usage.

See for reasons, p. 187, vol. i., Duer, and cases cited as to the meaning of the words in the memorandum, tit. "Policy," *ante*.

Latent ambiguities and indeterminate words may be explained by proving a meaning acquired by usage.

1 Duer, 184.

If any terms of a policy have by the known usage of trade, or by use and practice as between assurers

and assured acquired an appropriate sense, they shall be construed according to that sense and meaning.

Mason v. *Skuney*, 1 Marsh. 143; 4 East, 135; 6 East, 207; S. B. & P. 213; *Anderson* v. *Pitcher*, 3 B. & P.

The insurer is presumed to know the trade meaning of the words used in the policy, if proved to bear a particular meaning by usage, unless the usage is limited and peculiar.

Brough v. *Whitmore*, 4 T. Rep. 206.

Examples.

A usage in the pilchard fishery for the insurance on ship, tackle and furniture, to cover tackle and stores.

Hoskins v. *Pickersgill*, 2 Marsh. Ins. 735; 1 Park, Ins. 126.

As to the scope of a policy containing the words "either with or without letters of marque."

Parr v. *Anderson*, 6 East, 202.

As to the meaning of "port."

See cases cited, "Ship: Risk, at and from," *ante*.

Of "premises."

Beacon Fire and Life Ass. Co. v. *Gibb*, 1 Moo. P. C., N. S. 73.

To vary the understanding of geographers as to what is included in geographical description.

Robertson v. *Clarke*, 1 Bing. 445; *Uhde* v. *Walters*, 3 Camp. 15.

Valued Policies.

[See "Policy," *ante*, and several subjects of Insurance.]

Wages.

477. A master may insure his wages and any commissions to which he may be entitled.

King v. *Glover*, 2 B. & P., N. R. 206; *Hawkins* v. *Twizell*, 5 E. & B. 883; 25 L. J., Q. B. 160.

Seamen and officers under the master have no insurable interest in their wages.

Webster v. *De Tastet*, 7 T. R. 157; *The Lady Durham*, 3 Hagg. Ad. 201; 1 Emerig. c. viii. s. 6, p. 221.

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Warranties.

479. Warranties are—

I. Express; and

II. Implied.

I. EXPRESS.

480. An express warranty is an agreement expressed in the policy whereby the assured stipulates that certain facts are or shall be true, or certain acts shall be done relative to the risk.

Phillips, s. 754; Arn. 4th ed. 543.

It may relate to an existing or past fact, or be promissory and relate to the future.

Phillips, s. 754; 1 Marsh. (Shee's), 279.

The fact or act warranted need not be material to the risk.

Phillips, s. 754.

The effect of a warranty may be restricted by providing that it shall be construed as a representation.

2 Duer, 645.

Form.

481. The warranty may be written in any manner on the face of the policy or be con-

tained in documents expressly referred to in the policy.

De Hahn v. *Hartley*, 1 T. R. 343 ; *Pawson* v. *Barnevelt*, Doug. 12, n.; *Bize* v. *Fletcher*, Ib. n. 4 ; *Fittegrew* v. *Pringle*, 3 B. & Ad. 514; *Graham* v. *Barras*, 5 B. & Ad. 1011.

A formal expression is not necessary. Any direct or even incidental allegation of a fact relating to the risk may constitute a warranty.

Phillips, s. 757.

But every recital of a fact is not necessarily a warranty, particularly if it be evident that it cannot have any relation to the risk.

Ibid. s. 758.

The rule of a mutual insurance society merely directory to its committee is not an express warranty.

Harrison v. *Douglas*, 3 Ad. & E. 396.

Construction.

482. Warranties are strictly construed.

[NOTE.—The English courts have required *literal* compliance. American opinion is in favour of a construction which gives the assured the benefit of *substantial* compliance. Phillips, s. 762; see 1 Emerig. c. vi., s. 3; Pothier, n. 106.]

[See "Usage," *ante*.]

A warranty will not be extended by construction to include anything not necessarily implied in its terms.

Hyde v. *Bruce*, 3 Doug. 213.

Where it is expressed in clear terms, evidence will not be admitted to show that it is to be construed contrary to the apparent meaning of the terms used, although such construction is that which has ordinarily been put upon it by persons who have adopted the same form of policy.

Provincial Ins. Co. of Canada v. *Leduc*, 43 L. J., P. C. 49; 2 Asp. Mar. Law Ca. 338.

Non-compliance—Its operation.

483. Failure even temporarily to comply with the warranty at any stage of the risk avoids the policy *ab initio.*

Arn. 4th ed. 547; *College* v. *Harty*, 6 Exch. 205.

AMERICAN LAW.—Unless the warranty relates to the commencement of the risk, a breach relieves the underwriter from liability for subsequent loss only.

Phillips, Ins. s. 771.

When the warranty relates to a period antecedent to the risk insured, the breach of it, although remedied before the ship sails on the voyage insured, is fatal.

De Hahn v. *Hartley*, 1 T. R. 343.

The breach of warranty need not be connected with the loss.

Hibbert v. *Pigou*, 1 Marsh. (Shee's) Ins. 280.

If the warranty amounts to a prohibition against entering at certain times certain named seas, violation discharges the insurer for all loss arising therefrom.

Provincial Ins. Co. of Canada v. *Leduc*, 43 L. J., P. C. 49; 2 Asp. Mar. Law Ca. 338.

[NOTE.—If abandonment be accepted, the insurers cannot avail themselves of a breach of warranty.]

The warranty to sail is not complied with by leaving harbour imperfectly equipped.

Graham v. *Barras*, 5 B. & Ad. 1011; *Pittegrew* v. *Pringle*, 3 Barn. & Ad. 514; *Ridsdale* v. *Newnham*, 3 M. & S. 456; 4 Camp. 111; *Cochrane* v. *Fisher*, 2 Cr. & M. 581; 1 Cr. M. & R. 809.

The risk under the policy having commenced before the time fixed for the sailing, the warranty is complied with if the ship is ready to sail and is only prevented by a peril insured against by the policy.

1 Phillips, p. 427, s. 772.

If sufficiently equipped on sailing on the first stage of the voyage, there being an intention to complete the equipment at subsequent stages, the warranty is complied with.

Bouillon v. *Lupton*, 33 L. J., C. P. 37.

An involuntary detention after sailing does not affect the policy.

Bond v. *Nutt*, 2 Cowp. 607; *Hore* v. *Whitmore*, 2 Cowp. 784; *Thellusson* v. *Fergusson*, Doug. 346; *Earle* v. *Harris*, 1 Doug. 357.

"To depart" and "to sail from:"

These expressions mean to leave a port; not merely to get under way.

Moir v. *Royal Exchange Ass. Co.*, 1 Marsh. at p. 576; *Lang* v. *Anderdon*, 3 B. & C. 495.

"To sail with convoy:"

The convoy must be the regular convoy provided by the government for vessels bound on the voyage insured.

Lily v. *Ewer*, 1 Doug. 72; *D'Eguino* v. *Bewicke*, 2 H. Bl. 551; Shee's Marshall, 290, 291.

The vessel insured must sail with the convoy and continue with it until the end of the voyage unless separated by necessity.

See *Cohen* v. *Hinckley*, 1 Taunt. 249; *Hibert* v. *Pigou*, Shee's Marshall, 292.

She is protected on her voyage to join convoy at the appointed rendezvous.

Warwick v. *Scott*, 4 Camp. 62.

A breach of the warranty is fatal, though the ship overtake the convoy before loss.

Cohen v. *Hinckley* (*ubi sup.*).

A ship cannot proceed without convoy from port to port to join convoy unless she has a licence to sail without convoy.

Hinckley v. *Walton*, 3 Taunt. 131.

Being driven back by stress of weather after sailing with convoy, the ship may sail without waiting for the next convoy.

Laing v. *Glover*, 5 Taunt. 49.

The captain must have sailing orders to keep with convoy.

Anderson v. *Pitcher*, 2. B. & P. 164. See Arn. 4th ed. 563; Phillips, ss. 780, 781.

"To begin from and immediately following the loading on board the said vessels" at certain ports:

This is mere recital, description, intention or expectation that the goods will be there loaded, and is not to be construed as a warranty unless it was so clearly intended.

Wells, Fargo & Co. v. *The Pacific Ins. Co.*, 1 Asp. M. L. Ca. 111.

"All well," &c.:

A warranty that a ship is all well or all safe on a particular day is satisfied if she is safe or well at any time of such day.

Blackhurst v. *Cokell*, 3 T. R. 360.

"In port:"

This warranty is complied with if the ship is in any port.

Kenyon v. *Berthon*, 1 Doug. 12, n.

The port being named, she must be in it, but may be moved about in it.

Clark v. *Westmore*, Selw. N. P. 940.

In policies "at and from," the general words "in port" refer to the port where the voyage is to commence. The ship must be in that port on the specified day.

Colby v. *Hunter*, 1 Mood. & Malk. 81.

"Lawful trade:"

Relates to the employment of the ship by the owners.

Havelock v. *Hancill*, 3 T. R. 277.

[See tit. "Barratry," *ante*.]

Neutrality.

Definition.

484. An engagement on the part of the assured that the property is owned by persons resident in a country at peace when the risk begins, and who have the commercial character of subjects of such country, and that it shall be accompanied with such documents, and shall be so managed and conducted by the assured and their agents, as to be entitled as far as depends on them to all the protection and privileges of property belonging to the subjects of such country.

Phillips, s. 783; Arn. 4th ed. 564.

Form.

485. The warranty may be in words "warranted neutral," or by reference to nationality.

[Note.—A condition that the nationality of the ship shall not be changed cannot be implied.]

Extent of Warranty.

486. The warranty is that the subject is neutral at the commencement of the risk, and that it shall continue to be neutral so far as depends upon the assured, or he is responsible.

Phillips, s. 784; Arn. 4th ed. 565.

Part owners insuring their interest with a warranty as to neutrality the warranty extends to their interest only.

Phillips, s. 789.

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and enemy-owned goods shipped with a neutral destination, are not within the warranty.

Arn. 4th ed. 568.

The produce of a hostile country, the property of a neutral resident in a neutral country, is not within the warranty. *A fortiori* if contracted for by a neutral in contemplation of war, unless delivered before the declaration of war.

Ibid ,: Phillips, s. 792.

[NOTE.—But if imported into a neutral country it is neutral during its subsequent passage by re-exportation to a belligerent country. Arn. 4th ed. 568.]

The shipment of goods after notice of the breaking out of a war which makes them contraband, although in pursuance of a prior contract, is not within the warranty.

Phillips, s. 793.

Goods shipped by a belligerent, to be delivered to a neutral only on conditions and contingencies other than the general right to stop *in transitu*, are not within the warranty.

Phillips, s. 794.

A declaration of war after the policy is made does not change the character of the subject from neutral to belligerent, so as to take it out of the warranty.

Eden v. *Parkinson*, Doug. 732; *Tyson* v. *Gurney*, 3 Term Rep. 477; *Salonica* v. *Johnson*, Park, 8th ed. 716.

But where goods are shipped by a belligerent, conditionally to become those of a neutral, and the latter complies with the condition before a capture, they thereby from that time are within the warranty.

Phillips, s. 795.

If a consignor becomes a belligerent by the breaking out of war during the transit, he cannot, by assignment to a neutral, screen the property from capture, and they will not therefore thereby be within the warranty.

[NOTE.—Whether such is the object of the transfer is to be gathered from the circumstances. Phillips, s. 796, and n. 5.]

If an owner changes his national character during transit of the goods, the national character of his property in transit does not change.

Phillips, s. 797; 1 Duer, Mar. Ins. 437.

Proofs of Neutrality.

488. In order to be neutral within the meaning of the warranty the ship must be furnished with all the documents and proofs of the neutral character of herself and her cargo required to be on board either by the law of nations or by the regulations of international treaties.

Arn. 4th ed. 569; Phillips, s. 802.

[NOTE.—These should comprise the flag, the passport, sea-brief, sea-letter, or pass; the register, or certificate of registry; the muster-roll, the charter-party, the log-book, the bill of health; proofs of the national character of the cargo; *ex. gr.*, invoices, bills of lading, certificates of origin. *Price* v. *Bell*, 1 East, 663; *Dawson* v. *Atty*, 7 East, 367; *Everth* v. *Tunno*, 1 B. & A. 142.]

Breaches of the Warranty.

489. All voluntary illegal acts forfeiting the character of a neutral are breaches of the warranty.

Garrels v. *Kensington*, 8 T. Rep. 230.

Ex. gr.—Resisting the right of search when properly exercised (*a*). Rescuing, or attempting to rescue, a neutral vessel sent in for examination by an authorized belligerent captor. Violating blockade (*b*). Carrying hostile despatches (*c*).

(*a*) As to what is a proper exercise of the right of search, see

Phillips, ss. 819, 820; Arn. 4th ed. 580; *The Maria*, 1 C. Rob. Adm. 340.

(*b*) Blockade must be effective, and neutral nations must have had notice of it.

(*c*) "A distinction has been made between carrying despatches of the enemy between different parts of his dominions and carrying despatches of an ambassador from a neutral country to his own sovereign. The effect of the former despatches is presumed to be hostile; but the neutral country has a right to preserve its relations with the enemy, and it does not necessarily follow that the communications are of a hostile nature."

1 Kent, Com. s. 153.

A master forfeits the neutral character of his ship by covering belligerent goods on board as neutral,

tral part of the cargo, is a breach of the warranty of neutrality, and will avoid the policy as to the whole of the neutral cargo.

Arn. 4th ed. 576.

Goods may be put on board the merchant ship of a belligerent without any breach of the warranty.

Phillips, s. 824.

Nor is it a breach of the warranty of the neutrality of the ship that she carries a belligerent cargo.

Ibid.

If during war neutral property be engaged in any branch of the colonial or coasting trade of the enemy that is open to foreigners in time of peace, such property loses its character of neutrality.

1 Kent, Comm. 81—86; *The Immanuel*, 2 C. Rob. Ad. R. 186.

[NOTE.—This rule is confined to trade between the enemy's colony and the mother country, and is not applicable where the produce of a hostile colony is *bonâ fide* imported into a neutral country, and thence re-exported into the mother country. Arn. 4th ed. 574.]

The employment of a neutral vessel in a service auxiliary to the hostile operations of a belligerent forfeits its neutral character.

Phillips, s. 825.

[NOTE.—This is so, although the master be not aware of the belligerent character of the service. Ibid.]

Property despatched to a neutral in pursuance

of a contract with a belligerent government, or employed by him in a trade for which a privilege is given by a belligerent, does not answer to a warranty of neutrality.

The Anna Catherina, 4 C. Rob. Adm. 107.

A warranty that a vessel is neutral is not forfeited merely by the supercargo being a belligerent.

Mayne v. *Walker*, 3 Doug. 79.

Evidence of Breach.

490. A ship insured being merely represented as neutral, the sentence of a foreign court of admiralty is not evidence to falsify the representation.

Von Jungeln v. *Dubois*, 2 Camp. 151.

A sentence of condemnation of a neutral by a British vice-admiralty court is sufficient evidence from which to presume that the ship condemned had been engaged in some illegal transaction, though the ground of condemnation does not appear on the sentence.

Gilson v. *Mair*, 1 Marsh. 39.

A sentence of a foreign court of admiralty condemning a ship for navigating contrary to the ordinances of a belligerent state to which the neutral country had not assented is not evidence of a breach.

Pollard v. *Bell*, 8 T. R. 434; *Bird* v. *Appleton*, 8 T. R. 562.

Blockade—Violation.

491. To constitute a violation of a blockade there must be—

(1) Actual or constructive knowledge of its existence on the part of the assured; and

(2) An intention to violate it, and some act done in pursuance of such intention.

Sailing for a blockaded port after notice is *primâ facie* evidence of an intention to violate the blockade.

See 1 Kent's Comm. s. 148.

If the assured has actual or constructive notice of a blockade, declared upon sufficient authority and maintained by an adequate force, an attempt on his part to carry property warranted neutral to or from the blockaded port is a violation of the blockade and a breach of the warranty.

A neutral vessel having entered the port before the blockade, may come out in ballast, or with a cargo taken on board before the blockade began, but not with one taken on board after notice of the blockade.

Phillips, s. 830.

So she may bring away from a blockaded port the cargo imported in her before the declaration of blockade and still remaining on board.

Ibid.

It is a violation of blockade to sail with intent to proceed to the mouth of the harbour for the

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(3) That the voyage is lawful, and shall be performed according to law, in the usual course, and without wilful deviation.

Seaworthiness.

Voyage Policies.

493. The assured warrants that at the time when the policy attached or should attach the ship was seaworthy, unless expressly or by necessary implication such warranty is negatived.

Gibson v. *Small*, 4 H. of L. Ca. 397; *Holdsworth* v. *Wise*, 7 B. & C. 794, and cases, *infra*.

This warranty is implied in all voyage policies, whatever the subject-matter of the insurance may be.

Ibid.

The enumeration as excepted from the policy of some losses of the same kind as those resulting from defects which constitute unseaworthiness, does not exclude the general implied warranty.

The Quebec Mar. Ins. Co. v. *The Commercial Bank of Canada*, L. Rep., 3 P. C. 234.

A description of the subject of insurance in the policy as "an abandoned ship," does not dispense with this warranty, and the obligation of the assured under it.

Knill v. *Hopper*, 2 H. & N. 277; 26 L. J., Ex. 377.

Time Policies.

494. In time policies the utmost that can be said is that there is an implied condition that the

ship is in existence, capable of navigation, and has not sustained actual damage.

[NOTE (*a*).—This is a doctrine established by an American authority (*Capen* v. *Washington Ins. Co.*, 12 Cush. Mass. 517; 2 Phillips, p. 397, s. 727), and has been followed by English cases, in which it was decided, after much conflict, that there was no warranty of seaworthiness in a time policy. *Gibson* v. *Small*, 4 H. of L. Ca. 53—approved in *Jenkins* v. *Heycock*, 8 Moo. P. C. 351. This principle applies whatever means might have been available for making the vessel seaworthy. *Fawcus* v. *Sarsfield*, 6 E. & B. 192; 25 L. J., Q. B. 249.

[NOTE (*b*).—In an action on a time policy if it be proved that the vessel insured was sent to sea in an unseaworthy state, but such state being unknown to the owner, and is lost by perils of the sea owing to such unseaworthiness, the owner can recover the loss. *Dudgeon* v. *Pembroke*, L. R., 9 Q. B. 581.]

ESSENTIALS.

495. The materials of which the ship is made;
Its construction;
The qualifications of the captain;
The number and description of the crew;
The tackle, sails, and rigging;
The stores, equipment, and outfit generally, must be such as to render the ship in every respect fit for the proposed voyage or service.

Phillips, s. 695.

The cargo must be such as the ship can safely carry, and must be properly stowed.

[NOTE.—If cargo loaded on deck must inevitably endanger the ship in an ordinary voyage the warranty in a policy on ship is not satisfied; but if by reason of the facility with which such deck cargo could be got rid of it would cause no danger to the ship, the warranty is satisfied. *Daniels* v. *Harris*, L. R., 10 C. P. at p. 8.]

There must be sufficient ballast.

Compliance.

496. The warranty requires seaworthiness in conformity with the standard at the time for the contemplated service at the port to which the vessel belongs, unless some other standard is referred to expressly or by implication.

Knill v. *Hooper*, 26 L. J., Ex. 377; 2 H. & N. 277; *Burgess* v. *Wickham*, 3 B. & S. 669; 33 L. J., Q. B. 17; *Clapham* v. *Langton*, 34 L. J., Q. B. 46; Phillips, sect. 719.

[NOTE.—A ship may be able to stow a given quantity of cargo and to have a good freeboard, but the weight of the goods may be disproportioned to the strength of the hull; therefore the vessel may be unseaworthy irrespective of a load-line. *Merchants Trading Co.* v. *Universal Mar. Ins. Co.*, 2 Asp. Mar. L. Ca. 431, n.]

Breach.

497. The contract is absolutely void if the warranty be not complied with, although the loss cannot be traced to the breach, and the owners have acted honestly and in good faith, and in ignorance of any defect.

Dixon v. *Sadler*, 5 M. & W. 414.

The remedy of a defect after sailing—unless with the consent of the underwriters—does not aid owners of a ship unseaworthy at the time of sailing.

Forshaw v. *Chabert*, 3 Br. & B. 158; *The Quebec Mar. Ins. Co.* v. *The Commercial Bank of Canada*, L. Rep., 3 P. C. 234, in which Lord Tenterden's dictum to the contrary (in *Weir* v. *Aberdeen*, 2 B. & Ald. 320) is dissented from.

At a Port.

498. If the policy attaches before the voyage

Dixon v. *Sadler*, 5 M. & W., see p. 414: *Busk* v. *Royal Exchange Co.*, 2 B. & Ald. 72; *Walker* v. *Maitland*, 5 B. & Ald. 171; *Holdsworth* v. *Wise*, 7 B. & C. 794; *Bishop* v. *Pentland*, id. 219; *Shore* v. *Bentall*, id. 798, note; Phillips, sect. 733.

AMERICAN LAW.—Unseaworthiness arising after the commencement of the voyage, and produced by a peril insured against, imposes upon the assured the duty of using reasonable diligence to repair it, and negligence in that respect may discharge the insurer from any loss arising from the want of such due diligence.

3 Kent, Comm., sect. 288.

As to Lighters.

500. The warranty of seaworthiness does not apply to lighters engaged in loading or unloading the cargo.

Lane v. *Nixon*, L. Rep., 1 C. P. 412.

Insurance on Freight and Cargo.

501. A ship whose condition complies with the warranty in a policy on ship may yet fail to comply with the warranty in a policy on cargo and freight.

The policy being on cargo and freight, the warranty of seaworthiness is not complied with if the cargo is put on board for the voyage when the ship is in so defective a state that the cargo must be relanded in order to make the necessary repairs, and the policy therefore does not attach on the cargo if the risk is to commence at the time of loading.

Phillips, s. 723, vol. i., p. 391; approved in *Daniels* v. *Harris*, L. R., 10 C. P. 1.

If the goods insured are so loaded that the safety of the ship can only be considered as secured

by the facility with which the insured can be got rid of, the ship is not seaworthy under a policy on the goods.

Daniels v. *Harris*, L. R., 10 C. P. 1.

[NOTE.—A vessel may be in a fit state to carry a cargo not liable to be dissolved by sea water, and yet not seaworthy when carrying a perishable cargo. *Castles* v. *Irving*, Court of Exchequer, July 8, 1840.]

There is no implied warranty that the goods shall be in such condition as to be able to encounter the ordinary risks of a sea-voyage.

Koebel v. *Saunders*, 17 C. B., N. S. 71.

Navigation.

502. The captain must be competent to conduct the vessel in safety through all the ordinary perils of the voyage, and in long voyages—not in all voyages—there should be a competent mate.

Arn. 615, 4th edit.; 3 Kent, Com. p. 337, n. e.

[*Quære*, is a criminal intent on the part of the master to scuttle the ship evidence of unseaworthiness? *Ionides* v. *Pender*, 1 Asp. Mar. L. Ca. 381.]

When pilotage is compulsory or customary, a pilot should be on board (*a*).

Phillips, s. 717; *Phillips* v. *Headlam*, 2 B. & Ad. 380; *Law* v. *Hollingsworth*, 7 T. R. 160.

[NOTE.—If a pilot cannot be procured, and it is prudent to enter the port rather than wait, the underwriter will not be discharged if the master enters without a pilot. Arn. 617, 4th edit.]

(*a*) It appears that failure in this respect would not *per se* discharge the underwriters unless in violation of the provisions of a statute.

The person engaged in navigating the vessel need not be an authorized pilot if he possesses a competent knowledge of the ground.

Phillips, s. 713.

If the master takes on board a person representing himself to be a qualified pilot, although in fact he is not so, the warranty is satisfied.

Phillips, s. 714, citing *Law* v. *Hollingsworth*, 7 T. Rep. 160.

The crew must be adequate and of sufficient skill when the vessel sails.

Annen v. *Woodman*, 3 Taunt. 299; *Hicks* v. *Thornton*, Holt's N. P. 30; *Forshaw* v. *Chabert*, 3 Br. & B. 158.

A sufficient crew being shipped originally, an occasional disability or absence of the men does not violate the warranty.

Busk v. *Roy. Ex. Ass.*, 2 B. & Ald. 73, per Bayley, J.

Legal Conduct.

503. An illegal act committed by the assured, or on his behalf, which induces a loss by a peril insured against, is a violation of this implied warranty.

Dawson v. *Atty*, 7 East, 367.

If the act arise out of negligence or mistake, the insurers are not exonerated from consequent loss by perils insured against.

The vessel must be furnished with all proper evidence of her national character, for want of

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worthy for the voyage as her size and construction would allow, is sufficient to support the warranty.

Burgess v. *Wickham*, 30 L. J., Q. B. 17.

The ship must be proved to have been at the commencement of the voyage fit in the degree which a prudent owner uninsured would require to meet the perils of the service it is then engaged in, and would continue so during the voyage, unless it met with extraordinary damage.

Erle, J., in *Gibson* v. *Small*, 4 H. L. Ca. at p. 384.

Where the ship sinks in smooth water very soon after the attaching of the policy, and there is no other evidence as to the condition of the ship or as to the cause of loss, it is evidence on which a jury ought to find that the ship was unseaworthy at the commencement of the risk.

See the judgment in *Anderson* v. *Morice*, L. R., 10 C. P., at p. 68.

In such a case the onus of proof is shifted.

Willes, J., in *Davidson* v. *Burnand*, L. R., 4 C. P. 117.

[NOTE.—A ship laden with coal had left the docks twelve hours, and was lying in the roads in quiet weather; she suddenly sank without any apparent cause. Lush, J., asked the jury whether they could come to any other conclusion than that the loss was owing to the inherent weakness of the vessel. The jury found their verdict for the defendants, and the court refused to disturb it (*Merchants' Trading Company* v. *Universal Mar. Ins. Co.*, 2 Asp. M. L. Ca. 431, n.). Lush, J., said: "According to the evidence given here the ship was unable to maintain herself afloat in still water, lying quietly at anchor. If so, there is an end of the case. This occurring so soon after she left the dock the inference seems irresistible that she must have been in a very infirm state, although not known to the parties when she left the dock." In *Anderson* v. *Morice* (*ubi sup.*) the vessel, when almost fully loaded, sank in port. The jury

having found for the plaintiff, the court sustained the verdict.]

But where there is other cogent evidence of the condition of the ship or of a cause of the loss, then the fact of the ship sinking in smooth water becomes one of several facts which must all be left to the jury.

Anderson v. *Morice*, L. R., 10 C. P. 58.

If a ship cannot pass through an insured voyage without foundering from the effects of wear and tear, occurring without extraordinary action of sea or wind, such ship was unseaworthy at the inception of the risk.

Ibid., p. 69. See *Thompson* v. *Hopper*, 6 E. & B. 172; E. B. & E. 1038; 25 L. J., Q. B. 240; 27 L. J., Q. B. 441; *Fawcus* v. *Sarsfield*, 6 E. & B. 192; 25 L. J., Q. B. 249.

Illustrations.

Cases in which the ship was held unseaworthy from defect in herself or her equipment:—*Parker* v. *Potts*, 3 Dow. 23; *Watt* v. *Morris*, 1 Dow. 32; *Douglas* v. *Scougall*, 4 Dow. 269; *Wedderburn* v. *Bell*, 1 Camp. 1 (defective sails); *Quebec Mar. Ins. Co.* v. *Commercial Bank of Canada*, L. R. 3 P. C. 234 (defective boiler); *Wilkie* v. *Geddes*, 3 Dow. 57 (defective ground tackling); *Wolff* v. *Clagett*, 4 Esp. 258 (medicines); *Fontaine* v. *Phœnix Ins. Co.*, 10 Johnson's N. Y. R. 58 (fuel and candles).

From overloading and want of trim:—*Biccard* v. *Shepherd*. 14 Moo. P. C. 471; *Foley* v. *Tabor*, 2 F. & F. 662; *Weir* v. *Aberdeen*, 2 B. & A. 320; *Daniels* v. *Harris*, L. R. 10 C. P. 1.

From want of competent master:—*Tait* v. *Levi*, 14 East, 481; *Clifford* v. *Hunter*, 1 M. & M. 103; 3 C. & P. 16.

From want of competent crew:—*Forshaw* v. *Chabert*, 3 Br. & B. 158.

From failing to take a pilot: see "Navigation" (*supra*).

Waiver of Breach.

505. After breach insurers may by a memorandum endorsed on the policy continue their liability on the risk.

See *Weir* v. *Aberdeen*, 2 B. & Ald. 320; *Quebec Mar. Ins. Co.* v. *Commercial Bank of Canada*, L. R., 3 P. C. 234.

Wear and Tear.

[See "Perils of the Sea," *ante.*]

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