# THE MARINE INSURANCE ACT 1906

BY

SIR M. D. CHALMERS, K.C.B., C.B.I.

AND

DOUGLAS OWEN

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# PREFACE.

THIS edition of the Marine Insurance Act, 1906, is in substance a third edition of the Digest of Marine Insurance, the second edition of which was published, in 1903, by Mr. Douglas Owen and myself. Owing to Mr. Owen's absence abroad, I have, unfortunately, been deprived of his valuable assistance during the later stages of the preparation of this edition.

The sections of the Act in the present edition correspond with the large type propositions in the Digest, which were taken from the Bill of 1903. A comparison of the sections with the large type propositions of the last edition will show what changes were effected in the measure during its passage through Parliament last year.

Although the language of the Act is now authoritative it may, nevertheless, be useful to the profession to be referred to the authorities on which each proposition was founded, and the cases before the Act are still in point as illustrations in so far as the Act does not alter the existing law.

References to the sixth edition of Arnould have been retained instead of references to the excellent seventh edition, because the sixth edition was used when the Bill was prepared.

M. D. CHALMERS.

*February*, 1907.

# INTRODUCTION TO FIRST EDITION OF DIGEST.

THE large type propositions of this Digest are taken, with a few slight corrections, and with the necessary verbal alterations (such as the substitution of the indicative for the imperative), from the clauses of the Marine Insurance Bill, which was introduced in the House of Lords in 1894, 1895, 1896, and 1899.

The object of that Bill was to reproduce as exactly as possible the existing law, without making any attempt to amend it. Lord Herschell, who originally took charge of the Bill, was strongly of opinion that a codifying Bill, in its inception, ought to be a mere reproduction of existing law. If amendments in the law are made in the initial stage, the whole Bill becomes controversial. Any amendment which seems desirable should be deliberately inserted by the Legislature when the Bill is under consideration. In some instances, of course, the Bill has to deal with questions where the law is unsettled, and the framers of the Bill must decide what they believe the law to be. In the Digest, propositions which appear to be unsettled law are included in square brackets, and the doubt is dealt with in the notes. Again, in one or two instances, the Lords Select Committee, which partially examined the Bill, introduced

some small amendment in the law. In those cases the Digest reverts to the original drafts, and the point is mentioned in the notes.

The law of marine insurance rests almost entirely upon common law. Only a few isolated points are dealt with by statute. The reported cases are very numerous, being over 2000 in number. On some points there is a plethora of authority. On other points of apparently equal importance the decisions are meagre, and not always satisfactory. Some important questions are still untouched by authority, and the rule depends on recognised commercial usage. Again, many of the older cases turn upon commercial conditions which are now obsolete. The subject, therefore, is not an easy one to deal with in a brief Digest. It would be altogether beyond the scope of this Digest to attempt even to refer to the great bulk of decided cases, much more so to endeavour to criticise them in detail. The objects of the Digest are twofold: first, to state the main principles of marine insurance law in brief consecutive propositions; and, secondly, to support those propositions, where possible, by references to leading cases, or cases containing good expositions of principle by eminent commercial judges. Each case is dated, and if a later case reviews previous cases only a reference to the later case is given. Where rules of law seem difficult to apply, illustrations drawn from decided cases are inserted after the section to show the application of the abstract proposition to concrete states of fact.

After the list of cases referred to, there is added a list of important cases, which have been overruled, doubted, or explained. This list has no pretensions to completeness, but may be useful as far as it goes.

Occasional reference is made to foreign codes by

way of illustration, but no attempt has been made to compare the English rules systematically with any foreign code.

The Marine Insurance Bill was first introduced by Lord Herschell in 1894. Its history up to the present time sufficiently appears from the following extract from the Memorandum attached to it, viz.:—

"The Bill is founded on the Bill which was introduced in 1894. Its provisions and suggestions received from various sources have been carefully considered by a Committee appointed by the late Lord Chancellor (Lord Herschell). The Committee met at first under the presidency of the late Attorney-General (Sir R. T. Reid, Q.C.), and afterwards under the presidency of Lord Herschell. It consisted of Mr. John Glover and Mr. Milburn, representing the shipowners, Mr. McArthur (Chairman of the Liverpool Chamber of Commerce), and Mr. Hogg, representing the average adjusters, and Mr. J. E. Street, Deputy Chairman of Lloyd's, Mr. Douglas Owen, of the Alliance Marine and General Assurance Company, Mr. William Walton (legal adviser to Lloyd's), representing the underwriters and insurance companies, Mr. C. B. Vallence, Chairman of the Liverpool Underwriters' Association, and the draftsman, Mr. Chalmers.*

* After Lord Herschell's death, Lord Chancellor Halsbury again took up the Bill, and introduced it in the House of Lords in 1899, but did not proceed with it.

Further criticisms on the Bill were obtained from Lord Justice Mathew, the Right Hon. Arthur Cohen, K.C., and other friends, and the Bill was again introduced in 1900. Lord Halsbury then appointed another committee, on which the underwriters, shipowners, and average adjusters were represented, and, presiding himself, went through the Bill with them clause by clause.

After this conference the Bill was passed through the Lords, but it

"In dealing with rules of law, which may be modified by the stipulations of the parties, it is to be borne in mind that the certainty of the rule laid down is of more importance than its theoretical perfection. As Willes, J., said in 1776, 'In all commercial transactions the great object is certainty; it will therefore be necessary for the Court to lay down some rule, and it is of more consequence that the rule should be certain, than whether it is established one way or the other.' (*Lockyer* v. *Offley*, 1 T. R. at p. 259. See, too, *Sailing Ship Blairmore* v. *Macredie* (1898), A. C. at p. 597, per Lord Halsbury.) What mercantile men require is a clear rule to provide for cases where the parties have either formed no intention or have failed to express it clearly. Where the rule of law is certain, the parties know when to stipulate and what to stipulate for."

The future which awaits the Bill is uncertain. Mercantile opinion is in favour of codification, but probably the balance of legal opinion is against it. As long as freedom of contract is preserved, it suits the man of business to have the law stated in black and white. The certainty of the rule laid down is of more importance than its nicety. It is cheaper to legislate than to litigate; moreover, while a moot point is being litigated and appealed, pending business is embarrassed. The lawyer, on the other hand, feels cramped by codification. Discussions on the wording of the Act in question have to take the place of discussions of principles. No code

was always blocked in the House of Commons until, in 1906, it was taken up by Lord Chancellor Loreburn in conjunction with Lord Halsbury. In the Commons the Bill was sent to Grand Committee, and was in charge of the Solicitor-General. A good many amendments were made in committee and on the report stage, and most of them were agreed to, with occasional modification, when the Bill returned to the Lords.

can provide for every case that may arise, or always use language which is absolutely accurate. The cases which come before lawyers are the cases in which the code is defective. In so far as it works well it does not come before them. Every man's view of a question is naturally coloured by his own experience, and a lawyer's view of commerce is perhaps affected by the fact that he sees mainly the pathology of business. He does not often see its healthy physiological action.

If the Bill passes, this Digest may be useful as showing the foundations on which it was built up. If it does not pass, it is hoped that the Digest may be useful as a brief and succinct exposition of the existing law.

I may add that I am mainly responsible for the purely legal part of this Digest, though I have had throughout the benefit of the criticisms of my colleague, Mr. Douglas Owen.

M. D. C.

*January*, 1901.

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*Gladstone* v. *King* (1813), 1 M. & S. 35; disapproved, BLACKBURN *v.* VIGORS (1887), 12 App. Cas. at pp. 530, 540.

*Great Indian Peninsular Ry. Co.* v. *Saunders* (1861), 1 B. & S. 41; 2 B. & S. 266; explained, KIDSTON *v.* EMPIRE INS. Co. (1866), L. R. 1 C. P. at p. 548.

*Hagedorn* v. *Oliverson* (1814), 2 M. & S. 485; followed, CORY *v.* PATTON (1874), L. R. 9 Q. B. 577, Ex. Ch.

*Hamilton* v. *Mendes* (1761), 2 Burr. 1198; discussed, RUYS *v.* ROYAL EXCHANGE (1897), 2 Q. B. at p. 138.

*Harris* v. *Scaramanga* (1872), L. R. 7 C. P. 481; followed, DE HART *v.* COMPAÑIA ANONIMA "AURORA" (1903), 2 K. B. 503, C. A.

*Havelock* v. *Hancill* (1789), 3 T. R. 277; discussed, CORY *v.* BURR (1883), 8 App. Cas. at p. 399.

*Hicks* v. *Shield* (1857), 7 E. & B. 633; discussed, ALLISON *v.* BRISTOL MAR. INS. Co. (1876), 1 App. Cas. at p. 221.

*Holdsworth* v. *Wise* (1828), 7 B. & C. 794; discussed, SAILING SHIP BLAIRMORE *v.* MACREDIE (1898), A. C. at p. 609.

*Hurst* v. *Usborne* (1856), 18 C. B. 144; doubted, RANKIN *v.* POTTER (1873), L. R. 6 H. L. at p. 117.

*Hydarnes Steamship Co.* v. *Indemnity Mutual Mar. Ins.* (1894), 2 Q. B. 500; reversed (1895), 1 Q. B. 500, C. A.

*Jackson* v. *Union Mar. Ins. Co.* (1874), L. R. 10 C. P. 125; distinguished, INMAN STEAMSHIP Co. *v.* BISHOFF (1882), 7 App. Cas. at p. 676; followed, *Re* JAMIESON (1895), 1 Q. B. at p. 95, C. A.

*Joyce* v. *Kennard* (1871), L. R. 7 Q. B. 78; discussed, CUNARD STEAMSHIP Co. *v.* MARTEN (1902), 2 K. B. at p. 629.

*Kirchner* v. *Venus* (1859), 12 Moore P. C. 361; explained, ALLISON *v.* BRISTOL MAR. INS. Co. (1876), 1 App. Cas. 209, at p. 224.

*Kleinwort* v. *Shepard* (1859), 1 E. & E. 447; discussed, CORY *v.* BURR (1883), 8 App. Cas. at p. 396.

*Knight* v. *Faith* (1850), 15 Q. B. 649; criticised, RANKIN *v.* POTTER (1873), L. R. 6 H. L. at pp. 102, 130; TRINDER *v.* THAMES AND MERSEY INS. Co. (1898), 2 Q. B. at p. 119, C. A.

*Laveroni* v. *Drury* (1853), 22 L. J. Ex. 2; discussed, HAMILTON *v.* PANDORF (1887), 12 App. Cas. at p. 523.

*Law* v. *Hollingsworth* (1797), disapproved, DIXON *v.* SADLER (1839), 5 M. & W. at p. 408; disapproved with a qualification, SADLER *v.* DIXON (1841), 8 M. & W. at p. 900, Ex. Ch.

*Le Cheminant* v. *Pearson* (1812), 4 Taunt. 367, 380; discussed, AITCHISON *v.* LOHRE (1879), 4 App. Cas. at p. 763.

*Lewis* v. *Rucker* (1761), 2 Burr. 1167; discussed, IRVING *v.* MANNING (1847), 1 H. of L. Cas. at p. 305; DUUS BROWN & Co. *v.* BINNING (1906), 11 Com. Cas. at p. 194.

*Livie* v. *Janson* (1812), 12 East, 647; explained, IONIDES *v.* UNIVERSAL MAR. INS. Co. (1863), 14 C. B. (N. S.) at p. 294; LIDGETT *v.* SECRETAN (1871), L. R. 6 C. P. at p. 625.

*Lohre* v. *Aitchison* (1878), 3 Q. B. D. 558, C. A.; reversed, AITCHISON *v.* LOHRE (1879), 4 App. Cas. 755.

*Mason* v. *Sainsbury* (1748), 1 Ves. Sen. 98; explained, SIMPSON *v.* THOMPSON (1877), 3 App. Cas. at p. 293.

*Moss* v. *Smith* (1850), 9 C. B. 94; approved, AITCHISON *v.* LOHRE (1879), 4 App. Cas. at p. 762.

*North Britain, The* (1894), P. 77; approved, TATHAM *v.* BURR (1898), A. C. 382, H. L.

*North of England Ins. Assn.* v. *Armstrong* (1870), L. R. 5 Q. B. 244; doubted, BURNAND *v.* RODOCANACHI (1882), 7 App. Cas. at p. 342.

*Palmer* v. *Blackburn* (1822), 1 Bing. 61; followed, UNITED STATES SHIPPING Co. *v.* EMPRESS ASS. CORPN. (1907), 1 K. B. 259.

*Parmeter* v. *Todhunter* (1808), 1 Camp. 541; disapproved, CURRIE *v.* BOMBAY NATIVE INS. Co. (1869), L. R. 3 P. C. at p. 78.

*Pink* v. *Fleming* (1890), 25 Q. B. D. 396; distinguished, SCHLOSS BROTHERS *v.* STEVENS (1906), 11 Com. Cas. at p. 279.

*Pipon* v. *Cope* (1808), 1 Camp. 434; explained, TRINDER *v.* THAMES AND MERSEY MAR. INS. Co. (1898), 2 Q. B. at p. 129, C. A.

*Pitman* v. *Universal Mar. Ins. Co.* (1882), 9 Q. B. D. 192, C. A.; discussed, MARINE INS. Co. *v.* CHINA STEAMSHIP Co. (1886), 11 App. Cas. at p. 590.

*Powell* v. *Hyde* (1855), 5 E. & B. 607; discussed, CORY *v.* BURR (1883), 8 App. at p. 396.

*Price* v. *A 1 Ships' Small Damage Assn.* (1889), 22 Q. B. D. 580, C. A.; criticised, MCARTHUR, ED. 2, p. 386.

*Proudfoot* v. *Montefiore* (1866), L. R. 2 Q. B. 511, 521; approved, BLACKBURN *v.* VIGORS (1887), 12 App. Cas. at p. 537.

*Randal* v. *Cockran* (1748), 1 Ves. Sen. 98; distinguished, BURNAND *v.* RODOCANACHI (1882), 7 App. Cas. at p. 339.

*Rankin* v. *Potter* (1873) L. R. 6 H. L. 83; discussed, KALTENBACH *v.* MACKENZIE (1878), 3 C. P. D. at pp. 474, 480, C. A.

*Rosetto* v. *Gurney* (1851), 11 C. B. 176; approved, FARNWORTH *v.* HYDE (1866), L. R. 2 C. P. 204, Ex. Ch.

*Roux* v. *Salvador* (1836), 3 Bing. N. C. 266; discussed, FARNWORTH *v.* HYDE (1865), 18 C. B. (N. S.) at p. 856; TRINDER *v.* THAMES AND MERSEY MAR. INS. CO. (1898), 2 Q. B. at p. 119, C. A.

*Sailing Ship Garston* v. *Hickie* (1885), 15 Q. B. D. 580; discussed, HUNTER *v.* NORTHERN MAR. INS. CO. (1888), 13 App. Cas. 717.

*Scottish Mar. Ins. Co.* v. *Turner* (1853), 1 Macq. H. L. 334; discussed, RANKIN *v.* POTTER (1873), L. R. 6 H. L. at p. 100.

*Smith* v. *Reynolds* (1856), 1 H. & N. 221; followed, BERRIDGE *v.* MAN ON INS. CO. (1887), 18 Q. B. D. 346, C. A.

*Sparkes* v. *Marshall* (1836), 2 Bing. N. C. 761; explained, ANDERSON *v.* MORICE (1876), 1 App. Cas. at p. 735.

*Stephens* v. *Australasian Ins. Co.* (1873), L. R. 8 C. P. 18; discussed, IMPERIAL MAR. INS. CO. *v.* FIRE INS. CORPN. (1856), 4 C. P. D. 166.

*Stribley* v. *Imperial Mar. Ins. Co.* (1876), 1 Q. B. D. 507; disapproved, BLACKBURN *v.* VIGORS (1887), 12 App. Cas. at p. 540.

*Thompson* v. *Hopper* (1856), 6 E. & B. 172; reversed, THOMPSON *v.* HOPPER (1858), E. B. & E. 1038; discussed and explained, DUDGEON *v.* PEMBROKE (1877), 2 App. Cas. 284.

*Thompson* v. *Taylor* (1795), 6 T. R. 478; followed, FOLEY *v.* UNITED MAR. AND FIRE INS. CO. (1870), L. R. 5 C. P. 155.

*Thornely* v. *Hobson* (1819), 2 B. & Ald. 513; discussed, COSSMAN *v.* WEST (1887), 13 App. Cas. at pp. 177, 178.

*Uzielli* v. *Boston Mar. Ins. Co.* (1884), 15 Q. B. D. 11; discussed, WESTERN ASS. CO. (TORONTO) *v.* POOLE (1903), 1 K. B., at p. 384.

*The Vortigern* (1899), P. 140; followed, GREENOCK STEAMSHIP CO. *v.* MARITIME INS. CO. (1903), 2 K. B. 657, C. A.

*Watson* v. *Clark* (1813), 1 Dow. 336, H. L.; discussed, PICKUP *v.* THAMES AND MERSEY MAR. INS. CO. (1878), 3 Q. B. D. 594, C. A.

*Weir* v. *Aberdeen* (1819), 2 B. & Ald. 320; discussed, QUEBEC MAR. INS. CO. *v.* COMMERCIAL BANK OF CANADA (1870), L. R. 3 P. C. 234.

*West India and Panama Tel. Co.* v. *Home and Col. Mar. Ins. Co.* (1880), 6 Q. B. D. 51, C. A.; overruled, THAMES AND MERSEY MAR. INS. CO. *v.* HAMILTON (1887), 12 App. Cas. 484, H. L.

*Williams* v. *London Ass. Co.* (1813), 1 M. & S. 318; approved, STEAMSHIP CARISBROOK CO. *v.* LONDON AND PROV. MAR. INS. CO. (1902), 2 K. B. 692, C. A.

*Westwood* v. *Bell* (1815), 4 Camp. 349; explained, Fisher *v.* Smith (1876), 34 L. T. at p. 916.

*Wilson* v. *Rankin* (1865), L. R. 1 Q. B. 162; followed, Dudgeon *v.* Pembroke (1874), L. R. 9 Q. B. 581.

*Woodley* v. *Mitchell* (1883), 11 Q. B. D. 47, C. A.; overruled, The Xantho (1887), 12 App. Cas. 503.

*Yates* v. *Whyte* (1838), 4 Bing. N. C. 272; explained, Simpson *v.* Thomson (1877), 3 App. Cas. at p. 293.

# THE
# MARINE INSURANCE ACT, 1906.

(6 EDW. 7, CH. 41.)

*An Act to codify the Law relating to Marine Insurance.*
[21st December, 1906.]

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*Marine Insurance.*

§ 1. A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure. Marine insurance defined.

NOTE.—For various definitions of marine insurance, and discussion thereof, see *post*, p. 161; for history of marine insurance, see *post*, p. 170.

The formal instrument in which the contract is embodied is called the "policy."[1] The informal note or memorandum which is drawn up when the contract is entered into is called the "slip" or "covering note."[2]

The party who undertakes to indemnify the other, that is to say, the promisor, is called the "insurer" or "underwriter" (so called because he subscribes or underwrites the policy). The party to be indemnified is called the "insured," or, more commonly, the "assured."[3]

The consideration which the insurer receives for his undertaking

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[1] From Latin *pollicitatio*, a promise, through Italian *polizza* or French *police*. Oddly enough, in an English policy the promise to pay in case of loss is implied, not expressed. Continental policies contain an express promise to pay within so many days after notice of loss.

[2] See *McArthur*, Ed. 2, p. 21, and §§ 21, 22, 89.

[3] As to what is included in the term "assured," see *Ocean I. S. Ins. Assn.* v. *Leslie* (1889), 22 Q. B. D. at pp. 724, 726, per Mathew, J.

SECT. 1. is called the "premium." But in the case of mutual insurance a guarantee or other arrangement may take the place of the premium.[1]

The term "loss" includes damage or detriment as well as actual loss of property.[2]

The term "risk" is used in different senses, and must always be construed by the light of its context. Sometimes it is used to denote the perils themselves to which insurable property may be exposed, as when sea risks are contrasted with land risks, or when goods are insured against "all risks." Sometimes it is used to denote the risk run by the person whose property is exposed to danger. But, more commonly perhaps, it is used to denote the liability undertaken by the insurer in respect of his contract, as, for example, when goods are lost, and it is said that "the risk had not attached," that is to say, that the goods were not covered by the policy.[3]

Marine insurance, in legal theory, is essentially a contract of indemnity.[4] The legal consequences and incidents of the contract are deductions from this cardinal principle. Hence arise its distinctive characteristics; such as the rules requiring interest, the necessity for full disclosure by the assured, the rules as to double insurance, the right of subrogation which arises on settlement of the loss, and the right to return of premium in certain events. But it has often been pointed out that in practice marine insurance is not a perfect contract of indemnity.[5] For example, under an unvalued policy on goods, in the ordinary form, and without any special clause, the assured will probably receive less than his real loss,[6] while under a valued policy

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[1] As to premium, see §§ 52–54, and as to mutual insurance, § 85.

[2] As to loss, see §§ 56–66. For a useful discussion of the mercantile meaning of loss, see *Moss* v. *Smith* (1850), 19 L. J. C. P. 225, 228.

[3] Cf. *Bradford* v. *Symondson* (1881), 7 Q. B. D. at p. 464, per Lord Bramwell.

[4] *Arnould*, Ed. 6, p. 3; *McArthur*, Ed. 2, p. 23; per Lord Mansfield, *Kent* v. *Bird* (1777), 2 Cowp. at p. 585 (wager policy); per Lord Blackburn, *Lloyd* v. *Fleming* (1872), L. R. 7 Q. B. at p. 302 (assignment after loss); per Lord Blackburn, *Anderson* v. *Morice* (1875), L. R. 10 C. P. at p. 615 (insurable interest); per Jessel, M.R., *Pitman* v. *Universal Mar. Ins. Co.* (1882), 9 Q. B. D. at p. 204 (partial loss); per Lord Esher and Lord Bowen, *Castellain* v. *Preston* (1883), 11 Q. B. D. at pp. 386 and 397 (subrogation); *Moran Galloway & Co.* v. *Uzielli* (1905), 2 K. B. at p. 563 C. A. (insurable interest).

[5] *Aitchison* v. *Lohre* (1879), 4 App. Cas. at p. 761.

[6] *Arnould*, Ed. 6, pp. 297, 298; *McArthur*, Ed. 2, pp. 24 and 68. In practice the expected profits are covered by special provision; see *Owen's* Notes and Clauses, Ed. 3, p. 79.

he may receive an amount which either exceeds or falls short of his real loss.[1] But this deviation in practice from true indemnity depends rather on the form of policies in actual use than on the nature of the contract itself; see *Phillips on Insurance*, § 3. The contract is always in principle a contract of indemnity, but the extent and amount of indemnity are matters of convention between the parties.

The main principles of marine insurance law are well settled. The difficulties that occur in practice arise chiefly out of the crabbed and obscure language of the time-honoured Lloyd's policy, which was framed with reference to the conditions of commerce in a bygone era. New wine has continually to be put into the old bottle, with inconvenient results. See note to Sched. I., *post*, p. 140.

Mixed sea and land risks.

§ 2.—(1.) A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage.[2]

(2.) Where a ship in course of building, or the launch of a ship, or any adventure analogous to a marine adventure, is covered by a policy in the form of a marine policy, the provisions of this Act, in so far as applicable, shall apply thereto; but, except as by this section provided, nothing in this Act shall alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurance as by this Act defined.[3]

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[1] Cf. *Woodside* v. *Globe Ins. Co.* (1896), 1 Q. B. at p. 107.

[2] *McArthur*, Ed. 2, p. 88. As to trade usage, which hitherto has been of very limited scope, see *Rodocanachi* v. *Elliott* (1873), 42 L. J. C. P. at p. 254, per Lord Esher.

[3] For form of launch and trial trip insurance, see *Owen's* Notes and Clauses, Ed. 3, p. 83. *Jackson* v. *Mumford* (1904), 9 Com. Cas. 114 C. A. (ships when building insured against "fire in ship and on bond stocks, *trials*, and all marine risks to completion and acceptance by Admiralty"). As to the words "so far as applicable," see *Quebec Mar. Ins. Co.* v. *Commercial Bank of Canada* (1870), L. R. 3 P. C. 234 (lake, river, and canal insurance); *Joyce* v. *Kennard* (1871), L. R. 7 Q. B. 78 (insurance of lighterman's liability); *Shelbourne* v. *Law Invest. Ins. Co.* (1898), 8 Asp. Mar. Cas. 445 (river insurance).

SECT. 2.

NOTE.—As commerce has progressed, and insurance has developed, new forms of risks are included in marine policies. But in order to cover them, special and appropriate forms of words must, in the absence of any well-ascertained trade usage, be inserted in the policy. Thus goods may be insured "from Japan to London, *viâ* Marseilles and [or] Southampton;"[1] wool may be insured "at and from Townsville to London, including risk of fire and flood, from sheep's back until waterborne at Townsville;"[2] and bullion may be insured "at and from Boodini to London, including all risks of every description, from the mines by escort to railway station at Raichur, thence by rail to Bombay, and thence to London;"[3] and a fox terrier may be insured against all risks from London to Bombay, and thence by rail to Lahore;[4] and goods may be insured "against all risks by land or by water" from Cartagena to any place in the interior of Columbia.[5] These mixed sea and land risks may be compared, by way of analogy, with "through bills of lading," which are the invention of modern commerce. Compare also the definition of "policy of sea insurance," given by § 92 of the Stamp Act, 1891 (54 & 55 Vict. c. 39), *post*, p. 155. Policies on ships in course of building are to be stamped as voyage, and not as time policies, see § 8 of the Revenue Act, 1903 (3 Edw. 7, c. 46), *post*, p. 160.

Marine adventure and maritime perils defined.

§ 3.—(1.) Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.[6]

(2.) In particular there is a marine adventure where—

(*a*.) Any ship, goods, or other moveables are exposed to maritime perils. Such property is in this Act referred to as "insurable property:"[7]

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[1] *Rodocanachi* v. *Elliott* (1873), L. R. 8 C. P. 649; affirmed L. R. 9 C. P. 518, Ex. Ch. (goods detained in Paris during siege).

[2] *King* v. *Victoria Ins. Co.* (1896), A. C. 250 P. C.; see, too, *Davies* v. *National Ins. Co. of New Zealand* (1891), A. C. 485.

[3] *Hyderabad Deccan Co.* v. *Willoughby* (1899), 2 Q. B. 530; see, too, *Janson* v. *Driefontein Consolidated Mines*, A. C. (1902) 484 (bullion insured from Transvaal Mines to London).

[4] *Jacobs* v. *Gaviller* (1902), 7 Com. Cas. 116.

[5] *Schloss Brothers* v. *Stevens* (1906), 2 K. B. 665.

[6] *Arnould*, Ed. 6, p. 688; *Wilson* v. *Jones* (1867), L. R. 2 Ex. 139, Ex. Ch.

[7] *Arnould*, Ed. 6, pp. 18-29; and as to "moveables," see § 90, *post*.

(*b.*) The earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils:[1]

(*c.*) Any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils.[2]

"Maritime perils" means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind, or which may be designated by the policy.[3]

NOTE.—Strictly speaking, it is the risk or adventure of the assured and not the property exposed to peril, which is the subject of insurance. *Ex hypothesi*, the ship or goods may be lost. What is really insured is the pecuniary interest of the assured in or in respect of the property exposed to peril, in other words, the risk or adventure.[4] Lord

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[1] *McArthur*, Ed. 2 pp. 59, 65; cf. *Rankin* v. *Potter* (1873), L. R. 6 H. L. 83 (chartered freight on homeward voyage insured as to outward voyage); *Price* v. *Maritime Ins. Co.* (1900), 5 Com. Cas. 332, affirmed (1901) 2 K. B. 412, C. A. (advances); *Moran Galloway & Co.* v. *Uzielli* (1905), 2 K. B. 555 (disbursements).

[2] *McArthur*, Ed. 2, p. 59; *Boehm* v. Bell (1799), 8 T. R. at p. 161 (damages and costs for illegal capture); *Tatham* v. *Burr* (1898), A. C. at p. 385 (liability for running down another ship); *Cunard Co.* v. *Marten* (1902), 2 K. B. 624 (liability of shipowner under contract of carriage); and see §§ 14, 75.

[3] Cf. *Thames and Mersey Ins. Co.* v. *Hamilton* (1887), 12 App. Cas. at p. 498, per Lord Herschell.

[4] A good illustration of this principle is furnished by the rule that there may be a total loss of goods when the adventure is wholly frustrated though the goods themselves remain in specie, and consider the case of re-insurance. See § 60, *post*.

SECT. 3.

Esher has sought to reconcile the underlying facts with popular language, by drawing a distinction between the subject insured and the subject-matter of insurance.[1] The Netherlands Com. Code, Art. 268, provides simply that "the subject-matter of an insurance may be any interest appreciable in money, and not excepted by law." See, too, German Com. Code of 1897, Art. 778.

If an insurer, with his eyes open, insures an unlawful adventure, the policy is obviously a mere "honour policy," for *ex turpi causa non oritur actio*.[2] Speaking generally, an adventure is illegal if it is prohibited by statute, or contrary to good morals or public policy;[3] and illegality in any part of the adventure taints the whole of it.[4]

The lawfulness of an English adventure or insurance must be determined by English law.[5] For example, if two foreign states are at war, there is nothing unlawful in sending an English ship to run a blockade, though the ship may be liable to confiscation by the blockading belligerent.[6] So, too, as a general rule, English law takes no cognizance of foreign trade or revenue laws.[7] But a distinction must be drawn between the lawfulness of the adventure and the implied warranty of legality by the assured (see § 41, *post*). If insurer and assured like to insure an illegal venture, the contract is an honour contract; but where the assured does not disclose the illegality of the venture, the contract is binding neither in law nor honour. Again, if there be anything in foreign law or international relations which increases the particular risk, and is not a matter of common knowledge, it must be disclosed to the insurer before the contract is entered into, for the nature of the risk and the amount of premium charged will necessarily be affected thereby. Cf. § 18, *post*.

The terms of subsect. (2) are inclusive, not exhaustive. As the conditions of maritime commerce change, new dangers and matters require to be covered by insurance. For example, shipments of live cattle, which are insured against mortality and all other risks, have to be covered by special provisions, as such risks are not contemplated by the old form of policy.

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[1] *Rayner* v. *Preston* (1881), 18 Ch. D. at p. 9, C. A.

[2] Cf. *Gedge* v. *Royal Exchange Ass. Corpn.* (1900), 2 Q. B. at p. 220.

[3] *Wetherell* v. *Jones* (1832), 3 B. & Ad. at pp. 225, 226.

[4] *Arnould*, Ed. 6, p. 691.

[5] Cf. *Kellner* v. *Le Mesurier* (1803), 4 East, at pp. 402, 403.

[6] *Arnould*, Ed. 6, p. 713, *Ex p. Chavasse* (1865), 34 L. J. (Bank.) 17.

[7] *Westlake*, Private International Law, Ed. 3, § 213; *Lowndes*, Ed. 2, p. 102; cf. *Francis* v. *Sea Ass. Co.* (1898), 8 Asp. Mar. Cas. 418.

The subject-matter, says Lord Blackburn, "is generally described very concisely as being so much 'on ship,' 'on goods,' 'on freight,' 'on profit on goods,' 'on advances on coolies,' 'on emigrant money,' and so on."[1] See further, § 26, *post*.

The insurer, as a rule, is not liable for damages consequent on delay, even though the delay be caused by a peril insured against (see § 55 (2) (*b*), *post*, p. 73). But policies may be effected to protect the assured against the cancelling clause in charter parties, and to protect the owner of perishable goods.

Subsect. (3).—Lloyd's policy, after enumerating the ordinary perils, proceeds with the words "and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods," etc. But these general words have always been interpreted to refer to perils of a like kind with those already enumerated.[2] Perils of a dissimilar kind may be insured against (see, *e.g.*, the note to § 2), but they must be covered by express terms.[3] Insurances are sometimes effected against "all risks," or even against all risks by land or by water.[4] On the other hand, a policy may be confined to some only of the specified perils. In that case a so-called warranty is added, excluding particular perils, *e.g.* "warranted free from capture, seizure, and detention, and all the consequences of hostilities." (See *Owen's* Notes and Clauses, Ed. 3, p. 28, *et seq.*)

The result of maritime perils is to cause "marine damage," which, says Lord Herschell, does not mean only damage which has been caused by the seas, "but damage of a character to which a marine adventure is subject. Such an adventure has its own perils, to which *either* it is exclusively subject *or* which possess in relation to it a special or peculiar character. To secure an indemnity against them is the object of marine insurance."[5] As to the narrower expression "perils of the seas," see Sched. I., rule 7, *post*, p. 145.

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[1] *Mackenzie* v. *Whitworth* (1875), 1 Ex. D. at p. 40, C. A.

[2] *Arnould*, Ed. 6, p. 789; *McArthur*, Ed. 2, p. 136; *Thames and Mersey Ins. Co.* v. *Hamilton* (1882), 12 App. Cas. at p. 495.

[3] See, *e.g.*, *Inman* v. *Bischoff* (1882), 7 App. Cas. at p. 686 (abatement clause in charter party); *Thames and Mersey Ins. Co.* v. *Hamilton* (1887), 12 App. Cas. 484, at p. 491 (donkey engine explosion), which gave rise to the "*Inchmaree* clause," as to which see *Oceanic Steamship Co.* v. *Faber* (1906), 11 Com. Cas. 179.

[4] *Schloss* v. *Stevens* (1906), 2 K. B. 665, and see cases cited *ante*, p. 4.

[5] *Thames and Mersey Ins. Co.* v. *Hamilton* (1887), 12 App. Cas. at p. 498.

SECT. 4.

*Insurable Interest.*

Wagering or gaming contracts are void [cf. 8 & 9 Vict. c. 109, s. 18].

§ 4.—(1.) Every contract of marine insurance by way of gaming or wagering is void.

(2.) A contract of marine insurance is deemed to be a gaming or wagering contract—

(*a.*) Where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest:[1] or

(*b.*) Where the policy is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term:

Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer.[2]

NOTE.—This section appears to reproduce the effect of the 19 Geo. 2, c. 37, §§ 1 to 3, as read with the 8 & 9 Vict. c. 109. The Act of 1845 avoids all policies which are in fact wagering policies. The Act of 1745 (now repealed) avoided policies which bear on the face of them the *indicia* of wagering, whether in fact they are wagering policies or not.

A policy without interest is not necessarily a wager policy. For example, when the assured *bonâ fide* expects to have an interest, but the expectation is not realized, the policy is not a wager policy.[3] The assured cannot recover on the policy, but he may be entitled to a return of the premium; see § 84.

Subsect. (1).—See the Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18, which provides that "all contracts or agreements, whether by

[1] *McArthur*, Ed. 2, p. 24; *Cousins* v. *Nantes* (1811), 3 Taunt. 513 (presumption of interest and averment in pleading) Ex. Ch.; *Wilson* v. *Jones* (1867), L. R. 2 Ex. at p. 141, per Willes, J. See §§ 4–15.

[2] Cf. *Lucena* v. *Crauford* (1806), 2 B. & P. at p. 310, and note, *post*.

[3] See, *e.g.*, *Anderson* v. *Morice* (1876), 1 App. Cas. 713.

parole or in writing, by way of gaming or wagering, shall be null and void."

As to subsect. (2) (*b*), which reproduces with slight modification the effect of §§ 1–3 of the Marine Insurance Act, 1745 (19 Geo. 2, c. 37), repealed by Sched. II. of this Act, the following points may be noted:—

(1.) The statute was confined in terms to British ships, and goods and effects laden thereon. Therefore a p.p.i. policy on a foreign ship was not illegal if, as a fact, the insurer had a lawful interest and could prove it. As, however, such a policy bears the mark of wagering on the face of it, the Lords' Select Committee thought that the provision should be generalized.

(2.) The statute spoke of ships, and goods and effects laden thereon. But a wide construction was put on these terms, and the scope of the statute was by judicial decision extended to policies on profits, and commission on ships and goods, effected, "without benefit of salvage."[1]

(3.) The scope of the statute was not confined to the exact terms prohibited. Any similar terms avoid the policy. Thus a policy on cash advances, "full interest admitted," is void.[2]

(4.) A distinction must be drawn between p.p.i. policies and policies "without benefit of salvage," that is to say, in modern language, "without benefit of abandonment." The nature of an insurance may be such that, in case of loss, there could be nothing to abandon to the insurer, and therefore such a policy may lawfully be effected "without benefit of salvage." Nine judges, in giving their opinion to the House of Lords in *Lucena* v. *Crauford*,[3] say that the 19 Geo. 2, c. 37, "which prohibited insurances without benefit of salvage, was not to be understood as prohibiting the insurance of things not capable of salvage, but only as prohibiting the insertion of a clause to that effect *in a policy upon things which were capable of salvage*." For example, a man may have an interest, but no property, in the thing imperilled, and then he has nothing which he can abandon.[4]

(5.) The statute further contained two more or less obsolete

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[1] *De Mattos* v. *North* (1868), L. R. 3 Ex. 185; *Allkins* v. *Jupe* (1877), 2 C. P. D. 375; see at p. 388 as to possibility of salvage in such a case.

[2] *Berridge* v. *Man On Ins. Co.* (1887), 18 Q. B. D. 346, C. A.; see, too, *Gedge* v. *Royal Exchange* (1900), 2 Q. B. 214.

[3] *Lucena* v. *Crauford* (1806), 2 B. & P. at p. 310; 6 R. R. at p. 694.

[4] Cf. *Wilson* v. *Jones* (1867), L. R. 2 Ex. 139 (policy on successful laying of submarine cable effected by shareholder in company).

SECT. 4.

exceptions, viz. policies on privateers, and policies on ships in the Spanish trade. These are not reproduced.

(6.) The statute did not extend to Ireland.[1] The present section extends to the whole United Kingdom.

(7.) It is an open question whether an honour policy (*e.g.* a p.p.i. policy on disbursements) constitutes a breach of a warranty to keep a certain proportion of the value of a ship uninsured.[2]

Insurable interest defined.

§ 5.—(1.) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.[3]

(2.) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure, or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.[4]

*Illustrations.*

1. Floating policy for £1200 on goods as interest may appear. The assured, who are canal carriers, have an insurable interest in

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[1] *Keith* v. *Protector Mar. Ins. Co.* (1882), 10 L. R. Ir. 51.

[2] *Roddick* v. *Indemnity Mar. Ins. Co.* (1895), 2 Q. B. 380, C. A.

[3] *Arnould*, Ed. 6, p. 55; *Wilson* v. *Jones* (1867), L. R. 2 Ex. 139, Ex. Ch.

[4] *Arnould*, Ed. 6, p. 101; as to equitable assignee of freight, see *Wilson* v. *Martin* (1856), 11 Ex. Ch. 684.

Conversely, a prospect or possibility of loss or gain which is not founded on any right or liability in, or in respect of the subject-matter insured, is not insurable. *Lucena* v. *Crauford* (1806), 2 B. & P. 269; 6 R. R. 623, H. L.; *Seagrave* v. *Union Mar. Ins. Co.* (1866), L. R. 1 C. P. 305, at p. 320 (cargo); *Barber* v. *Fleming* (1869), L. R. 5 Q. B. at p. 71 (freight); and see, *e.g.*, *Manfield* v. *Maitland* (1821), 4 B. & Ald. 582 (loan to shipowner); *Devaux* v. *Steele* (1840), 6 Bing. N. C. 358; 54 R. R. 818 (expected fishing bounty from French Government); *Stainbank* v. *Fenning* (1851), 11 C. B. 51 (invalid bottomry bond).

respect of their liability for the safe carriage of the goods, and this interest is sufficiently described as "on goods."[1]

2. Policy effected by shareholder in Submarine Cable Co. on the successful laying of the cable. The assured has an insurable interest in the adventure, although he has no property in the cable.[2]

3. A. lends money to B., a small shipowner, whose solvency depends on the safe arrival of his ship, but the loan is not secured on the ship or freight. The loan is not at risk, and A. has no insurable interest which can be covered by a marine policy.[3]

4. Policy on freight, chartered or otherwise, per *Cambodia* from Bombay to Howlands Island, and thence to a port of discharge in the United Kingdom. Under charter the ship is to go to Howlands Island in ballast, and then load a cargo for England. On the way to Howlands Island she is disabled by perils of the seas, so the freight cannot be earned. The assured has an insurable interest, and the risk has attached.[4]

5. The agents of a foreign ship effect a policy on disbursements against the risk of total loss only. The ship becomes a constructive total loss. The agents have an insurable interest in the advances they have made to the ship in so far as they could arrest the ship under § 6 of the Admiralty Act, 1840 (3 & 4 Vict. c. 65) for the purpose of founding an action *in rem*.[5]

NOTE.—Three questions, often confused, must be kept distinct, viz.: 1. Has the assured an insurable interest? 2. Is the subject-matter in respect of which his interest arises sufficiently described in the policy? 3. What is the quantum of his interest?

The definition of insurable interest has been continuously expanding, and dicta in some of the older cases, which would tend to narrow

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[1] *Crowley* v. *Cohen* (1832), 3 B. & Ad. 478, 37 R. R. 472; see *Cunard Steamship Co.* v. *Marten*, 2 K. B. (1902), 624, for an insurance in express terms against liability of carrier owing to the omission of the negligence clause in a charter party. As to insurance by a bailee (who is not responsible) by virtue of his special property in the goods bailed, see *North British Ins. Co.* v. *Moffatt* (1871), L. R. 7 C. P. 25, 31 (fire insurance).

[2] *Wilson* v. *Jones* (1867), L. R. 2 Ex. 139.

[3] Cf. *Manfield* v. *Maitland* (1821), 4 B. & Ald. 582; *Allison* v. *Bristol Marine Ins. Co.* (1876), 1 App. Cas. at p. 220. Of course B.'s solvency can be insured by an appropriate contract, but that is not a marine policy.

[4] *Barber* v. *Fleming* (1869), L. R. 5 Q. B. 59.

[5] *Moran Galloway & Co.* v. *Uzielli* (1905), 2 K. B. 555.

SECT. 5. it, must be accepted with caution. The essence of interest is (*a*) that there should be a physical object exposed to sea perils, and (*b*) that the assured should stand in some relationship, cognizable by law, to that object, in consequence of which he either benefits by its preservation, or is prejudiced by its loss, or mishap thereto.

It appears to have been held that a person who had bought goods at sea under a verbal contract, which was unenforceable by reason of the Statute of Frauds, had not an insurable interest.[1] But would this be the case now that it is established that the statute affects the remedy only and not the right?

It is clear, since *Wilson* v. *Jones* (1867), L. R. 2 Ex. 139 (insurance by shareholder in an Atlantic Cable Company on the successful laying of its cable), that interest is not confined to rights in the nature of property or arising out of contract, for the assured had no property in the cable nor any contract respecting it.

Suppose A. is offered an appointment abroad on the condition that his acceptance of the offer is received by return of post. Why should he not insure the safe arrival of the letter, although he has no legal rights in respect of it after it is posted? Subsect. (2) is, therefore, framed as being inclusive, not exhaustive, and its language was somewhat broadened in the Commons Committee.

Interest can hardly be defined exhaustively, and probably the criterion proposed by Lawrence, J., a century ago, cannot be improved upon: "Interest," he says, "does not necessarily imply a right to the whole or a part of a thing, nor necessarily or exclusively that which may be the subject of privation; but the having some relation to or concern in the subject of insurance, which relation or concern, by the happening of the perils insured against, may be so affected as to produce a damage, detriment, or prejudice to the person insuring. . . . To be interested in the preservation of a thing, is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction."[2] Elsewhere, speaking of liability to third persons, he says, "Did they mean to game, or was there not a loss against which they might indemnify themselves by insurance?"[3] "The general rule," says Willes, J., "is clear, that to constitute interest insurable against a peril, there must be an interest such that the peril would, by its proximate effect, cause damage to the assured."[4]

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[1] *Stockdale* v. *Dunlop* (1840), 6 M. & W. 224.

[2] *Lucena* v. *Crauford* (1806), 2 B. & P. at p. 302, cited and approved by Lord Blackburn in *Lloyd* v. *Fleming* (1872), L. R. 7 Q. B. at p. 302.

[3] *Boehm* v. *Bell* (1799), 8 T. R. 162 (prize insured by captors).

[4] *Seagrave* v. *Union Mar. Ins. Co.* (1866), L. R. 1 C. P. at p. 326.

SECT. 5.

"Any interest may be insured," says Walton, J., "which is dependent on the safety of the thing exposed to the risks insured against, still it must in all cases at the time of loss be an interest legal or equitable, and not merely an expectation however probable."[1]

French law formerly drew a distinction between "frêt acquis" and "frêt à faire," the former being insurable, the latter not.[2] English law draws no such distinction. Thus chartered freight on homeward voyage may be insured against loss by perils on the previous outward voyage.[3]

When interest must attach.

§ 6.—(1.) The assured must be interested in the subject-matter insured at the time of the loss, though he need not be interested when the insurance is effected.[4]

Provided that where the subject-matter is insured, "lost or not lost," the assured may recover although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance the assured was aware of the loss, and the insurer was not.[5]

(2.) Where the assured has no interest at the time of the loss, he cannot acquire interest by any act or election after he is aware of the loss.[6]

*Illustrations.*

1. Policy on rice, as interest may appear, by ship *Sunbeam* from Rangoon to London. The assured had contracted to buy a "cargo" of rice to be shipped in that ship. When three-fourths of the cargo are on board, the ship and rice are lost by perils of the sea. The rice

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[1] *Moran Galloway & Co.* v. *Uzielli* (1905), 2 K. B. at p. 562.

[2] Code de Commerce, Art. 347; but this rule has now been modified by the Law of 1885.

[3] *Rankin* v. *Potter* (1873), L. R. 6 H. L. 83, at p. 114.

[4] *Rhind* v. *Wilkinson* (1810), 2 Taunt. at p. 243; *Anderson* v. *Morice* (1876), 1 App. Cas. 713.

[5] *Sutherland* v. *Pratt* (1843), 11 M. & W. 296, and *post*, p. 122.

[6] *Anderson* v. *Morice* (1876), 1 App. Cas. 713, H. L.

SECT. 6

is not at the assured's risk till a complete cargo is loaded, and he has therefore no insurable interest.[1]

2. Policy on "wheat cargo now on board or to be shipped" in the ship *Sutherland* from New Zealand to England. Under the terms of the contract between the vendors and the assured, the property (and risk) pass to him as the wheat is shipped. Before the whole cargo is loaded the ship and wheat are lost by perils of the seas. The assured has an insurable interest which has attached, and can recover for the wheat lost.[2]

NOTE.—The section relates only to the existence of interest as a condition to effective insurance. A policy founded on interest may, of course, be assigned after loss.[3]

It has been argued that the rule contained in the proviso to subsect. (1) only applies to the case of a partial loss, but that is not so. Suppose a man buys a cargo while at sea. It turns out that before the purchase was completed the cargo had perished. As a rule, the contract is void, and, therefore, the buyer has no insurable interest; but there is such a thing as an *emptio spei*, as opposed to the purchase of a thing itself.[4]

In the old form of pleading, interest was averted as existing *during the risk* and at the time of the loss. But if interest was traversed, it was sufficient to prove interest at the time of the loss.[5] Until interest was acquired, the policy could not attach.

It is often a difficult question to determine the exact moment when, under a contract of sale, the risk passes from seller to buyer. *Primâ facie*, the risk passes when the property passes, but under the terms of the contract they may pass at different times. When goods are insured by the buyer, the question is whether, on the true construction of the contract, the risk has passed to him at the time the loss occurs.[6]

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[1] *Anderson* v. *Morice* (1875), L. R. 10 C. P. 609, Ex. Ch., affirmed 1 App. Cas. 713, H. L.

[2] *Colonial Ins. Co.* v. *Adelaide Mar. Ins. Co.* (1886), 12 App. Cas. 128, P. C.

[3] *Sparkes* v. *Marshall* (1836), 2 Bing. N. C. 761, and see further, Sched. I., rule 1, *post*, p. 142.

[4] See *Chalmers'* Sale of Goods Act (1893), § 5, and notes thereto.

[5] *Bullen and Leake*, Prec. of Pleading, Ed. 3, p. 611.

[6] As to when the risk passes from seller to buyer under a contract of sale, see *Chalmers'* Sale of Goods Act, 1893, §§ 20 and 32, and notes thereto.

SECT. 7. Defeasible or contingent interest.

§ 7.—(1.) A defeasible interest is insurable, as also is a contingent interest.

(2.) In particular, where the buyer of goods has insured them, he has an insurable interest, notwithstanding that he might, at his election, have rejected the goods, or have treated them as at the seller's risk, by reason of the latter's delay in making delivery or otherwise.[1]

NOTE.—As regards contingent interests, the main difficulty is to determine, not whether there is an interest, but whether the interest has attached at the time of loss.[2] Where captors of a ship insured her, but the Prize Court afterwards restored her to her owners, it was held that the premium was not returnable, for the risk had attached. The interest in this case may be regarded either as defeasible or contingent.[3]

In *Lucena* v. *Crauford* (1806), 2 B. & P. pp. 294, 295, seven of the judges, in their opinion to the House of Lords, say, "Inchoate rights, founded on subsisting titles, unless prohibited by positive laws, are insurable. Freight, respondentia, and bottomry are of this description." And then, after discussing various ancient definitions of insurance, they go on to say: "These definitions clearly embrace a contingent interest which is subject to the perils of the sea, and for the loss of which a compensation may be made." Re-insurance is a good example of a contingent interest.

In *Clay* v. *Harrison* (1830), 10 B. & C. 99, the seller stopped goods in transitu after partial loss. Held that the buyer could not recover on his policy, as his interest was defeated by the seller's resumption of possession. But how far would that case be followed, now that it is established that stoppage in transit does not, as a rule, rescind the contract?[4] The facts, too, were peculiar.

In the case provided for by subsect. (2), the assured has an actual interest, defeasible only at his own option. Suppose A. buys goods by sample, to be shipped from abroad, and insures them. Goods which

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[1] *Sparkes* v. *Marshall* (1836), 2 Bing. N. C. 761, as explained in *Anderson* v. *Morice* (1875), L. R. 10 C. P. at p. 620; *Colonial Ins. Co. of New Zealand* v. *Adelaide Ins. Co.* (1886), 12 App. Cas. 128, at p. 140, P. C.

[2] Cf. *Barber* v. *Fleming* (1870), L. R. 5 Q. B. at p. 73.

[3] *Boehm* v. *Bell* (1799), 8 T. R. 154.

[4] See *Chalmers'* Sale of Goods Act, 1893, § 48, and notes.

SECT. 7.

are inferior to sample are shipped, and then partially sea-damaged on the voyage. A. may accept the goods, and claim on the policy. If A. rejects the goods, presumably he could not claim on the policy; but could he assign the policy to the seller, and then reject the goods? Probably not; but various complications may be suggested which still await decision.

Partial interest.

**§ 8. A partial interest of any nature is insurable.**

NOTE.—An undivided interest in a parcel of goods shipped f.o.b. is insurable.[1] So, too, a shareholder may insure his interest in the adventure of a company engaged in laying a submarine cable;[2] and a "hotchpot" interest in cargo may be insured.[3]

"I do not see," says Heath, J., "why a joint tenant or tenant in common has not such an interest in the entirety as will entitle him to insure."[4]

By § 5 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ships are divided into sixty-four shares, and any number of persons not exceeding five may be registered as joint owners of a ship or any share therein. But a part owner has no *implied* authority to insure on behalf of the other part owners.[5]

Lloyd's policy (*post*, p. 138) is expressed to enure for the benefit of all to whom the subject-matter appertains "in part or in all;" but these general words must be restrained by the circumstances of the particular insurance.

Re-insurance.

**§ 9.—(1.) The insurer under a contract of marine insurance has an insurable interest in his risk, and may re-insure in respect of it.[6]**

**(2.) Unless the policy otherwise provides, the original**

[1] *Inglis* v. *Stock* (1885), 10 App. Cas. pp. 263, 274 (390 tons of sugar sent off to satisfy two contracts, for 200 tons each, without any appropriation to either contract).

[2] *Wilson* v. *Jones* (1867), L. R. 2 Ex. 139, Ex. Ch.

[3] *Ebsworth* v. *Alliance Mar. Ins.* (1873), L. R. 8 C. P. at p. 613.

[4] *Page* v. *Fry* (1800), 2 B. & P. 240, 243 (cargo).

[5] *Bell* v. *Humphries* (1816), 2 Stark. 345; *Arnould*, Ed. 6, p. 160; but quære the effect of s. 14 (2) as amended in the Commons.

[6] *Arnould*, Ed. 7, p. 386; *Uzielli* v. *Boston Mar. Ins. Co.* (1884), 15 Q. B. D. at p. 16; and cf. *Bradford* v. *Symondson* (1881), 7 Q. B. D. at p. 463, C. A.

assured has no right or interest in respect of such re-insurance.[1] SECT. 9.

NOTE.—Re-insurance, that is to say, an insurance effected by an insurer to cover wholly or in part the risk he has undertaken, must be distinguished from double insurance, that is to say, a second insurance effected by or on behalf of an assured on a risk already covered, as to which see § 32.

At common law re-insurance was valid, but it was prohibited in 1745 by the 19 Geo. 2, c. 37, § 4, unless the insurer was dead or insolvent. The prohibition was removed in 1864 by the 27 & 28 Vict. c. 56, § 1 (since repealed), and re-insurance is now expressly recognized by § 92 of the Stamp Act, 1891 (54 & 55 Vict. c. 39), *post*, p. 155, and by this Act.

The common form of a re-insurance policy runs thus—"being a re-insurance subject to all clauses and conditions of the original policy or policies, and to pay as may be paid thereon." Then follow the exceptions, if any.[2] As to specifying in policy that it is a re-insurance, and as to notice of abandonmemt, see §§ 27 and 62, *post*. In an action by an original assured against his insurer, the re-insurer cannot be brought in as a third party against whom indemnity is claimed.[3]

[1] *McArthur*, Ed. 2, p. 332; *Arnould*, Ed. 7, p. 388. Cf. *Nelson* v. *Empress Ins. Co.* (1905), 2 K. B. 281, C. A. (re-insurer not liable as third party in action by original assured).

[2] As to construction of this provision, see *Uzielli* v. *Boston Mar. Ins. Co.* (1884), 15 Q. B. D. C. A. (re-insurer not liable for expenses under sue and labour clauses); *Ex p. Western Ins. Co.* (1892), 2 Ch. 423 ("pay as paid"—payment by original insurer not condition precedent); *Chippendale* v. *Holt* (1895), 65 L. J. Q. B. 104 (re-insurer not bound by improper payment by original insurer); *Crocker* v. *Sturge* (1897), 1 Q. B. 330 (re-insurance of portion of risk—construction of "final port"); *China Traders Assn.* v. *Royal Exchange* (1898), 2 Q. B. 187, C. A. (right of re-insurer to discovery of ship's papers); *Lower Rhine Ins. Assn.* v. *Sedgwick* (1899), 1 Q. B. 199, C. A. (lapse of original policy, and issue of new one); *Charlesworth* v. *Faber* (1900), 5 Com. Cas. 408 (continuation clause exceeding twelve months' limit for time policy); *Maritime Ins. Co.* v. *Stearns* (1901), 2 K. B. 912, 6 Com. Cas. 182 (variation of risk from summer to winter); *Marten* v. *Steamship Owners Assn.* (1902), 7 Com. Cas. 195 ("pay as may be paid" = pay as re-assured may be compellable to pay); *Western Ass. Co.* (*Toronto*) v. *Poole* (1903), 1 K. B. 376 (reinsurance against total loss, salvage charges excluded). *South British F. & M. Ins. Co.* v. *Da Costa* (1906), 1 K. B. 456, 11 Com. Cas. 81 (re-insurance for £1000 in excess of £500).

[3] *Nelson* v. *Empress Ass. Corporation* (1905), 2 K. B. 281, C. A.

SECT. 10.

Bottomry.

**§ 10. The lender of money on bottomry or respondentia has an insurable interest in respect of the loan.**[1]

*Illustrations.*

1. The master of a damaged British ship requires money for necessary repairs. A merchant abroad advances the money, taking a bond mortgaging the ship, and making the money repayable whether she arrives or not. The merchant has no insurable interest, for the master has no authority to give such a bond, or do more than hypothecate the ship for the advances[2] (*sed. qu.* now).

2. Policy on bottomry bond in old form. The ship becomes a constructive total loss. The assured cannot recover, for the bond stands good unless there is an actual total loss.[3]

NOTE.—By the law of the sea the master may, in case of necessity, and under certain restrictions, raise money on the security of the ship, freight, and cargo.[4] The condition of a loan on bottomry or respondentia is that the money is not repayable if the ship or cargo does not arrive. Consequently it is the lender, and not the borrower, who must insure.[5] As to describing the subject-matter insured in the policy, see § 26, *post*. As to the general law of bottomry, see *Carver's* Carriage by Sea, Ed. 3, §§ 310–319.

Master's and seaman's wages.

**§ 11. The master or any member of the crew of a ship has an insurable interest in respect of his wages.**

NOTE.—The law as to the insurability of seamen's wages was doubtful. The master of a ship could always insure his wages, but formerly at any rate a seaman under the rank of master could not (*Arnould*, Ed. 6, p. 45). "Wages of seamen," said the judges in an old case, "are in their nature insurable, though universally prohibited to be insured on principles of policy."[6] But when this was laid down

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[1] See *McArthur*, Ed. 2, pp. 59, 62, 214; and § 7.

[2] *Stainbank* v. *Fenning* (1851), 11 C. B. 51; *Carver's* Carriage by Sea, Ed. 3, § 312; but see *The Haabet* (1899), P. 295, per Bucknill, J.; and *Price* v. *Maritime Ins. Co.* (1901), 2 K. B. 412, C. A.

[3] *Broomfield* v. *Southern Ins. Co.* (1870), L. R. 5 Ex. 192. Modern forms provide for constructive total loss.

[4] *Abbott* on Shipping, Ed. 12, pp. 110, 121.

[5] For forms of insurance on bottomry, see *Owen's* Notes and Clauses, Ed. 3, p. 143, and for modern forms of bottomry and respondentia bonds, see *ibid.*, pp. 209, 211.

[6] *Lucena* v. *Crauford* (1806), 2 B. & P. at p. 294, H. L.

the doctrine prevailed that "freight was the mother of wages," and if freight was not earned the seaman was not entitled to his wages. This doctrine was abandoned in 1854, and § 183 of the Merchant Shipping Act of that year (17 & 18 Vict. c. 104) provided that the right to wages should not be dependent on the earning of freight, but that in all cases of wreck or loss of the ship, proof that the seaman had not exerted himself to the utmost to save the ship and cargo should bar his claim to wages. This provision is now reproduced in § 157 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60). On the principle *cessante ratione cessat ipsa lex*, it may be that seamen's wages were insurable in England, but the point is now cleared up by an amendment made in the Commons Committee. The German Commercial Code of 1897, on grounds of public policy, forbids either masters or seamen to insure their wages. SECT. 11.

**§ 12. In the case of advance freight, the person advancing the freight has an insurable interest, in so far as such freight is not repayable in case of loss.**[1] Advance freight.

*Illustration.*

Policy by shipowner on freight. Under the charter party, half the freight is to be prepaid and half is to be paid on right delivery of the cargo. The ship is lost, but half the cargo is saved and delivered. No further freight is payable in respect of the half so delivered, inasmuch as it is covered by the prepayment of half the freight. This is a total loss of half the shipowner's freight, the prepaid freight being at the charterer's and not at the shipowner's risk.[2]

NOTE.—By English law advance freight, as such, is not repayable in case of loss; the shipowner therefore has not an insurable interest in it, but the person advancing it has.[3] But by special contract it may be repayable,[4] and then the positions are reversed.

Though advance freight may not be repayable in case of loss, the shipowner may be liable in damages to the cargo owner if the loss is

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[1] *Arnould*, Ed. 6, p. 62; *McArthur*, Ed. 2, p. 65; cf. *Smith* v. *Pyman* (1891), 1 Q. B. at pp. 744, 745, C. A.

[2] *Allison* v. *Bristol Mar. Ins. Co.* (1876), 1 App. Cas. 209, see at pp. 235, 238.

[3] *Allison* v. *Bristol Ins. Co.* (1876), 1 App. Cas. 208, 238, H. L., reviewing the cases.

[4] *Ibid.*, at p. 221, citing *Hall* v. *Janson* (1855), 4 E. & B. 500.

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occasioned by his negligence or fault, and in estimating the damages the amount advanced for freight must be taken into account.[1]

An advance to a shipowner by a shipper or charterer in respect of a voyage may fall into three categories: (*a*) It may be advance freight not repayable in case of loss; (*b*) it may be advance freight specially repayable in case of loss; or, (*c*) it may be a mere loan repayable in any event. In the last case it is not at risk, and therefore not insurable.[2] As to the tests for determining within which category a given advance falls, see *Carver's* Carriage by Sea, Ed. 3, §§ 562, 566.

By the law of most foreign countries, prepaid freight is repayable in case of loss.[3]

Charges of insurance.

§ 13. The assured has an insurable interest in the charges of any insurance which he may effect.[4]

NOTE.—Ordinarily the charges of insurance consist of the premium, the brokerage, and the stamp. Cf. § 16 as to insurable value.

Quantum of interest.

§ 14.—(1.) Where the subject-matter insured is mortgaged, the mortgagor has an insurable interest in the full value thereof, and the mortgagee has an insurable interest in respect of any sum due or to become due under the mortgage.[5]

(2.) A mortgagee, consignee, or other person having an interest in the subject-matter insured may insure on behalf and for the benefit of other persons interested as well as for his own benefit.[6]

(3.) The owner of insurable property has an insurable

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[1] *Dufourcet* v. *Bishop* (1886), 18 Q. B. D. 373.

[2] *The Salacia* (1862), Lush. 578, at p. 582.

[3] *Byrne* v. *Schiller* (1871), L. R. 6 Ex. at p. 325, Ex. Ch.

[4] *McArthur*, Ed. 2, p. 68; *Phillips* on Insurance, § 1221; *Usher* v. *Noble* (1810), 12 East, 639. As to the premium in case of re-insurance, see *Arnould*, Ed. 6, p. 104.

[5] *Arnould*, Ed. 6, pp. 84, 118; *Irving* v. *Richardson* (1831), 2 B. & Ad. 193; *North British Ins. Co.* v. *London, etc., Ins. Co.* (1877), 5 Ch. D. at pp. 583, 584, C. A.

[6] *Ebsworth* v. *Alliance Ins. Co.* (1873), L. R. 8 C. P. 596, at pp. 608 and 641; *Castellain* v. *Preston* (1883), 11 Q. B. D. at p. 398, C. A. This subsection was inserted in the Commons Committee.

interest in respect of the full value thereof, notwithstanding that some third person may have agreed, or be liable, to indemnify him in case of loss.[1]

NOTE.—In *Small* v. *U. K. Mar. Assn.* (1897), 2 Q. B. 311, C.A., a policy was effected by ships-husbands for the mortgagee, at the instance of the mortgagor, who was part owner and master. The mortgagee was held entitled to recover, although the loss was occasioned by the barratry of the mortgagor.

Subsect. (2), which was inserted in committee in the Commons, affirms the judgment of Bovill, C.J., and Denman, J., in *Ebsworth* v. *Alliance Mar. Ins. Co.*, L. R. 8 C. P. 596. The correctness of the rule in the text is assumed by Bowen, L.J.,[2] who, in a later case, says: "A person having a limited interest may insure either for himself, and to cover his own interest only, or he may insure so as to cover not only his own limited interest, but the interest of all others who are interested in the property," and then proceeds to discuss various instances.[3]

Lloyd's policy in terms expresses that it is effected by J.S. "as well in his own name as for, and in the name and names of, all and every other person to whom the same doth, may, or shall appertain."[4] The provision, of course, is confined to interests *bonâ fide* intended to be covered; and see further the note to sect. 23, *post*.

Subsect. (3) generalizes a case where the charterer had agreed to indemnify the shipowner. Obviously a cargo owner may insure his cargo, though if it is lost through the negligence of the shipowner, he may have his remedy by damages.[5]

Theoretically, at any rate, the rules as to double insurance, and the

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[1] *Hobbs* v. *Hannam* (1811), 3 Camp. 93.

[2] *Castellain* v. *Preston* (1883), 11 Q. B. D. at p. 398, C. A.

[3] As to the complications which might arise in the case of double insurance, see *McArthur*, Ed. 2, p. 63, n.; but see a solution suggested by Mellish, L.J., in *North British Ins. Co.* v. *London Ins. Co.* (1877), 5 Ch. D. at p. 583.

[4] Perhaps some light is thrown on this ancient formula by the statement that a trustee may insure in his own name, "as the law does not regard the use or trust of a chattel" (*Lucena* v. *Crauford* (1806), 2 B. & P. at p. 290; 6 R. R. 676 in H. L.). See, too, *Ionides* v. *Pacific Ins. Co.* (1871), L. R. 6 Q. B. at p. 678; cf. *Ocean I. S. Ins. Assn.* v. *Leslie* (1889), 22 Q. B. D. 724, as to the scope of the term "assured."

[5] Cf. *Dufourcet* v. *Bishop* (1886), 18 Q. B. D. 373, and *Yates* v. *White* (1838), 4 Bing. N. C. 272. As to the insurer's right of subrogation consequent on payment, see § 79, *post*.

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right of subrogation, work out the equities resulting from two persons being allowed to insure the same subject-matter for its full value. See §§ 32, 79, and 81.

Assignment of interest.

**§ 15.** Where the assured assigns or otherwise parts with his interest in the subject-matter insured, he does not thereby transfer to the assignee his rights under the contract of insurance, unless there be an express or implied agreement with the assignee to that effect.[1]

But the provisions of this section do not affect a transmission of interest by operation of law.

NOTE.—As to the converse case of an assignee insuring for his assignor, see § 14.

In *Rayner* v. *Preston*, cited below, Lord Esher says: "Where the subject-matter of the insurance is sold during the running of the policy, no interest under the policy passes unless it is made part of the contract of sale, so that it will be considered in a court of equity as an assignment." Where there is such an agreement, it may be given effect to either by an assignment of the policy, or by the assignor holding the policy as trustee for the assignee.

The ordinary cases of transmission of interest by act of law are death and bankruptcy, but the subrogation of the insurer to the rights of the assured on payment of the claim may perhaps be regarded as coming under this category.

As to assignment of policy, see § 50, *post*, and as to assignment of interest, see § 51, *post*.

*Insurable Value.*

Measure of insurable value.

**§ 16.** Subject to any express provision or valuation in the policy, the insurable value of the subject-matters insured must be ascertained as follows:—

(1.) In insurance on ship, the insurable value is the value, at the commencement of the risk, of the ship, including her outfit, provisions and stores for the officers and crew, money advanced for

[1] *Arnould*, Ed. 6, p. 115; *Lowndes*, Ed. 2, p. 8; *Powles* v. *Innes* (1841), 11 M. & W. 10 (sale of shares in a ship); *North of England Oil Cake Co.* v. *Archangel Mar. Ins. Co.* (1875), L. R. 10 Q. B. 249 (sale of cargo); *Rayner* v. *Preston* (1881), 18 Ch. D. at p. 12, C. A.

seamen's wages, and other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, plus the charges of insurance upon the whole;[1]

The insurable value, in the case of a steamship, includes also the machinery, boilers, and coals and engine stores, if owned by the assured, and in the case of a ship engaged in a special trade, the ordinary fittings requisite for that trade:[2]

2.) In insurance on freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at the risk of the assured, plus the charges of insurance:[3]

(3.) In insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole:[4]

(4.) In insurance on any other subject-matter, the insurable value is the amount at the risk of the assured when the policy attaches, plus the charges of insurance.[5]

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[1] *McArthur*, Ed. 2, p. 67; *Lowndes*, Ed. 2, p. 56; *Brough* v. *Whitmore* (1791), 4 T. R. 206 (stores and provisions for crew); *Moran Galloway & Co.* v. *Uzielli* (1905), 2 K. B. at p. 558 (disbursements).

[2] See *McArthur*, Ed. 2, p. 67, and as to fittings, see *Hogarth* v. *Walker* (1900), 2 Q. B. 283, C. A.

[3] *McArthur*, Ed. 2, p. 68; *Palmer* v. *Blackburn* (1822), 1 Bing. 61; *United States Shipping Co.* v. *Empress Assurance Corpn.* (1906), Times, December 6 (gross not net freight); Report of Commission on Unseaworthy Ships, 1874, vol. 2, p. xvi.

[4] *McArthur*, Ed. 2, p. 68; *Usher* v. *Noble* (1810), 12 East, 639, as to charges of insurance, see at p. 646.

[5] *McArthur*, Ed. 2, p. 69.

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*Illustrations.*

1. Policy on ship in usual form. This does not cover fishing-tackle for the Greenland trade. Such tackle must be insured specially, as it is no part of the outfit of the ship.[1]

2. Time policy on ship in usual form, the ship being generally engaged in the grain trade. This policy covers separation cloths and dunnage mats as part of the ship's outfit, even though at the time of loss the cloths and mats were not in use.[2]

NOTE.—A clear delimitation of insurable value is necessary, (*a*) to fix the measure of indemnity in the case of an unvalued policy, (*b*) to fix the measure of indemnity in the few cases in which a valued policy can be opened up, and (*c*) to furnish an approximate standard for fixing the value in a valued policy.

Though marine insurance is universally admitted to be a contract of indemnity (*see* note to § 1), there are two opposing theories as to what is the nature of the indemnity to be aimed at. According to some, the assured ought to be put in the same position as if he had not undertaken the adventure. According to others, he ought to be put in the same position as if the adventure had been carried to a successful issue.[3] English law steers a halting course between these two theories, but with a strong leaning towards the former.

According to modern practice, unvalued policies are practically confined to goods and to freight payable on arrival. Other interests are almost invariably insured by valued policies. When the amount to be insured on goods cannot be fixed till the receipt of what are known as "closing particulars," provision is usually made that, in the event of loss before declaration, the declaration shall be on the basis of invoice cost and charges, plus a certain agreed percentage for anticipated profits. See *Owen's* Notes and Clauses, Ed. 3, p. 79.

As regards "ship," it is to be noted that Lloyd's policy expresses the insurance to be upon "the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture of and in the good ship ——." The words, "if owned by the assured," are inserted in the second paragraph of subsect. (1) because it may happen that coals and engine stores are the property of the chartcrer and not of the shipowner.

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[1] *Hoskins* v. *Pickersgill* (1783), 3 Dougl. 222; cf. *Hill* v. *Patten* (1807), 8 East, 373.

[2] *Hogarth* v. *Walker* (1900), 2 Q. B. 282, C. A.

[3] *McArthur*, Ed. 2, p. 67, citing *Benecke*, Principles of Indemnity.

It appears that a policy on "hull and machinery" covers less than a policy on "ship," *e.g.* it may not cover coals and stores.[1]

As to measure of indemnity, see further, §§ 67–78.

## *Disclosure and Representations.*

Insurance is *uberrimæ fidei.*

**§ 17.** A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.[2]

NOTE.—The general principle is stated in this section because the special sections which follow are not exhaustive.

Insurance is a contract *uberrimæ fidei*, and the obligation is binding upon both parties alike, though necessarily the question usually arises with reference to the conduct of the assured. "Good faith," says Lord Mansfield, "forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and from his believing the contrary. . . . The policy would be equally [void] against the underwriter if he concealed; as if he insured a ship on her voyage which he privately knew to be arrived, an action would lie to recover the premium."[3]

The contract is often said to be rendered void by concealment or misrepresentation, but it is clear that it is only voidable at the option of the party prejudiced, and that the ordinary rules of law as to voidable contracts apply to insurance.[4]

Ships' papers.

It follows from the nature of the contract that even in litigation both parties must play with the cards on the table; hence the full discovery allowed as to ships' papers and other material documents.[5]

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[1] *Roddick* v. *Indemnity Mutual Mar. Ins. Co.* (1895), 2 Q. B. at p. 386, C. A.

[2] *Arnould*, Ed. 6, pp. 5, 513, 548; *Pothier*, Traité d'Assurance, §§ 280 to 290; cf. *Seaton* v. *Heath* (1899), 1 Q. B. at p. 792, C. A.

[3] *Carter* v. *Boehm* (1765), 3 Burr. 1905.

[4] *Morrison* v. *Universal Ins. Co.* (1873), L. R. 8 Ex. 187, Ex. Ch.

[5] *Boulton* v. *Holder Brothers* (1904), 1 K. B. 784, C. A. (ships' papers —action by underwriters for misrepresentation); *Harding* v. *Bussell* (1905), 2 K. B. 83, C. A. (ship's papers—mixed sea and land risk).

SECT. 18. Disclosure by assured.

§ 18.—(1.) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure the insurer may avoid the contract.[1]

(2.) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.[2]

(3.) In the absence of inquiry the following circumstances need not be disclosed, namely:—

(*a.*) Any circumstance which diminishes the risk:[3]

(*b.*) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know:[4]

(*c.*) Any circumstance as to which information is waived by the insurer:[5]

[1] *Arnould*, Ed. 6, p. 548; *Parsons* on Insurance, vol. i. p. 467; *Ionides* v. *Pender* (1874), L. R. 9 Q. B. at p. 537, per Blackburn, J. As to facts which assured ought to know, see *Proudfoot* v. *Montefiore* (1867), L. R. 2 Q. B. 511, 519; *Blackburn* v. *Vigors* (1887), 12 App. Cas. at pp. 537, 541. As to Lloyd's agents abroad, see *Wilson* v. *Salamandra Ass. Co.*, Times, Feb. 10, 1903.

[2] *Rivaz* v. *Gerussi* (1880), 6 Q. B. D. at p. 229, per Lord Esher; *Tate* v. *Hyslop* (1885), 15 Q. B. D. at p. 379, per Lord Bowen.

[3] *Arnould*, Ed. 6, pp. 579, 591; *Carter* v. *Boehm* (1766), 3 Burr. at p. 1910, per Lord Mansfield.

[4] *Arnould*, Ed. 6, p. 579; *Carter* v. *Boehm* (1766), 3 Burr. at p. 1910; *Harrower* v. *Hutchinson* (1870), L. R. 5 Q. B. at p. 590.

[5] *Arnould*, Ed. 6, p. 587; *Phillips* on Insurance, § 568; *Carter* v. *Boehm* (1766), 3 Burr. at pp. 1910, 1911; cf. *Laing* v. *Union Ins. Co.* (1895), 11 Times L. R. 359.

(*d.*) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty:[1]

(4.) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.[2]

(5.) The term "circumstance" includes any communication made to, or information received by, the assured.[3]

*Illustrations.*

1. Insurance on ship. Lloyd's List contains an entry that a ship of a similar name had stranded. The broker, after inquiry, comes to the conclusion that the entry must relate to another ship, and does not disclose the information to the insurer. The insurer, not having seen the entry, may avoid the contract.[4]

2. Policy on goods which are grossly over-valued. The assured does not disclose the over-valuation. The insurer may avoid the contract.[5] see Wood v. White 29 L. J. C. P. 313

3. Assured effects a series of consecutive policies on shipments to be declared. The goods declared on the earlier policies are systematically under-valued, so as to conceal the fact that the earlier policies are more exhausted than they appear to be. The insurer may avoid the latter policies on the ground of non-disclosure.[6]

4. Insurance on chartered freight. If the charter contains a cancelling clause, this must be disclosed.[7]

5. Insurance on goods, including risk of craft. The assured does not disclose that he gets his lighterage done on cheaper terms in consideration of the lighterman limiting his liability as a common carrier. The insurer may avoid the contract.[8]

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[1] *Arnould*, Ed. 6, p. 588; *Shoolbred* v. *Nutt* (1782), *Marshall* on Insurance, Ed. 4, p. 366; *Haywood* v. *Rodgers* (1804), 4 East, 590; 1 *Parsons* on Insurance, p. 485.

[2] *Ionides* v. *Pender* (1874), L. R. 9 Q. B. 531.

[3] *Blackburn* v. *Haslam* (1888), 21 Q. B. D. 144.

[4] *Morrison* v. *Universal Mar. Ins. Co.* (1873), L. R. 8 Ex. 197, Ex. Ch.

[5] *Ionides* v. *Pender* (1874), L. R. 9 Q. B. 531 (fraud).

[6] *Rivaz* v. *Gerussi* (1881), 6 Q. B. D. 222, C. A. (fraud).

[7] *Mercantile Steamship Co.* v. *Tyser* (1881), 7 Q. B. D. 73.

[8] *Tate* v. *Hyslop* (1885), 15 Q. B. D. 368, C. A. A common carrier is responsible as an insurer, and not merely for negligence.

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6. Insurance on chartered freight, one-third diminishing each month. The slip sufficiently discloses that this is a time charter, which may contain the common cesser clause.[1]

7. Policy on goods. The plaintiff's shipping agent at Smyrna hears that the vessel on which the goods were shipped has stranded. Instead of telegraphing, he informs plaintiff of this by letter, so that plaintiff may have time to insure. Before receipt of the letter the plaintiff insures the goods. The insurer may avoid the contract.[2]

NOTE.—Non-disclosure by the assured is commonly referred to as concealment, but the expression non-disclosure is preferable. *Aliud est celare, aliud tacere.* The duty of the assured to disclose material facts is a positive, not a negative duty. Mere silence, and even innocent silence, as to a material fact may entitle the insurer to avoid the contract.[3] It has been suggested that if the master of a ship, or a ship's agent, innocently omits to disclose a material fact to his employer, who accordingly cannot disclose it to the insurer, the contract will stand, but the House of Lords appear to have repudiated this notion.[4]

If insurance be undertaken by an agent for the insurer, the ordinary rules of agency appear to apply, but special rules apply to the agent of the assured; see next section.

Subsect. (2), *Rivaz* v. *Gerussi*, cited in illustration 3, was a case of fraud, but it was laid down generally that a circumstance might be material, though it had no direct bearing on the particular risk. An apparently well-founded rumour, though it turns out afterwards to be incorrect, must be disclosed (*Arnould*, Ed. 6, p. 574).

The rule which exempts from disclosure circumstances covered by an implied warranty (*Arnould*, Ed. 6, p. 588) appears to be of doubtful policy, but it is an old one.

It seems still to be a moot point whether expert evidence is admissible to prove the materiality of a fact which has not been disclosed.[5]

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[1] *The Bedouin* (1894), P. 1, C. A.; cf. *Charlesworth* v. *Faber* (1900), 5 Com. Cas. 408 (continuation clause).

[2] *Proudfoot* v. *Montefiore* (1867), L. R. 2 Q. B. 511.

[3] See *Bates* v. *Hewitt* (1867), L. R. 2 Q. B. 595, at p. 607 (failure to disclose that a merchant ship had formerly been a Confederate cruiser).

[4] *Blackburn* v. *Vigors* (1887), 12 App. Cas. at pp. 536, 540.

[5] See notes to *Carter* v. *Boehm*, 1 Smith, L. C. Ed. 10, p. 874; *Roscoe's* Nisi Prius, Ed. 17, p. 177.

SECT. 19.

Disclosure by agent effecting insurance.

§ **19.** Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer—

(*a.*) Every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him :[1] and

(*b.*) Every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent.[2]

*Illustrations.*

1. Time policy on ship. The broker who effects the insurance omits to disclose a letter in his possession from the captain saying that the ship has been ashore, and that she is being repaired. This is not done dishonestly. The insurer may avoid the contract.[3]

2. A., who has insured an overdue ship, instructs his Glasgow brokers to re-insure it. The Glasgow brokers effect an insurance with B. through their London agents, having received some material information about the ship which they do not disclose. Afterwards A. effects another policy with B. through R., his London agent, who knows nothing of the news about the ship, so that both parties act honestly. A. can recover on the latter policy from B.[4]

3. Plaintiff, in Glasgow, employs a broker there to re-insure an overdue ship. The Glasgow broker employs a broker in London to effect the re-insurance. The Glasgow broker does not communicate either to the plaintiff or to the London broker information which he has received tending to show that the ship was lost. The insurer may avoid the contract.[5]

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[1] *Blackburn* v. *Vigors* (1887), 12 App. Cas. at p. 541; *Blackburn* v. *Haslam* (1888), 21 Q. B. D. 144.

[2] *Blackburn* v. *Vigors* (1887), 12 App. Cas. at p. 537.

[3] *Russell* v. *Thornton* (1859), 4 H. & N. 788; affirmed 6 H. & N. 140, Ex. Ch.

[4] *Blackburn* v. *Vigors* (1887), 12 App. Cas. 531.

[5] *Blackburn* v. *Haslam* (1888), 21 Q. B. D. 144.

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NOTE.—The knowledge of an agent to insure, who does not effect the particular insurance, is immaterial,[1] but if an agent to insure employs a sub-agent, all material facts known to the agent must be communicated to the sub-agent.[2]

If before the contract is made the assured hears of a loss, but has not time to communicate with his agent, the contract would stand. The assured must use "due diligence" to communicate with his agent.[3]

Representations pending negotiation of contract.

**§ 20.**—(1.) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.[4]

(2.) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.[5]

(3.) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.[6]

(4.) A representation as to a matter of fact is true, if it be substantially correct,[7] that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.[8]

(5.) A representation as to a matter of expectation or belief is true if it be made in good faith.[9]

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[1] *Blackburn* v. *Vigors* (1887), 12 App. Cas. 530.

[2] *Blackburn* v. *Haslam* (1888), 21 Q. B. D. 144.

[3] *Cory* v. *Patton* (1872), L. R. 7 Q. B. at p. 308.

[4] *Arnould*, Ed. 6, pp. 519, 520; *Anderson* v. *Pacific Mar. Ins. Co.* (1872), L. R. 7 C. P. at p. 68, per Willes, J.; *Ionides* v. *Pacific Ins. Co.* (1871), L. R. 6 Q. B. at p. 683, per Blackburn, J.

[5] *Arnould*, Ed. 6, p. 518; *Rivaz* v. *Gerussi* (1880), 6 Q. B. D. at p. 229.

[6] *Arnould*, Ed. 6, p. 514.

[7] *Ibid.*, pp. 518, 521; *Pawson* v. *Watson* (1778), 2 Cowp. 785. As to a warranty, see § 33 (2).

[8] *Macdowell* v. *Frazer* (1779), 1 Doug. 260, 261.

[9] *Arnould*, Ed. 6, p. 524.

(6.) A representation may be withdrawn or corrected before the contract is concluded.[1]

(7.) Whether a particular representation be material or not is, in each case, a question of fact.[2]

*Illustrations.*

1. Insurance on ship. The assured falsely informs the insurer that he has partially insured the ship elsewhere on certain specified terms. The insurer, relying on this, gives a policy on similar terms. The insurer may avoid the contract.[3]

2. Policy on goods at sea. The assured represents to the insurer that the ship sailed from Baltimore for London on the 12th January. As a fact she sailed on the 1st January. The insurer may avoid the contract.[4]

3. Policy on goods to be shipped from abroad. The assured, mistaking the old ship "Socrates" for a new ship called the "Socrate," informs the insurer that the goods are to be shipped on the new ship. The insurer may avoid the contract.[5]

NOTE.—*Sibbald* v. *Hill*,[6] where the contract was avoided, though the representation had no direct bearing on the particular risk, was a case of fraud, but according to *Rivaz* v. *Gerussi*,[7] it seems that the rule would apply whether there was fraud or not. Lord Esher, in a later case, says: "The assured is not bound to tell the insurer what the law is. He is bound to tell him, not every fact, but every material fact. His other obligation is this, that if he is asked a question—whether a material fact or not—by the underwriters, he must answer it truly. If he answers it falsely, with intent to deceive, though it may not be a material fact, it will vitiate the policy."[8]

*Arnould*, Ed. 6, pp. 514, 530, specifies a further class of representation, viz. a communication of information which the assured has

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[1] *Arnould*, Ed. 6, pp. 538, 544.
[2] *Rivaz* v. *Gerussi* (1880), 6 Q. B. D. at p. 229, C. A.
[3] *Sibbald* v. *Hill* (1814), 2 Dow. H. L. 263.
[4] *Anderson* v. *Thornton* (1853), 8 Exch. 425.
[5] *Ionides* v. *Pender* (1871), L. R. 6 Q. B. 674, 683.
[6] *Sibbald* v. *Hill* (1814), 2 Dow. H. L. 263.
[7] *Rivaz* v. *Gerussi* (1880), 6 Q. B. D. 222, 229.
[8] *The Bedouin* (1894), P. at p. 12, C. A.

SECT. 20.

received from others, but it is submitted that this supposed third case must always fall within one of the two classes specified in subsect. (3).

The cases seem generally to assume that it is sufficient if a representation as to expectation or belief is made in good faith, but there was an *obiter dictum* by Blackburn, J., that the assured must have reasonable ground for his belief.[1]

This section deals with representations made during the negotiation of the contract. A representation expressed in, or implied from the terms of, the policy itself, constitutes a warranty or condition.[2] The policy is the final expression of the contract, and extrinsic evidence is inadmissible to contradict its terms. A representation differs from a warranty in this—a warranty must be literally complied with, while it is sufficient if a representation is substantially correct. See §§ 33–41 as to warranties.

As to the rule, or supposed rule, that a misrepresentation made to the first underwriter is presumed to be made to subsequent underwriters, see *Arnould*, Ed. 6, p. 544.

The assured, or his agent, is not bound to give his opinion to the insurer on any matter relating to the adventure.[3] The assured is bound to disclose facts within his knowledge and not the opinions which he forms on those facts. For example, the assured may think that war between two States is imminent; but unless he has special information, he may leave the insurer to form his own judgment on the matter. If the assured chooses to give his opinion, he must, of course, give it honestly.[4]

When contract is deemed to be concluded.

**§ 21.** A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract, although it be unstamped.[5]

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[1] *Ionides* v. *Pacific Ins. Co.* (1871), L. R. 6 Q. B. at pp. 683, 684.

[2] *Behn* v. *Burness* (1863), 32 L. J. Ex. 204, 205, Ex. Ch. and § 33.

[3] *Anderson* v. *Pacific Ins. Co.* (1872), L. R. 7 C. P. 65, 69.

[4] Cf. *The Bedouin* (1894), P. at p. 12, per Lord Esher.

[5] *Arnould*, Ed. 6, p. 259; *Ionides* v. *Pacific Mar. Ins. Co.* (1871), L. R. 6 Q. B. at p. 684. See further, § 89, as to slip as evidence.

NOTE.—"In effecting marine insurance," says the Court of Exchequer Chamber, "the matter is considered merely as negotiation till the slip is initialled, but when that is done the contract is considered to be concluded. It was proved to be the usage of underwriters to issue a stamped policy in accordance with the slip, notwithstanding anything that might happen after the initialling of the slip."[1]

In *Cory* v. *Patton*,[2] the proposal of the agent of the assured was accepted by the insurer subject to the ratification by the assured of an increased premium, and it was held that a material fact which came to the knowledge of the assured after the acceptance, but before the ratification, need not be disclosed, for the ratification related back to the acceptance. As to ratification by assured, see § 86, *post*, and see further, notes to §§ 22, 23, 89.

## *The Policy.*

Contract must be embodied in policy.

**§ 22. Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act. The policy may be executed and issued either at the time when the contract is concluded or afterwards.**[3]

*Illustration.*

Policy on ship in mutual association. The ship is accepted as insurable in February, and after this a loss occurs. The policy may be issued in October, taking effect from February, although when the policy is executed it is known to both parties that the loss has occurred.[4]

NOTE.—No action can be maintained in the United Kingdom upon the implied promise to grant a policy when the slip is initialled.[5] It is otherwise where revenue laws do not interpose.[6]

[1] *Morrison* v. *Universal Mar. Ins. Co.* (1873), L. R. 8 Ex. at p. 199.

[2] *Cory* v. *Patton* (1874), L. R. 9 Q. B. 577, Ex. Ch.

[3] See *McArthur*, Ed. 2, pp. 21, 29 and notes to next section. As to issuing a policy after notice of loss, see *Mead* v. *Davison* (1835), 3 A. & E. 303.

[4] *Mead* v. *Davison* (1835), 3 A. & E. 303, 42 R. R. 401.

[5] *Fisher* v. *Liverpool Mar. Ins. Co.* (1874), L. R. 9 Q. B. 418 Ex. Ch.

[6] *Bhugwandass* v. *Netherlands Sea Ins. Co.* (1888), 14 App. Cas. 83 P. C. (Rangoon foreign policy).

SECT. 22. When a stamped policy has been duly issued, then reference may be made to the slip or covering note for the purpose of showing when the contract was concluded, or for the purpose of rectifying or avoiding the policy, see §§ 21, 23, 89.

What policy must specify.

§ 23. A marine policy must specify—

(1.) The name of the assured, or of some person who effects the insurance on his behalf: [1]

(2.) The subject-matter insured and the risk insured against: [2]

(3.) The voyage, or period of time, or both, as the case may be, covered by the insurance:

(4.) The sum or sums insured:

(5.) The name or names of the insurers.

NOTE.—Subsect. (1).—The Marine Insurance Act, 1788 (28 Geo. 3, c. 56), was construed as merely prohibiting insurances in blank or to bearer, and is, therefore, sufficiently reproduced by this subsection.

Where different interests are concerned it is common practice, as Blackburn, J., points out, for the broker to enter into the policy in his own name "but on behalf of and to protect the interests of different constituents." A policy is often effected by J. S. "and [or] as agent."[3] Lloyd's policy in terms expresses that it is effected by J. S. "as well in his own name as for, and in the name and names of, all and every other person to whom the same doth, may, or *shall* appertain." But this provision is confined to interests intended to be covered. For example, A. & Co. charter a ship from the owners. The owners' broker effects a policy on the ship in the ordinary form, with a collision clause. The charterers after long litigation have to pay damages to another ship for collision. There being no evidence

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[1] See *Arnould*, Ed. 6, pp. 107–109; *McArthur*, Ed. 2, p. 29; and the common form of Lloyd's policy. As to ratification by assured, see § 86.

[2] Cf. *Edwards* v. *Aberayron Mutual Ins. Society* (1875), 1 Q. B. D. 563, Ex. Ch. (mutual insurance), at p. 573; and see § 26.

[3] *Ionides* v. *Pacific Ins. Co.* (1871), L. R. 6 Q. B. at p. 678; cf. *Ocean I. S. Ins. Assn.* v. *Leslie* (1889), 22 Q. B. D. 724 as to scope of the term "assured."

of any intention by the owners to insure on A. & Co.'s behalf, they cannot recover on this policy in reliance on the general words.[1]

Subsects. (2) to (5).—By § 93 of the Stamp Act, 1891 (54 & 55 Vict. c. 39), set out *post*, p. 156, a policy is invalid unless it specifies "the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured."

Where under an open cover the insurer undertook to re-insure the plaintiffs to the extent of the excess over certain amounts upon risks which plaintiff had undertaken, or might undertake, on goods by certain ships, with a limit of £4000, it was held that the cover could not be stamped as a policy, inasmuch as it did not specify the sum or sums insured.[2] Although the requirement that a contract of marine insurance must be embodied in a policy was before this Act contained in a Revenue Act, it is more than a fiscal rule. The rule is clearly stated in the Guidon de la Mer in 1600, and may be regarded as a general rule of public policy. The Continental codes contain minute regulations as to the particulars to be inserted in marine policies.[3]

An error in describing the name of the ship is not usually material.[4] The error then comes under the maxim *falsa demonstratio non nocet.*

Signature of insurer.

§ 24.—(1.) A marine policy must be signed by or on behalf of the insurer, provided that in the case of a corporation the corporate seal may be sufficient, but nothing in this section shall be construed as requiring the subscription of a corporation to be under seal.[5]

(2.) Where a policy is subscribed by or on behalf of two or more insurers, each subscription, unless the

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[1] *Boston Fruit Co.* v. *British and Foreign Mar. Ins. Co.* (1905), 1 K. B. 637, C. A., affirmed A. C. (1906), 336 H. L.

[2] *Home Mar. Ins. Co.* v. *Smith* (1898), 2 Q. B. 351, C. A.

[3] See, for example, French Commercial Code, Art. 332; Netherlands Commercial Code, Art. 592. Art. 605 of the Italian Commercial Code provides that, where possible, the name of the master, and the nationality and tonnage of the ship must be inserted in the policy. It has also been suggested that a policy should specify the place where it is made (*McArthur*, Ed. 2, p. 29, n.).

[4] *Ionides* v. *Pacific Ins. Co.* (1871), L. R. 6 Q. B. 674, affirmed L. R. 7 Q. B. 517.

[5] *Arnould*, Ed. 6, p. 271, and compare § 91 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61).

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contrary be expressed, constitutes a distinct contract with the assured.[1]

NOTE.—In a recent case,[2] underwriters formed a syndicate, and an ordinary Lloyd's policy was subscribed "The S. Syndicate, C. Manager;" afterwards followed the names of the members and the amounts of their subscriptions. *Held*, that the contract of the members was several, and not joint.

Issue of policy.

A marine policy, like every other instrument, is incomplete and revocable until delivery to, or for the benefit of, the person entitled to hold it. In the case of Lloyd's underwriters the assured's broker gets the signatures, so that no difficulty arises. In the case of a company's policy delivery is presumed on very slight evidence.[3]

Voyage and time policies.

§ 25.—(1.) Where the contract is to insure the subject-matter at and from, or from one place to another or others, the policy is called a "voyage policy," and where the contract is to insure the subject-matter for a definite period of time the policy is called a "time policy." A contract for both voyage and time may be included in the same policy.[4]

[1 Edw. 7, c. 7.]

(2.) Subject to the provisions of § 11 of the Finance Act, 1901, a time policy which is made for any time exceeding twelve months is invalid.[5]

NOTE.—A ship may be insured "from London to Hong Kong for six months," or "from London to New York, and thirty days after arrival."

Subsect. (2) reproduces § 93 of the Stamp Act, 1891 (54 & 55

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[1] *Arnould*, Ed. 6, pp. 150, 250; Lloyd's Act, 1871 (34 & 35 Vict. c. xxi.), Rule 4 in schedule; and see per Walton, J., in *Anglo-Californian Bank* v. *London & Prov. Mar. Ins. Co.* (1904), 10 Com. Cas. at p. 8.

[2] *Tyser* v. *Shipowners' Syndicate* (1896), 1 Q. B. 135.

[3] *Xenos* v. *Wickham* (1867), L. R. 2 H. L. 296 (policy executed by two directors, and ordered to lie in the office till assured called for it); see to like effect, *Roberts* v. *Security Co., Ltd.* (1897), 1 Q. B. 111, C. A. (accident policy).

[4] *Arnould*, Ed. 6, pp. 230, 373; and *Gambles* v. *Ocean Ins. Co.* (1876), 1 Ex. D. 141, C. A.

[5] See 54 & 55 Vict. c. 39, §§ 93, 94, 96; and as to calculation of dates, see *South Staffordshire Tramways* v. *Sickness Ass. Assn.* (1891), 1 Q. B. 402.

Vict. c. 39), *post*, p. 156. The rule prohibiting time policies for a longer period than twelve months dates from the Stamp Act of 1795.[1] The prohibition was held to apply to a continuation clause, as well as to the original policy,[2] but the rigour of this rule has been mitigated by § 11 of the Finance Act, 1901, *post*, p. 159. For stamp purposes policies on ships in course of building, &c., are deemed to be voyage and not time policies, see § 8 of the Revenue Act, 1903 (3 Edw. 7, c. 46), *post*, p. 160. SECT. 25.

A voyage policy which covers a ship for thirty days after arrival may be stamped as a voyage policy only, but if any longer period be covered it must be stamped both as a voyage and time policy. See § 94 of the Stamp Act, 1891, *post*, p. 156.

Time policies sometimes give rise to difficult questions where the cause of loss comes into operation before the policy expires, but the actual loss occurs after it expires.[3] As to calculating time, when ship's time differs from English time, see note to § 91.

Designation of subject-matter.

**§ 26.**—(1.) The subject-matter insured must be designated in a marine policy with reasonable certainty.[4]

(2.) The nature and extent of the interest of the assured in the subject-matter insured need not be specified in the policy.[5]

(3.) Where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered.[6]

(4.) In the application of this section regard shall be had to any usage regulating the designation of the subject-matter insured.[7]

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[1] *Stewart* v. *Merchants' Mar. Ins. Co.* (1885), 16 Q. B. D. at p. 622.

[2] *Charlesworth* v. *Faber* (1900), 5 Com. Cas. 408; *Royal Exchange* v. *Vega* (1901), 2 K. B. 567, affirmed 2 K. B. (1902), 384, C. A.

[3] See the cases reviewed in *Lidgett* v. *Secretan* (1870), L. R. 5 C. P. 190; and see Rule 5 of First Sched., *post*, p. 144.

[4] *Arnould*, Ed. 6, c. 49; *McArthur*, Ed. 2, p. 61; *Mackenzie* v. *Whitworth* (1875), 1 Ex. D. 36, at p. 40, C. A.

[5] *Mackenzie* v. *Whitworth* (1875), 1 Ex. D. at p. 41.

[6] *Allison* v. *Bristol Mar. Ins. Co.* (1876), 1 App. Cas. at pp. 216, 235; but cf. *McSwinney* v. *Royal Exchange* (1850), 14 Q. B. 634, where "profits on rice" was under the circumstances held an insufficient description.

[7] *Mackenzie* v. *Whitworth* (1875), 1 Ex. D. at p. 40.

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NOTE.—In *Mackenzie* v. *Whitworth*,[1] in 1875, a policy of re-insurance was effected simply as a policy "on cotton." It was held to be sufficient, and that it was unnecessary to specify that it was a re-insurance. The decision at the time was supposed to be opposed to the ordinary understanding and practice, and the Lords Select Committee in 1896 proposed to alter the rule there laid down. But having regard to the length of time during which this decision has been unquestioned law, it was thought better not to disturb it. If an insurer does not know whether a proposed insurance is original or by way of re-insurance, he can always ask the question.

The quantum of the assured's interest need not be specified in the policy. Thus it is not necessary to specify whether the assured insures for himself or as trustee for another, as full owner, or as mortgagor or mortgagee. The subject-matter is usually very briefly described as being "on ship," "on goods," "on freight," "on advances on coolies," "on emigrant money," and so on; but the description must not be misleading, thus a policy on "piece goods" will not cover a loss on hats;[1] so, too, a policy "on freight" will not cover passage money.[2] Prospective profits may be insured apart from the goods out of which they are expected to arise, but in that case they must be specifically described as profits. "The subject-matter of this insurance is on rice," says Blackburn. J., "and though that is to be construed liberally as covering any interest in the rice, it cannot be construed as covering an interest in profits that might arise collaterally from a contract relating to the rice."[3]

"In some cases," says Blackburn, J., "the nature of the interest in the thing insured is such as to vary the nature of the risk, and then it should be stated . . . in all cases when the peculiar nature of the interest alters the risk, it may probably be said that such interest is the subject-matter of the insurance," and he then goes on to instance a case of profits dependent on various contingencies.[4] But it is difficult to see how the nature of the interest of the assured in the subject-matter can vary the risk. The true question seems to be

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[1] *Mackenzie* v. *Whitworth* (1875), 1 Ex. D. at p. 40.

[2] *Denoon* v. *Home and Colonial Ass. Co.* (1872), L. R. 7 C. P. 351. As to what is covered by the wide term "disbursements," see *Buchanan* v. *Faber* (1899), Times L. R. 684; 4 Com. Cas. 223; *Lawther* v. *Black* (1901), 6 Com. Cas. 5; affirmed by C. A., *ibid.*, p. 197; and as to what is, or is not, covered by "goods," see Sched. I., Rule 17, *post*.

[3] *Anderson* v. *Morice* (1875), L. R. 10 C. P. at p. 621, Ex. Ch.

[4] *Mackenzie* v. *Whitworth* (1875), 1 Ex. D. at p. 41; cf. *Wilson* v. *Jones* (1867), L. R. 2 Ex. at p. 151 (submarine cable).

whether, having regard to usage, the subject-matter is sufficiently described. Loans on bottomry and respondentia, must, it seems, be insured as such.[1] SECT. 26.

§ 27.—(1.) A policy may be either valued or unvalued.[2] Valued policy.

(2.) A valued policy is a policy which specifies the agreed value of the subject-matter insured.[3]

(3.) Subject to the provisions of this Act, and in the absence of fraud, the value fixed by the policy is, as between the insurer and assured, conclusive of the insurable value of the subject intended to be insured, whether the loss be total or partial.[4]

(4.) Unless the policy otherwise provides, the value fixed by the policy is not conclusive for the purpose of determining whether there has been a constructive total loss.[5]

*Illustrations.*

1. A ship is insured with one company for £1700, and with another company for £2000. In both policies she is valued at £3000. The assured, in case of total loss, is not entitled to recover more than £3000 in all.[6]

2. Ship and freight valued at £3000, with running-down clause under which insurers were to pay such proportion of three-fourths of

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[1] *Mackenzie* v. *Whitworth* (1875), 1 Ex. D. at p. 43, citing *Glover* v. *Black* (1765), 3 Burr. 1394.

[2] *Arnould*, Ed. 6, pp. 301–309; *McArthur*, Ed. 2, p. 71; *Irving* v. *Manning* (1847), 1 H. of L. Cas. at pp. 305, 307.

[3] *Ibid.*; and as to distinctly specifying the valuation, see *Wilson* v. *Nelson* (1864), 33 L. J. Q. B. 220. As to reforming a defective valuation, see *Rankin* v. *Potter* (1873), L. R. 6 H. L. at p. 114.

[4] *Arnould*, Ed. 6, p. 301; *Barker* v. *Janson* (1868), L. R. 3 C. P. 303; *The Main* (1894), P. at p. 325. As to concealment of over-valuation, see § 18 and notes.

[5] *Arnould*, Ed. 2, p. 309; *Irving* v. *Manning* (1847), 1 H. of L. Cas. at p. 305; but it is now common to provide that the insured value is to be taken as the repaired value, see, *e.g.*, *Angel* v. *Merchants' Mar. Ins. Co.* (1903), 1 K. B. 811, C. A.

[6] *Irving* v. *Richardson* (1831), 2 B. & Ad. 193.

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any damages paid by the assured as the sum insured bore to the value of the ship insured and freight. The assured had to pay £2110 damages for running down another ship. His ship was sold under a decree of the Admiralty Court to satisfy these damages. *Held*, that an underwriter for £100 must pay £52 15*s*.[1]

3. Ship valued at £9000 is insured for £2000. By another policy the same ship is valued at £8000, and insured for £8000. The insurer on the second policy pays for total loss. The insurer on the first policy is liable to pay £1000.[2]

4. A ship at sea is insured by time policy for £6000, and valued at £8000. At the time the policy is effected, the ship has been sea-damaged to the extent of £5000, but the assured is not aware of the fact. Afterwards, during the currency of the policy, she is totally lost. The assured can recover the full £6000.[3]

5. A ship valued at £6000 is insured for £6000. Her real value is £9000. She is run down by another ship and lost. The insurers pay for a total loss. Afterwards the assured recovers £5000 damages from the owners of the ship in fault. The insurers are entitled to the whole of this sum as salvage.[4]

6. Ship insured by same insurer in two successive valued policies. The first policy covers her to Calcutta and for thirty days after arrival. The second policy covers her at and from Calcutta to London. On the voyage out she is damaged by storms. While she is being repaired at Calcutta, and after the thirty days have expired, she is destroyed by fire. The insurer must pay on the first policy for the partial loss, and on the second policy for the total loss, without deducting what was paid on the first policy.[5]

7. A policy for £1000 is effected on freight valued at £2000. Only half the intended cargo is put on board, the rest of the ship being used for emigrants. The ship is lost. The insurer is only liable for £500.[6]

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[1] *Thompson* v. *Reynolds* (1857), 26 L. J. Q. B. 93; cf. *Xenos* v. *Fox* (1868), L. R. 3 C. P. at p. 636 to like effect.

[2] *Bruce* v. *Jones* (1863), 32 L. J. Ex. 132; discussed *McArthur*, Ed. 2, p. 73.

[3] *Barker* v. *Janson* (1868), L. R. 3 C. P. 303; cf. *The Main* (1894), P. 320 (freight).

[4] *North of England Ins. Assn.* v. *Armstrong* (1870), L. R. 5 Q. B. 244; but Lord Blackburn has thrown doubts on this case in *Burnard* v. *Rodocanachi* (1882), 7 App. Cas. at p. 342, and see at p. 335. But see § 81 as to under insurance.

[5] *Lidgett* v. *Secretan* (1871), L. R. 6 C. P. 616.

[6] *Denoon* v. *Home and Colonial Ass. Co.* (1872), L. R. 7 C. P. 341.

8. Policy on freight valued at £5500. The ship is detained by an accident, and, during this delay, there is a great fall in freights. When a full cargo is loaded, the freight comes to £3250, of which £925 is paid in advance. The ship is lost. The valuation stands, and the assured is entitled to receive £5500, less £1611, which is the proportion of the prepaid freight to the gross freight.[1]

9. Policy for £1000 on ship valued at £3750, with warranty that one-fifth shall remain uninsured. The real value of the ship is £5000. For the purpose of determining whether the warranty has been broken by a subsequent insurance, regard must be had to the policy value, and not to the real value.[2]

10. A ship is insured against fire by a valued time policy. While the policy is running, she is so injured by stranding that the cost of repairing her would exceed her repaired value. After this she is destroyed by fire. The insurer must pay the full amount insured.[3]

11. Policy on ship valued at £33,000. Her real value is £40,000. The ship incurs certain general average and salvage expenses, which are adjusted abroad on her real value. The assured can only recover 33–40ths of the adjustment from the insurer.[4]

12. Policy for £3000 on ship valued at £17,500. The ship is much injured by storms, and it is shown that it would cost £10,500 to repair, and that her market value when repaired would be £9000. The assured, notwithstanding the valuation, is entitled to abandon the ship and claim for a total loss.[5]

NOTE.—An unvalued policy is commonly spoken of by lawyers as an "open policy," but as that term is applied in mercantile language to a floating policy, it seems better to adhere to the term "unvalued policy."

In 1761 the validity of valued policies was contested on the ground that in substance they were wagering policies. Lord Mansfield disposed of this contention, and the validity of valued policies has never since been questioned. He pointed out that the effect of the valuation was merely to fix the insurable value of the goods or other

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[1] *The Main* (1894), P. 320. The assured must, of course, also deduct any sum which he has received on any other policy.

[2] *Muirhead* v. *Forth Mutual Ins. Assn.* (1894), A. C. 72 H. L.

[3] *Woodside* v. *Globe Ins. Co.* (1896), 1 Q. B. 105.

[4] *Steamship "Balmoral"* v. *Marten* (1900), 2 Q. B. 748; affirmed A. C. (1902), 511 H. L.

[5] *Irving* v. *Manning* (1847), 1 H. of L. Cas. 287.

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subject-matter insured, "just as if the parties admitted it at the trial."[1]

Speaking of a total loss, the judges in *Irving* v. *Manning* say, "In an open policy the compensation must be ascertained by evidence; in a valued policy the agreed total value is conclusive."[2] It is commonly said that the valuation is conclusive "for the purposes of the policy." It is probably more correct to say that it is conclusive for all purposes relating to the insurable value of the subject-matter insured by a given policy.[3] For other purposes it is not conclusive, and in some cases not even relevant. Notwithstanding the valuation, the interest of the assured may be disproved, or short interest may be shown, or it may be shown that the whole or part of the subject-matter insured was not at risk.[4]

In *Ionides* v. *Pender*[5] it was held that non-disclosure of an excessive valuation was ground for avoiding a policy; but that was a gross case of fraud. Non-disclosure of an over-valuation made in good faith would presumably be immaterial.[6] But grossly excessive valuation, if not disclosed, would, of course, always be evidence of fraud. As to mistake, see § 91, *post*.

For a useful discussion of the English law of valuation, see Report of Commission on Unseaworthy Ships, 1874, vol. 2, p. xvi., and a memorandum by Mr. Justice Willes, p. 426. Under the Continental Codes the policy valuation is only *primâ facie* evidence of the real value.

Unvalued policy.

**§ 28.** An unvalued policy is a policy which does not specify the value of the subject-matter insured, but, subject to the limit of the sum insured, leaves the

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[1] *Lewis* v. *Rucker* (1761), 2 Burr. 1167, see at p. 1171 (partial loss); cf. *Irving* v. *Manning* (1847), 1 H. of L. Cas. at p. 305; *Lidgett* v. *Secretan* (1871), L. R. 6 C. P. at p. 627, per Willes, J.

[2] *Irving* v. *Manning* (1847), 1 H. of L. Cas. at p. 307.

[3] Cf. *Burnand* v. *Rodocanachi* (1882), 7 App. Cas. at p. 335, per Lord Selborne.

[4] As to disproving interest entirely, see *Seagrave* v. *Union Ins. Co.* (1866), L. R. 1 C. P. 316–320; as to short interest, see *Denoon* v. *Home and Colonial Ass. Co.* (1872), L. R. 7 C. P. 351; *Williams* v. *North China Ins. Co.* (1876), 1 C. P. D. 757, C. A.; and as to part of the subject-matter not being at risk, see *Tobin* v. *Harford* (1865), 34 L. J. C. P. 57 Ex. Ch.; *The Main* (1894), P. 320.

[5] *Ionides* v. *Pender* (1874), L. R. 9 Q. B. 531.

[6] See *The Main* (1894), P. 320, 325, where the unreported case, *Company of South African Merchants* v. *Harper*, is discussed.

insurable value to be subsequently ascertained, in the manner herein-before specified.[1] SECT. 28.

§ 29.—(1.) A floating policy is a policy which describes the insurance in general terms, and leaves the name of the ship or ships and other particulars to be defined by subsequent declaration.[2] Floating policy by ship or ships.

(2.) The subsequent declaration or declarations may be made by indorsement on the policy, or in other customary manner.[3]

(3.) Unless the policy otherwise provides, the declarations must be made in the order of despatch or shipment. They must, in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated, but an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith.[4]

(4.) Unless the policy otherwise provides, where a declaration of value is not made until after notice of loss or arrival, the policy must be treated as an unvalued policy as regards the subject-matter of that declaration.[5]

NOTE.—The legality of the practice under floating policies was affirmed in England in 1794 (*Arnould*, Ed. 6, p. 337). When two or more floating policies, effected with different insurers, are open, it

[1] *Arnould*, Ed. 6, p. 318; *McArthur*, Ed. 2, p. 67; *Irving* v. *Manning* (1847), 1 H. L. Cas. at p. 307. As to insurable value, see § 16; and as to measure of indemnity, see §§ 68–71.

[2] *Arnould*, Ed. 6, p. 337; *McArthur*, Ed. 2, p. 77.

[3] *Ibid.*

[4] *Arnould*, Ed. 6, p. 337; and *Stephens* v. *Australasian Ins. Co.* (1872), L. R. 8 C. P. 18; *Imperial Mar. Ins. Co.* v. *Fire Ins. Corporation* (1879), 4 C. P. D. 166; cf. *Davies* v. *National Ins. Co. of New Zealand* (1891), A. C. at p. 491 (form of policy requiring double declaration).

[5] *McArthur*, Ed. 2, p. 78; *Gledstanes* v. *Royal Exchange Ass. Corporation* (1864), 34 L. J. Q. B. 30, 35. Special clauses as to valuation in event of loss before declaration are now frequently inserted.

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is said that "the assured has a right to declare on any of the policies a loss on board any ship he pleases that comes within the terms of that policy."[1] That may have been the law formerly, but floating policies are now commonly effected "to follow and succeed," that is to say, the prior policy must be exhausted before the next policy is declared on (*McArthur*, Ed. 2, p. 78).

Construction of terms in policy.

**§ 30.**—(1.) A policy may be in the form in the First Schedule to this Act.

(2.) Subject to the provisions of this Act, and unless the context of the policy otherwise requires, the terms and expressions mentioned in the First Schedule to this Act shall be construed as having the scope and meaning in that schedule assigned to them.[2]

NOTE.—It would be beyond the scope of an Act of Parliament to attempt to reproduce the many decisions which interpret particular terms in particular policies. But the rules in the schedule record the interpretation which has been put on the more important terms and expressions in the common Lloyd's policy. This may assist the parties to see the scope and effect of the ordinary printed contract, and to add to or alter its terms to meet their special requirements.

In subsect. (2) the words "Subject to the provisions of this Act" were added in the Commons Committee, and the word "may" was altered into "shall."

Premium to be arranged.

**§ 31.**—(1.) Where an insurance is effected at a premium to be arranged, and no arrangement is made, a reasonable premium is payable.

(2.) Where an insurance is effected on the terms that an additional premium is to be arranged in a given event, and that event happens but no arrangement is made, then a reasonable additional premium is payable.[3]

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[1] *Arnould*, Ed. 6, p. 340; note that in the cases cited the declaration was made before loss, and see the cases cited for subsect. (3).

[2] See Lloyd's policy set out, *post*, p. 138, and the main rules for its construction, *post*, p. 142.

[3] Cf. *Hyderabad (Deccan) Co.* v. *Willoughby* (1899), 2 Q. B. at p. 535 (deviation clause); and *Greenock Steamship Co.* v. *Maritime Ins. Co.* (1903), 1 K. B. 367 at p. 374 (any breach of warranty or unprovided incidental risk).

NOTE.—This section is hardly covered by express decision, but it accords with the mercantile understanding, and follows the analogy of "reasonable price" in the case of contracts of sale.[1] SECT. 31.

Policies are often effected on the terms that a given departure or deviation from the conditions of the policy shall be "held covered at a premium to be arranged."

### *Double Insurance.*

§ 32.—(1.) Where two or more policies are effected by or on behalf of the assured on the same adventure and interest or any part thereof, and the sums insured exceed the indemnity allowed by this Act, the assured is said to be over-insured by double insurance.[2] Double insurance.

(2.) Where the assured is over-insured by double insurance—

(*a.*) The assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he may think fit, provided that he is not entitled to receive any sum in excess of the indemnity allowed by this Act;[3]

(*b.*) Where the policy under which the assured claims is a valued policy, the assured must give credit, as against the valuation, for any sum received by him under any other policy without regard to the actual value of the subject-matter insured;[4]

(*c.*) Where the policy under which the assured claims

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[1] *Chalmers'* Sale of Goods Act, 1893, § 8, and notes thereto.

[2] *Arnould*, Ed. 6, p. 327, and Ed. 7, p. 396; *McArthur*, Ed. 2, p. 73; *North British Ins. Co.* v. *London and Globe Ins. Co.* (1877), 5 Ch. D. at p. 583, C. A.

[3] *Arnould*, Ed. 6, p. 328; *Newby* v. *Reed* (1763), 1 W. Bl. 416, Lord Mansfield; *Morgan* v. *Price* (1849), 4 Exch. 621.

[4] *Arnould*, Ed. 6, p. 332; *Bruce* v. *Jones* (1863), 1 H. & C. 769.

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is an unvalued policy he must give credit, as against the full insurable value, for any sum received by him under any other policy;[1]

(*d.*) Where the assured receives any sum in excess of the indemnity allowed by this Act, he is deemed to hold such sum in trust for the insurers, according to their right of contribution among themselves.[2]

NOTE.—The following case may be put in illustration. Suppose a merchant to have £3000 by one policy, and £2000 by another, on cotton, and that the insurable value of his cotton on board is £4000, and the loss on it £400, the merchant can recover the whole £400, and a return of premium on £1000, just as if he had one policy for £5000; but he may at his option claim from one policy three-fifths and from the other policy two-fifths of this total; or he may claim from either policy as if the other did not exist.[3]

For further illustrations, see the illustrations to § 27; and see also § 80 (contribution between insurers), which supplements this section.

There is very little English authority on the rules relating to double insurance, but the theory on which they rest is well explained in *Lowndes* on Insurance, Ed. 2, pp. 33–35. Insurance is a contract of indemnity, and the assured is entitled to indemnity, but not to a gambling profit. Correlatively the insurer must not make a profit where he runs no risk, hence the rules as to return of premium detailed in § 84. The English rule that the same subject-matter may be differently valued, in different policies, while the valuation in a policy is conclusive for the purposes of that policy gives rise to curious anomalies in working out the rules of double insurance under valued policies; see § 27. As to under insurance, see § 81, *post.*

There appears to be no decision as to overlapping policies. Suppose a ship is insured from A. to B., and thirty days while there after arrival, and is also insured at and from B. to C. If she is lost at B. during the thirty days she is doubly covered.[4] The question of

[1] *Arnould*, Ed. 6, p. 329; *Park* on Insurance, p. 423. As to insurable value, see § 16.

[2] This is consequential. See § 80 supplementing this provision.

[3] *Lowndes*, Ed. 2, p. 35 (unvalued policy).

[4] See the point raised in argument in *Union Mar. Ins. Co.* v. *Martin* (1866), 35 L. J. C. P. 182, where the second policy superseded the first.

mortgagor and mortgagee, among others, is discussed by Mellish, L.J., in an important case on a fire policy, where both merchant and wharfinger insured the same goods against fire. The goods were destroyed by fire, and it was held that the loss must be wholly borne by the wharfinger's insurers, as the wharfinger was liable to the merchant. The Lord Justice says: "The rule is perfectly established in the case of a marine policy that contribution only applies where it is an insurance by the same person having the same rights, and does not apply where different persons insure in respect of different rights. Where different persons insure the same property in respect of their different rights, they may be divided into two classes. It may be that the interest of the two between them makes up the whole property, as in the case of tenant for life and remainderman. Then if each insures, although they may use words apparently insuring the whole property, yet they would recover from their respective insurers the value of their own interests, and of course these values added together would make up the value of the whole property. Therefore it would not be a case of either subrogation or contribution, because the loss would be divided between the two companies in proportion to the interests which the respective persons assured had in the property. But then there may be cases where, although two different persons insured in respect of different rights, each of them can recover the whole, as in the case of mortgagor and mortgagee. But whenever that is the case, it will necessarily follow that one of these two has a remedy over against the other, because the same property cannot in value belong at the same time to two different persons. Each of them may have an interest which entitles him to insure for the full value, because in certain events—for instance, if the other person became insolvent—it may be he would lose the full value of the property, and therefore would have in law an insurable interest, but yet it must be that if each recover the full value of the property from their respective offices with whom they insure, one office must have a remedy against the other. Whenever that is the case, the company which has insured the person who has the remedy over succeeds to his right of remedy over, and then it is a case of subrogation." [1]

### *Warranties, etc.*

Nature of warranty.

§ **33**.—(1.) A warranty, in the following sections, relating to warranties,[2] means a promissory warranty,

[1] *North British Ins. Co.* v. *London and Globe Ins. Co.* (1877), 5 Ch. D. at p. 583.

[2] See §§ 34-41.

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that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.[1]

(2.) A warranty may be expressed or implied.[2]

(3.) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.[3]

*Illustrations.*

1. A ship is warranted to sail from L. with "fifty hands or upwards." She sails from L. with a crew of forty-six only, but afterwards takes on six more hands. The insurer is not liable.[4]

2. A ship is insured from New York to Quebec, whilst there, and thence to London, and is warranted to sail from Quebec on or before the 1st of November. The ship sails from New York too late to arrive at Quebec by the 1st of November, and is lost before reaching that port. The insurer is liable.[5]

3. Policy on ship, with warranty not to be in Gulf of St. Lawrence after the 15th of November. After the 15th of November the ship is wrecked in the Gulf. The assured gives notice of abandonment, and the insurer, with knowledge of the facts, accepts the notice. The insurer is liable, having waived the breach of warranty.[6]

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[1] *Arnould*, Ed. 6, p. 599; *Marshall* on Insurance, p. 353.

[2] *Arnould*, Ed. 6, p. 648; cf. *Quebec Mar. Ins. Co.* v. *Commercial Bank of Canada* (1870), L. R. 3 P. C. 234.

[3] *Arnould*, Ed. 6, pp. 602, 604; *McArthur*, Ed. 2, p. 36; *Lowndes*, Ed. 2, p. 93; *Pawson* v. *Watson* (1778), 2 Cowp. 785; *De Hahn* v. *Hartley* (1786), 1 T. R. 343. As to the final words of proviso, see note next page.

[4] *De Hahn* v. *Hartley* (1786), 1 T. R. 343; 1 R. R. 221.

[5] *Baines* v. *Holland* (1855), 10 Exch. 802.

[6] *Provincial Ins. Co.* v. *Leduc* (1874), L. R. 6 P. C. 224. See § 34 (3) as to waiver.

NOTE.—The use of the term "warranty" as signifying a condition precedent is inveterate in marine insurance, but it is unfortunate, because in other branches of the law of contract the term has a different meaning. It there signifies a collateral stipulation, the breach of which gives rise merely to a claim for damages and not to a right to avoid the contract.

Again, in marine insurance the term is used to denote two wholly different kinds of conditions. First, it is used to denote a condition to be performed by the assured. Secondly, it is used to denote a mere limitation on, or exception from, the general words of the policy. In the case of a promissory warranty, *e.g.* that a ship should sail on or before a particular date, the insurer may avoid the contract if the warranty is not strictly complied with. But take the case of the warranty "free from capture and seizure." The assured does not undertake that the ship or cargo shall not be captured. There is merely a stipulation that the policy shall not apply to such a loss.

The final words of subsect. (3) represent the American rule.[1] The point is said by Arnould not to have been decided in England.[2] In the analogous case of deviation the rule is clear. The policy is only avoided from the time of deviation.

It is often said that breach of a warranty makes the policy void. But this is not so. A void contract cannot be ratified, but a breach of warranty may be waived. A breach of warranty in insurance law appears to stand on the same footing as the breach of a condition in any other branch of contract.[3] When a breach of warranty is proved, the insurer is discharged from further liability, unless the assured proves that the breach has been waived. A special clause is often inserted holding the assured covered in the event of breach of warranty at a premium to be arranged (see § 31, *ante*).

When breach of warranty excused.

§ 34.—(1.) Non-compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law.[4]

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[1] *Phillips* on Insurance, § 771.

[2] *Arnould*, Ed. 6, p. 604; but see *Lowndes*, Ed. 2, p. 93, citing *Baines* v. *Holland* (1855), 10 Exch. 802, which seems in point.

[3] *Barnard* v. *Faber* (1893), 1 Q. B. 340, C. A. (fire policy).

[4] *Arnould*, Ed. 6, p. 605; *McArthur*, Ed. 2, p. 37.

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(2.) Where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss.[1]

(3.) A breach of warranty may be waived by the insurer.[2]

NOTE.—The cases, in terms, assume that there is no distinction between the effects of an express and an implied warranty.

Suppose a ship is warranted to sail on or before a particular day, but owing to the outbreak of war she has to wait for convoy. Probably in that case the policy never attaches.[3] See further, the illustration to § 33.

Express warranties.

§ 35.—(1.) An express warranty may be in any form of words from which the intention to warrant is to be inferred.[4]

(2.) An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy.[5]

(3.) An express warranty does not exclude an implied warranty, unless it be inconsistent therewith.[6]

NOTE.—The following are instances of express warranties which in recent years have been the subject of judicial interpretation:—

"Warranted [50] per cent. uninsured."[7]

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[1] *De Hahn* v. *Hartley* (1786), 1 T. R. 343 (express warranty); *Quebec Mar. Ins. Co.* v. *Commercial Bank of Canada* (1870), L. R. 3 P. C. 234 (implied warranty).

[2] See *Quebec Mar. Ins. Co.* v. *Commercial Bank of Canada* (1870), L. R. 3 P. C. at p. 244; *Provincial Ins. Co.* v. *Leduc* (1874), L. R. 6 P. C. at p. 243; and see *Owen's* Notes and Clauses, Ed. 3, p. 120.

[3] See *Hore* v. *Whitmore* (1778), 2 Cowp. 784 (effect of embargo).

[4] *Arnould*, Ed. 6, p. 601; cf. *De Hahn* v. *Hartley* (1786), 1 T. R. 343; *Behn* v. *Burness* (1863), 32 L. J. Ex. 204, 205; *Bentsen* v. *Taylor* (1893), 2 Q. B. at p. 281, C. A.

[5] *Arnould*, Ed. 6, p. 600, and *Bean* v. *Stupart* (1778), 1 Dougl. 11.

[6] *Quebec Mar. Ins. Co.* v. *Bank of Canada* (1870), L. R. 3 P. C. 234; *Sleigh* v. *Tyser* (1900), 2 Q. B. 333 (seaworthiness).

[7] *Roddick* v. *Indemnity Mutual Ins. Co.* (1895), 2 Q. B. 380 (subsequent honour policy); *General Ins. Co. of Trieste* v. *Cory* (1897), 1 Q. B. 335 (insolvency of insurer).

"Warranted, no iron or ore in excess of registered tonnage."[1]
"Warranted not to sail for North America after August 15."[2]
"Warranted, no St. Lawrence between October 1 and April 1."[3]
"Warranted not to proceed east of Singapore."[4]
"Sailing on or after March 1st."[5]

Warranty of neutrality.

§ 36.—(1.) Where insurable property, whether ship or goods, is expressly warranted neutral, there is an implied condition that the property shall have a neutral character at the commencement of the risk, and that, so far as the assured can control the matter, its neutral character shall be preserved during the risk.[6]

(2.) Where a ship is expressly warranted "neutral" there is also an implied condition that, so far as the assured can control the matter, she shall be properly documented; that is to say, that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers. If any loss occurs through breach of this condition the insurer may avoid the contract.[7]

*Illustrations.*

1. Policy on a Dutch ship warranted neutral, at and from A. to B. After the ship sails war breaks out between England and Holland,

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[1] *Hart* v. *Standard Mar. Ins. Co.* (1889), 22 Q. B. D. 499, C. A. ("iron" includes steel).

[2] *Cochrane* v. *Fisher* (1835), 1 C. M. & R. 809, Ex. Ch. (time policy).

[3] *Birrell* v. *Dryer* (1884), 9 App. Cas. 345.

[4] *Simpson Steamship Co.* v. *Premier Underwriting Association* (1905), 10 Com. Cas. 198).

[5] *Sea Ins. Co.* v. *Blogg* (1898), 1 Q. B. 27, affirmed 2 Q. B. (1898), 398, C. A. (what is a "sailing"?). As to sailing warranties, see further, *McArthur*, Ed. 2, p. 37; *Lowndes*, Ed. 2, p. 94.

[6] *Arnould*, Ed. 6, pp. 621, 622.

[7] *Ibid.*, p. 680. As to documents, see *Arnould*, Ed. 6, p. 681, and *Trinder* v. *Thames and Mersey Mar. Ins. Co.* (1898), 2 Q. B. at p. 128, per Collins, L.J.; and as to simulated papers, see *Arnould*, Ed. 6, p. 685.

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and the ship is captured by the English. There is no breach of the warranty of neutrality.[1]

2. Policy on goods. Ship and goods belong to the same owner, and are both warranted Danish (*i.e.* neutral). The master commits a breach of the laws of neutrality by forcibly resisting search, and the ship and goods are captured and condemned as prize. The assured cannot recover on the policy.[2]

3. Policy on goods from America to England with leave to carry simulated papers. The ship and goods are in fact American, but she carries irregularly simulated British papers, and is captured by a privateer belonging to a Power at war with England, and is condemned on the ground of having false papers. The insurer is liable for this loss.[3]

NOTE.—In an old case a ship not properly documented was held unseaworthy; but the case seems to come under this section.[4] The implied conditions may of course be negatived or varied by the terms of the particular express warranty.

The conditions of maritime commerce and war have altered so much in recent years that it would be misleading to attempt to deduce any rules from the numerous decisions at the beginning of the last century as to the effect of the warranty to sail with convoy.[5]

No implied warranty of nationality.

**§ 37. There is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk.[6]**

In *Dent* v. *Smith*, decided in 1869, Lush, J., points out that the fact that there was no decision on any such implied warranty was very good evidence that no such warranty existed. The facts were as follows:—

Policy on a parcel of gold shipped on the ss. *Dutchman*, which was a British ship. Next day the ship was transferred to Russian owners. In consequence of damage to the ship the gold had to be landed in Turkey, and deposited with the Russian consul. In Turkish territory

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[1] *Eden* v. *Parkinson* (1781), 2 Dougl. 732, Lord Mansfield. Point not raised that there can be no insurance against British capture.

[2] *Garrels* v. *Kensington* (1799), 8 T. R. 230.

[3] *Bell* v. *Bromfield* (1812), 15 East, 364.

[4] *Steel* v. *Lacey* (1810), 3 Taunt. 285.

[5] See *Arnould*, Ed. 6, pp. 620, 698; also *Owen's* Declaration of War, p. 386.

[6] *Dent* v. *Smith* (1869), L. R. 4 Q. B. 414.

all matters relating to shipping have to be decided by the consular court of the country to which the ship belongs. The Russian Consular court made the shippers pay salvage charges, which would not have been payable by English law, as a condition to releasing the gold. *Held*, that the risk had not been varied, and that the assured was entitled to recover these charges as a loss by perils of the seas. But suppose the shipper had also been the shipowner? Possibly in that case it would be held that the loss was the consequence of his own act, and not of the perils of the seas.

As to the express warranty of nationality, see *Arnould*, Ed. 6, pp. 122, 136, 620.

Warranty of good safety.

§ 38. Where the subject-matter insured is warranted "well" or "in good safety" on a particular day, it is sufficient if it be safe at any time during that day.[1]

Warranty of seaworthiness of ship.

§ 39.—(1.) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.[2]

(2.) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.[3]

(3.) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in

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[1] See *Lowndes*, Ed. 2, p. 94; *Blackhurst* v. *Cockell* (1789), 3 T. R. 360 (ship).

[2] *Arnould*, Ed. 6, p. 648; *McArthur*, Ed. 2, p. 13; *Lowndes*, Ed. 2, p. 98; *Biccard* v. *Shepherd* (1861), 14 Moore P. C. at p. 493.

[3] *Quebec Mar. Ins. Co.* v. *Commercial Bank of Canada* (1870), L. R. 3 P. C. at p. 241; cf. *Haughton* v. *Empire Mar. Ins. Co.* (1866), L. R. 1 Ex. 206 (overlapping policies).

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respect of such preparation or equipment for the purposes of that stage.[1]

(4.) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.[2]

(5.) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.[3]

*Illustrations.*

1. Policy on ship from Montreal to Halifax. At the time the ship sailed there was a defect in her boiler. The defect did not appear in the river, but disabled her when she got out to sea. She put back to port, and the defect was repaired. Afterwards she proceeded on her voyage, and was lost in bad weather. *Held*, that she was unseaworthy at the commencement of the voyage, and that the insurer was not liable.[4]

2. Steamer, built for inland navigation in Trinidad, is insured from the Clyde to Trinidad. In a rather heavy sea in the Atlantic she breaks asunder and is lost. With the exercise of reasonable care she might have been made more fit for the ocean transit. The insurer is not liable.[5]

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[1] *Bouillon* v. *Lupton* (1864), 33 L. J. C. P. at p. 43; *Quebec Mar. Ins. Co.* v. *Commercial Bank of Canada* (1870), L. R. 3 P. C. at p. 241; *The Vortigern* (1899), P. 140, C. A. (coals); *Greenock Steamship Co.* v. *Maritime Ins. Co.* (1903), 2 K. B. 657, C. A. (insufficient coal). This subsection was amended and redrafted in the Commons Committee.

[2] *Dixon* v. *Sadler* (1839), 5 M. & W. at p. 414; *Bouillon* v. *Lupton* (1864), 33 L. J. C. P. at p. 43. This includes manning, equipment, and stowage. A Commons amendment inserting these words was cut out in the Lords as unnecessary.

[3] *McArthur*, Ed. 2, p. 15; *Fawcus* v. *Sarsfield* (1856), 6 E. & B. 192; *Dudgeon* v. *Pembroke* (1877), 2 App. Cas. 284, H. L.

[4] *Quebec Mar. Ins. Co.* v. *Commercial Bank of Canada* (1870), L. R. 3 P. C. 234.

[5] *Turnbull* v. *Janson* (1877), 3 Asp. Mar. Cas. 433, C. A. *Aliter* if all reasonable means had been used, *Clapham* v. *Langton* (1864), 5 B. & S 729, Ex. Ch.

3. Voyage policy on freight. The ship, being badly damaged, has to put into a port of distress, and the cargo is sent on in a substituted ship, which is lost. There is, it seems, no implied warranty that the substituted ship is seaworthy.[1]

4. Time policy on ship. As she is nearing port the master imprudently, and through bad seamanship, throws his ballast overboard. Before the ship reaches port she is struck by a squall and capsized. The insurer is liable.[2]

5. Time policy on ship, lost or not lost, is effected in London in November, but to take effect from the 25th September previous. On the 24th September the ship was in the Indian Ocean badly damaged, but the assured did not know this when he effected this policy. The insurer is liable.[3]

6. Time policy on ship lying in her owner's yard. She is sent to sea in an unseaworthy condition, and lost. The owner did not know she was unseaworthy. The insurer is liable.[4]

7. Voyage policy on "wine in casks on or under deck." The wine is all stowed on deck. The effect of this is to endanger the safety of the ship in rough weather, unless the wine be jettisoned, but the wine is so stowed as to be easily jettisoned. The ship meets with bad weather in the Bay of Biscay and the wine is jettisoned. The ship was not seaworthy at the time of sailing, and the insurer is not liable.[5]

8. Policy on copper from Port H. and Port N. to S. At H. 150 tons are loaded, and at N. 250 tons more are loaded. The additional load is too heavy for the ship, she sinks, and the copper is lost. The insurers are liable for the first 150 tons, but not for the second load of 250 tons.[6]

9. Policy on *round voyage* from England to port or ports in South America, with liberty to call at any ports, and back again to England. The ship calls at Monte Video, but neglects to take in sufficient coal to bring her to St. Vincent, her next port, so that some of her fittings and cargo have to be burnt as fuel. For coaling purposes this voyage is necessarily divided into stages. When she leaves Monte Video she is not seaworthy as to her coaling equipment, and the loss incurred

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[1] *De Cuadra* v. *Swann* (1864), 16 C. B. N. S. 771, 3rd plea.

[2] *Dixon* v. *Sadler* (1839), 5 M. & W. 414, affirmed 8 M. & W. 895. This would equally apply to a voyage policy, *ibid.*

[3] *Gibson* v. *Small* (1853), 4 H. L. Cas. 352.

[4] *Dudgeon* v. *Pembroke* (1877), 2 App. Cas. 284.

[5] *Daniels* v. *Harris* (1874), L. R. 10 C. P. 1.

[6] *Biccard* v. *Shepherd* (1861), 14 Moore P. C. 471.

SECT. 39. by burning the fittings and cargo cannot be recovered under the policy.[1]

NOTE.—The implied warranty, unless expressly waived, attaches to every voyage policy, whether on ship, freight, cargo, profits, commission, or any other interest.[2]

The warranty applies only to the commencement of the voyage, or, as the case may be, of each distinct stage of the voyage. At one time it was thought that the omission to employ a pilot, where pilotage was compulsory, constituted unseaworthiness, but that doctrine was subsequently disapproved.[3]

Lord Wensleydale, speaking of a voyage policy, says that a ship is seaworthy when she is in a fit state, "as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured at the time of sailing upon it."[4]

The state of seaworthiness is a relative, not an absolute state. It must be determined with reference to the particular voyage and adventure in contemplation. As the Privy Council says, "There is seaworthiness for the port, seaworthiness in some cases for the river, and seaworthiness in some cases (as in a case which has been put forward of a whaling voyage) for some definite, well-recognized, and distinctly separate stage of the voyage.[5]

So, too, a ship may be seaworthy of herself, but not seaworthy for the purpose of the particular adventure, *e.g.* carrying deck cargo.[6] On the other hand, if the insurer knows the nature of the risk it is sufficient if every reasonable precaution be taken.[7]

Subsection (3) was redrafted in the Commons Committee. It

[1] *Greenock Steamship Co.* v. *Maritime Ins. Co.* (1903), 1 K. B. 367; affirmed 2 K. B. (1903) 657, C. A., and following *The Vortigern* (1899), P. 140 (contract of affreightment).

[2] *Daniels* v. *Harris* (1874), L. R. 10 C. P. at p. 5; cf. *Knill* v. *Hooper* (1857), 26 L. J. Ex. 377, 379 (policy on salvage of abandoned ship); *Biccard* v. *Shepherd* (1861), 14 Moore P. C. at p. 494 (goods).

[3] *Law* v. *Hollingworth* (1797), 7 T. R. 160; disapproved, *Dixon* v. *Sadler* (1839), 5 M. & W. at p. 408; *Sadler* v. *Dixon* (1841), 8 M. & W. at p. 900, Ex. Ch.

[4] *Dixon* v. *Sadler* (1839), 5 M. & W. at p. 414.

[5] *Quebec Mar. Ins. Co.* v. *Commercial Bank of Canada* (1870), L. R. 3 P. C. at p. 241. And see per Collins, M.R., in *The Vortigern* (1899), P. at p. 160, C. A.

[6] *Daniels* v. *Harris* (1874), L. R. 10 C. P. 1 (policy on wine stowed on deck).

[7] *Burges* v. *Wickham* (1863), 33 L. J. Q. B. 17 (river steamer sent across the sea to her destination).

originally provided, in accordance with the older *dicta*, that the ship must be seaworthy, *i.e.* seaworthy in all respects, at the commencement of each stage, but having regard to the implied coaling warranty in the case of round voyages it was narrowed to its present form. SECT. 39.

It is usual to pay "innocent shippers" as a matter of honour, though the ship be unseaworthy.[1]

There is no implied warranty that the lighters in which the goods are landed shall be seaworthy.[2]

The burden of proving unseaworthiness rests on the insurer,[3] but cases might arise where the maxim *res ipsa loquitur* would apply.[4] Evidence of unseaworthiness.

In *Anderson* v. *Morice*[5] the insurance was on a cargo of rice. The ship sank while loading at her moorings in the river near Rangoon in ordinary weather. Evidence was given that the ship had been recently overhauled and repaired. The jury found that she was seaworthy, and the courts refused to disturb the verdict.

In *Pickup* v. *Thames Ins. Co.*[6] the insurance was on freight. The vessel left Rangoon and met with heavy weather. Eleven days after sailing she had to put back, and was then found to be strained and unseaworthy. *Held*, that these facts did not establish the presumption of unseaworthiness when she sailed; it was a question for the jury.

In *Ajum Ghulam* v. *Union Mar. Ins.*[7] the insurance was on cargo. The ship capsized and sank twenty-four hours after leaving Port Louis, but there was no evidence to explain why she did so. Some evidence was given tending to show that the ship was seaworthy when she started. *Held*, that the evidence of unseaworthiness was not made out.

**§ 40.—(1.) In a policy on goods or other moveables there is no implied warranty that the goods or moveables are seaworthy.**[8] No implied warranty that goods are seaworthy.

[1] See *McArthur*, Ed. 2, p. 15; but see *Sleigh* v. *Tyser* (1900), 2 Q. B. at p. 336, where shipper was partly to blame.

[2] *Lane* v. *Nixon* (1866), L. R. 1 C. P. 412.

[3] *Arnould*, Ed. 7, § 725; *Pickup* v. *Thames Ins. Co.* (1878), 3 Q. B. D. 594, C. A.

[4] Cf. *Pickup* v. *Thames Ins. Co.* (1878), 3 Q. B. D. at p. 600, per Lord Esher.

[5] *Anderson* v. *Morice* (1875), L. R. 10 C. P. 58, 609, affirmed on this point (1876), 1 App. Cas. at p. 752.

[6] *Pickup* v. *Thames Ins. Co.* (1878), 3 Q. B. D. 594, C. A.

[7] *Ajum Ghulum* v. *Union Mar. Ins. Co.* (1901), A. C. 362, P. C.

[8] *Arnould*, Ed. 6, p. 650; *Koebel* v. *Saunders* (1864), 33 L. J. C. P. 310 (cocoa-nut oil); cf. *Boyd* v. *Dubois* (1811), 3 Camp. 133.

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(2.) In a voyage policy on goods or other moveables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other moveables to the destination contemplated by the policy.[1]

NOTE.—Under a voyage policy the shipper, equally with the shipowner, is responsible for the seaworthiness of the ship. See note to last section.

Though the shipper does not warrant the seaworthiness of goods insured, the insurer is not liable for any loss occasioned by *vice propre*.[2]

Questions of seaworthiness frequently arise in cases between shipper and shipowner;[3] but such cases must be applied with caution to insurance law. A ship might be seaworthy as between shipowner and insurer on ship, though unseaworthy as between shipowner and shipper of a particular cargo, *e.g.* frozen meat, which requires special freezing apparatus, though that does not affect the safety of the ship.[4] Again, the warranty as to goods may apply at a different time from the warranty on ship, as in the case where goods are shipped at an intermediate port (cf. *Lowndes*, Ed. 2, p. 99).

Suppose a ship is insured from Malta to London. She calls at Gibraltar, and there takes on board a consignment of apes for the Zoological Gardens. If the apes are insured, the ship must, for the purposes of the policy on apes, be reasonably fit (*i.e.* in the matter of appliances) to carry the animals safely to their destination, that is to say, she must be "ape-worthy" as well as being seaworthy *quà* ship. This implied condition is commonly included in the warranty of seaworthiness, but that seems rather a strain upon language, and it is better to regard the condition as a supplementary warranty by the assured on goods. The Californian Code, § 2687, provides that "a ship which is seaworthy for the purpose of an insurance upon ship, may nevertheless, by reason of being unfitted to receive the cargo, be unseaworthy for the purpose of insurance upon cargo."

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[1] Cf. *The Maori King* (1895), 2 Q. B. 550, 558, C. A. (frozen meat case).

[2] *Koebel* v. *Saunders* (1864), 33 L. J. C. P. 310; and see § 55, *post*.

[3] See *Carver's* Carriage by Sea, Ed. 3 (1900), §§ 17-22.

[4] Cf. *The Maori King* (1895), 2 Q. B. 550, 558, C. A.

SECT. 41. Warranty of legality.

§ 41. There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.[1]

*Illustrations.*

1. Time policy on ship. The master, with the connivance of the owner, engages in smuggling. The ship is arrested in England. The insurer is not liable.[2]

2. Policy on freight, from a British port abroad to Liverpool. The master, unknown to the owner, stows a part of the cargo (timber) on deck, and sails without a certificate from the clearing office, thereby contravening the statute 16 & 17 Vict. c. 107. The timber is lost by perils of the seas. The assured can recover.[3]

3. Policy for £400, insurer to pay for a total loss if ship does not arrive at Yokohama by a certain date. The ship does not arrive in time. As a fact, the assured had no interest in ship or cargo, and the policy was a wagering policy, but the insurer did not know this. The policy cannot be enforced.[4]

4. Policy on a French ship, effected in England, capture and seizure being among the perils insured against. After the policy is effected war breaks out between France and England, and the ship is captured by a British cruiser. The assured cannot recover on this policy.[5]

NOTE.—"Where a voyage is illegal an insurance upon such a voyage is invalid. Thus during the war policies on vessels sailing in contravention of the Convoy Acts were held void, so too when the voyage was against the East India Company Acts, or the general Navigation

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[1] *Arnould*, Ed. 6, p. 686; *McArthur*, Ed. 2, p. 19; *Dudgeon* v. *Pembroke* (1874), L. R. 9 Q. B. at 586.

[2] *Pipon* v. *Cope* (1808), 1 Camp. 434, as explained, *Trinder* v. *Thames and Mersey Ins. Co.* (1898), 2 Q. B. at p. 129, C. A. If the master smuggles without the owner's connivance it is barratry, *Cory* v. *Burr* (1883), 8 App. Cas. at p. 399.

[3] *Wilson* v. *Rankin* (1865), L. R. 1 Q. B. 162, Ex. Ch. *Aliter*, if the owner was privy to the illegality; *Cunard* v. *Hyde* (1860), 29 L. J. Q. B. 6 (policy on goods).

[4] *Gedge* v. *Royal Exchange* (1900), 2 Q. B. 214, at p. 222.

[5] *Kellner* v. *Le Mesurier* (1803), 4 East, 396, and *Gamba* v. *Le Mesurier* (1803), 4 East, 407. See note to § 91 (2), *post*.

SECT. 41. Act (6 Geo. 4, c. 109), which statutes were made with reference to the general policy of the realm."[1]

A contract to do a thing which cannot be done without a violation of the law is void, whether the parties know the law or not. But if a contract is capable of being performed in a legal manner, it is necessary to show clearly the intention to perform it in an illegal manner in order to avoid it.[2]

An insurance on enemies' goods or against British capture is illegal. See notes to § 91 (2), *post*, and see further, notes to §§ 3 and 4, *ante*, and *Owen's* Declaration of War, p. 405.

### *The Voyage.*

Implied condition as to commencement of risk.

**§ 42.**—(1.) Where the subject-matter is insured by a voyage policy "at and from" or "from" a particular place, it is not necessary that the ship should be at that place when the contract is concluded, but there is an implied condition that the adventure shall be commenced within a reasonable time, and that if the adventure be not so commenced the insurer may avoid the contract.[3]

(2.) The implied condition may be negatived by showing that the delay was caused by circumstances known to the insurer before the contract was concluded, or by showing that he waived the condition.[4]

*Illustration.*

Floating policy on cargo by a particular ship for twelve months from May 11th. A declaration of a cargo of coals having been made under this policy the insurers, on August 2nd, effected a reinsurance of the coals by that ship from the Tyne to Lulea at a specified premium. The vessel did not sail on the insured voyage till September 25th, and was lost with her cargo on October 2nd. The reinsurer is

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[1] *Redmond* v. *Smith* (1844), 7 M. & Gr. at p. 474.

[2] *Waugh* v. *Morris* (1873), L. R. 8 Q. B. 202.

[3] *De Wolf* v. *Archangel Ins. Co.* (1874), L. R. 9 Q. B. 451 (summer risk turned into winter risk).

[4] This seems fair, but before the Act was a somewhat doubtful proposition. See *ibid.* at p. 457, and see *Arnould*, Ed. 6, p. 409, as to usage.

not liable on this policy, for the delay alters the risk from a summer risk to a winter risk.[1]

NOTE.—As to the attachment of a policy in ordinary form under "from" and "at and from" risks, see further, Rules 2 and 3 in Sched. I., *post*, p. 142. Reasonable time is a question of fact; see § 88.

Where the assured abandons the adventure insured, the contract of marine insurance is determined.[2] The abandonment of the adventure by not commencing the voyage within a reasonable time appears to be distinct from the implied condition that the risk shall not be altered by delay or otherwise. As to frustration of adventure, see note to § 60, *post*.

Alteration of port of departure.

**§ 43.** Where the place of departure is specified by the policy, and the ship instead of sailing from that place sails from any other place, the risk does not attach.[3]

NOTE.—By usage, it is said, an intermediate voyage may be interposed, but the evidence of such a usage would have to be very clear.[4] Suppose a ship is insured from London to New York. If she starts from Southampton to Liverpool it is a wholly different risk. Unless the ship starts from the *terminus à quo* it is clear that the risk cannot attach.

Sailing for different destination.

**§ 44.** Where the destination is specified in the policy, and the ship, instead of sailing for that destination, sails for any other destination, the risk does not attach.[5]

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[1] *Maritime Ins. Co.* v. *Stearns* (1901), 2 K. B. 912, 6 Com. Cases, 182.

[2] *Grant* v. *King* (1802), 4 Esp. 175 (delay of six months, policy not avoided); *Palmer* v. *Fenning* (1833), 9 Bing. 460 (delay of four months in case of a yacht, policy avoided); cf. *Parkin* v. *Tunno* (1809), 11 East, 22 (abandonment of voyage in consequence of war perils); *Nickells* v. *London and Prov. Mar. Ins. Co.* (1900), Times, November 17 (abandonment of voyage under apprehension of hostilities); *Owen's* Declaration of War, p. 39.

[3] *Arnould*, Ed. 6, p. 452; *Way* v. *Modigliani* (1787), 2 T. R. 30.

[4] *Arnould*, Ed. 6, p. 409.

[5] *Sellar* v. *McVicar* (1804), 1 B. & P. (N. R.) 22; 8 R. R. 744, as explained, *Phillips* on Insurance, § 930; *Simon Israel & Co.* v. *Sedgwick* (1893), 1 Q. B. 303, C. A.

SECT. 44.

*Illustration.*

Policy on ship from the Mersey to any port or ports west of Gibraltar. The ship sails from Liverpool for Carthagena, which is east of Gibraltar. The policy does not attach, and a clause authorizing change of voyage does not come into operation.[1]

Change of voyage.

**§ 45.**—(1.) Where, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy, there is said to be a change of voyage.[2]

(2.) Unless the policy otherwise provides, where there is a change of voyage the insurer is discharged from liability as from the time of change, that is to say, as from the time when the determination to change it is manifested; and it is immaterial that the ship may not in fact have left the course of voyage contemplated by the policy when the loss occurs.[3]

*Illustration.*

Policy on ship at and from Cadiz to Liverpool. Afterwards, without the consent of the insurer, the destination of the ship is changed to Newfoundland. The ship is stranded and burnt in the bay of Cadiz. The insurer is discharged from liability.[4]

NOTE.—Three different states of fact must be distinguished. First, the ship may sail on a voyage not contemplated by the policy. In that case the risk does not attach. See §§ 43 and 44. Secondly, a

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[1] *Simon Israel & Co.* v. *Sedgwick* (1893), 1 Q. B. 303, C. A.; distinguished in the case of a warranty, *Simpson* v. *Premier Underwriting Association* (1905), 10 Com. Cas. 198.

[2] *Arnould*, Ed. 6, pp. 453, 458; *McArthur*, Ed. 2, p. 84; *Woolridge* v. *Boydell* (1778), Dougl. 16; *Tudor*, Mar. Cas. Ed. 3, p. 125; *Bottomley* v. *Bovill* (1826), 5 B. & C. 210; *Simon Israel & Co.* v. *Sedgwick* (1893), 1 Q. B. 303, C. A.

[3] *Ibid.*; and *Tasker v. Cunningham* (1819), 1 Bligh H. L. 87; 20 R. R. 33.

[4] *Tasker* v. *Cunningham* (1819), 1 Bligh H. L. 87, 102.

ship may start on the voyage insured, but afterwards change her destination. There is then a change of voyage. In that case the risk attaches, but is afterwards avoided. Thirdly, a ship may proceed from the terminus *a quo* to the terminus *ad quem*, but sail thither by an improper track. In that case there is a deviation.[1]

A clause, holding the assured covered in case of deviation or change of voyage at a premium to be arranged, is often inserted in the policy.

Deviation.

§ **46.**—(1.) Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs.[2]

(2.) There is a deviation from the voyage contemplated by the policy:—

(*a.*) Where the course of the voyage is specifically designated by the policy, and that course is departed from;[3] or

(*b.*) Where the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from.[4]

(3.) The intention to deviate is immaterial; there must be a deviation in fact to discharge the insurer from his liability under the contract.[5]

*Illustrations.*

1. Policy on ship from L. to J. There are two tracks to J., one going north and the other south of the island of D. Sometimes one

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[1] As to distinction between deviation and change of voyage, see further, *Arnould*, Ed. 6, p. 452.

[2] *Arnould*, Ed. 6, pp. 451, 462; *McArthur*, Ed. 2, pp. 18, 84.

[3] *Arnould*, Ed. 6, p. 463.

[4] *Davis* v. *Garrett* (1830), 6 Bing. 716; *Arnould*, Ed. 6, p. 462.

[5] *Arnould*, Ed. 6, pp. 453, 455; cf. *Middlewood* v. *Blakes* (1797), 7 T. R. at p. 168; 4 R. R. 409.

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track and sometimes the other is the best, and the master ought to exercise his own discretion in each case. The owners direct him to call at a port in the north of the island of D. He therefore takes the northern course, and his ship is captured. This is a deviation.[1]

2. Policy on ship from her "port of lading in North America to Liverpool." She loads part of her cargo at K., proceeds to B., which is seven miles off, to complete her cargo, and returns to K. for provisions, and then sails for England, and is lost on the voyage. The proceeding to B. and back again is a deviation, and the insurer is not liable.[2]

3. Time policy against fire on ship "lying in the Victoria Docks with liberty to go into dry dock and light the boiler once or twice during the currency of the policy." The ship goes up to the dry dock, and, after leaving it, delays in the river to replace her paddle wheels. It is usual and also cheaper to put on the paddle wheels in the river. This is a deviation.[3]

4. Insurance on salvage pumps from A. to the ss. *Alexandra* ashore in the neighbourhood of D., "and while *there* engaged at the wreck and until again returned to A." The pumps are lost on the wreck while it is being towed to N., a port of safety. This is a deviation.[4]

NOTE.—It is immaterial that the insurer may not be prejudiced by the deviation, see *Arnould*, Ed. 6, p. 450. As to usage to call at intermediate ports, see *Arnould*, Ed. 6, p. 462. As to causes which justify deviation, see § 49, *post*. As to change of voyage, see § 45, *ante*.

Several ports of discharge.

**§ 47.—(1.) Where several ports of discharge are specified by the policy, the ship may proceed to all or any of them,[5] but in the absence of any usage or sufficient cause to the contrary, she must proceed to them**

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[1] *Middlewood* v. *Blakes* (1797), 7 T. R. 162.

[2] *Brown* v. *Tayleur* (1835), 4 A. & E. 241; 43 R. R. 331.

[3] *Pearson* v. *Commercial Union Ass. Co.* (1876), 1 App. Cas. 498.

[4] *Wingate* v. *Foster* (1878), 3 Q. B. D. 582; followed *Difiori* v. *Adams* (1884), 53 L. J. Q. B. 437.

[5] *Arnould*, Ed. 6, p. 460; *McArthur*, Ed. 2, p. 85; *Lowndes*, Ed. 2, p. 48. As to the meaning of "port" in a policy, see *McArthur*, Ed. 2, p. 486, and *Hunter* v. *Northern Mar. Ins. Co.* (1888), 12 App. Cas. 726.

or such of them as she goes to, in the order designated by the policy. If she does not, there is a deviation.[1]

(2.) Where the policy is to "ports of discharge," within a given area, which are not named, the ship must, in the absence of any usage or sufficient cause to the contrary, proceed to them, or such of them as she goes to, in their geographical order. If she does not there is a deviation.[2]

NOTE.—In a case where three ports of discharge were specified in the policy, Lord Ellenborough says, "I think that the voyage insured to Palermo, Messina, and Naples meant a voyage to all or any of the places named; with this reserve only, that if the ship went to more than one place she must visit them in the order described in the policy."[3]

Delay in voyage.

§ 48. In the case of a voyage policy, the adventure insured must be prosecuted throughout its course with reasonable despatch, and if without lawful excuse it is not so prosecuted, the insurer is discharged from liability as from the time when the delay became unreasonable.[4]

*Illustration.*

A ship is insured from England to the coast of West Africa, and "during her stay and trade there," and back to England. After completing her cargo for homeward voyage, she delays sailing for a month to salve the cargo of another ship which has been wrecked. On the voyage home she is lost. The assured cannot recover.[5]

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[1] *Arnould*, Ed. 6, pp. 464, 466.

[2] *Ibid.*, p. 466; *McArthur*, Ed. 2, p. 85; cf. *Metcalf* v. *Parry* (1814), 4 Camp. 123.

[3] *Marsden* v. *Reid* (1803), 4 East, at p. 576.

[4] *Arnould*, Ed. 6, pp. 462, 486–493; *Company of African Merchants* v. *British Ins. Co.* (1873), L. R. 8 Ex. 154, Ex. Ch.; cf. *Samuel* v. *Royal Exchange* (1828), 8 B. & C. 119 (delay in entering port of destination caused by ice held justified).

[5] *Arnould*, Ed. 6, pp. 462, 486–493; *Company of African Merchants* v. *British Ins. Co.* (1873) L. R. 8 Ex. 154, Ex. Ch.; and cf. *Pearson* v. *Commercial Union Ass. Co.* (1876), 1 App. Cas. 498.

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NOTE.—Unjustifiable delay in prosecuting the voyage is usually classed under the heading of deviation; but it seems clearer to draw a distinction between time and locality. Compare Rule 5 in the Sched., *post*, p. 144, as to the termination of risk on goods.

Excuses for deviation or delay.

§ **49.**—(1.) Deviation or delay in prosecuting the voyage contemplated by the policy is excused:—

(*a.*) Where authorized by any special term in the policy;[1] or

(*b.*) Where caused by circumstances beyond the control of the master and his employer;[2] or

(*c.*) Where reasonably necessary in order to comply with an express or implied warranty;[3] or

(*d.*) Where reasonably necessary for the safety of the ship or subject-matter insured;[4] or

(*e.*) For the purpose of saving human life, or aiding a ship in distress where human life may be in danger;[5] or

(*f.*) Where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship;[6] or

(*g.*) Where caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against.[7]

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[1] *Arnould*, Ed. 6, p. 486; *Puller* v. *Glover* (1810), 12 East, 124; *Naylor* v. *Taylor* (1829), 9 B. & C. 718; *Hyderabad Co.* v. *Willoughby* (1899), 2 Q. B. 530.

[2] *Arnould*, Ed. 6, p. 499; *Elton* v. *Brogden* (1740), 2 Stra. 1264 (master forced out of his course by crew); *Delany* v. *Stoddart* (1776), 1 T. R. 22 (stress of weather).

[3] Generalized from *Bouillon* v. *Lupton* (1863), 15 C. B. (N. S.) 113 delay to make ship seaworthy for a particular stage of the voyage).

[4] *Arnould*, Ed. 6, p. 508.

[5] *Scaramanga Stamp* (1880), 5 C. P. D. 295, C. A.; *Arnould*, Ed. 6, p. 507.

[6] Said to be so held in United States, and agreed to by insurers in Lord Chancellor's Committee.

[7] *Ross* v. *Hunter* (1790), 4 T. R. 33.

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(2.) When the cause excusing the deviation or delay ceases to operate, the ship must resume her course, and prosecute her voyage, with reasonable despatch.[1]

*Illustrations.*

1. Ship insured from Lyons to Galatz. She starts from Lyons on July 24th, properly equipped for the river voyage. She is detained for three weeks at Marseilles to equip herself for the open sea voyage. This delay is justifiable.[2]

2. Ship warranted "free from capture in port." To avoid capture she slips her cable before she is ready for sea, and then proceeds to a port out of her direct course to load. She is afterwards wrecked. The insurer is not liable.[3] *Sed qu.* since the Act?

NOTE.—Where a policy contains a permissive clause, the scope of that clause must be determined in each case by the wording of the particular clause. For special clauses authorizing deviation or change of voyage at an additional premium to be arranged, see *Owen's* Notes and Clauses, Ed. 3, pp. 35, 120.

## *Assignment of Policy.*

When and how policy is assignable.

§ **50.**—(1.) A marine policy is assignable unless it contains terms expressly prohibiting assignment. It may be assigned either before or after loss.[4]

(2.) Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence

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[1] *Arnould*, Ed. 6, p. 500; and see § 49.

[2] *Bouillon* v. *Lupton* (1863), 15 C. B. N. S. 113.

[3] *O'Reilly* v. *Royal Exchange Ass. Co.* (1865), 4 Camp. 246, criticized *Phillips* on Insurance, 578. Sub-clause (*d*) perhaps overrides this decision.

[4] *Lloyd* v. *Fleming* (1872), L. R. 7 Q. B. 299 (action by executor of assignee after loss). As to policy prohibiting assignment, see *Parsons* on Insurance, p. 60; *Laurie* v. *West Hartlepool Indemnity Assn.* (1899), Times L. R. v. 15, p. 486 (mutual association).

SECT. 50. arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

(3.) A marine policy may be assigned by indorsement thereon or in other customary manner.

NOTE.—Some American policies require the insurer's assent to assignment.

Subsect. (2) reproduces § 1 of the Policies of Marine Insurance Act (31 & 32 Vict. c. 86), which is repealed by this Act. That Act in terms only applied to policies on ship, freight, or goods; but it would probably have been held to extend to all marine policies. The words "arising out of the contract" are inserted to give effect to *Pellas* v. *Neptune Ins. Co.* (1879), 5 C. P. D. 34, C. A., where it was held that a mere set-off was not a defence against an assignee.

Where a policy was effected by an agent in his own name, the person for whose benefit it was effected could always sue on it in his own name.[1] The difficulty arose in the case of an assignee.

Subsect. (3) reproduces the effect of § 2 of the Act, which in addition prescribed an optional form of indorsement. The subsection is permissive in its terms, and presumably a marine policy may be assigned in any way by which an ordinary chose in action may be assigned.[2]

Assured who has no interest cannot assign.

**§ 51.** Where the assured has parted with or lost his interest in the subject-matter insured, and has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative.[3]

Provided that nothing in this section affects the assignment of a policy after loss.[4]

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[1] *Browning* v. *Provincial Ins. Co.* (1874), L. R. 5 P. C. at p. 272.

[2] See Judicature Act, 1873 (36 & 37 Vict. c. 66, § 25 (6)); *Parsons* on Insurance, p. 52.

[3] *North of England Oil Cake Co.* v. *Archangel Mar. Ins. Co.* (1875), L. R. 10 Q. B. 249, and authorities cited for § 15.

[4] *Lloyd* v. *Fleming* (1872), L. R. 7 Q. B. 299.

*Illustrations.*

1. A., B., and C. each own a third share of a ship. A. and B. jointly insure their shares in a policy for £500. Afterwards B. sells his share to C., but no arrangement is made as to the policy. The ship is lost. On this policy only A.'s share (£250) can be recovered.[1]

2. A., who is abroad, insures a cargo to London, including all risk of craft. While the cargo is afloat, A.'s agent sells the cargo to B., but A. retains the policy, as the cargo is not to be paid for till arrival. Part of the cargo is damaged while being landed in B.'s lighters. After A.'s interest has ceased he assigns the policy to B. B. cannot recover on the policy.[2]

NOTE.—After loss, the right to indemnity accrues and is fixed, and this right can be assigned. "It is every day's practice, where a ship has sustained damage, to sell the injured hull for the benefit of whom it concerns, and then sue on the policy. If it can be made out that the loss is total, the sale is for the benefit of the underwriters, who pay the total loss. If the loss proves partial only, it is for the benefit of the assured; but no one ever thought of saying that the sale of the damaged hull put an end to the right to recover an indemnity for the partial loss."[3]

As to the time at which the risk passes from seller to buyer under a contract of sale, see *Chalmers'* Sale of Goods Act, 1893, §§ 20 and 32, and notes thereto. *Primâ facie*, property and risk pass together.

## *The Premium.*

When premium payable.

**§ 52. Unless otherwise agreed, the duty of the assured or his agent to pay the premium, and the duty of the insurer to issue the policy to the assured or his agent, are concurrent conditions, and the insurer is not bound to issue the policy until payment or tender of the premium.**[4]

NOTE.—The term "agreed" includes a binding usage, for usage is binding as being an implied term of the agreement. Payment, it is

[1] *Powles* v. *Innes* (1841), 11 M. & W. 10.

[2] *North of England Oil Cake Co.* v. *Archangel Mar. Ins. Co.* (1875), L. R. 10 Q. B. 249.

[3] *Lloyd* v. *Fleming* (1872), L. R. 7 Q. B. at p. 302, per Lord Blackburn.

[4] *Arnould*, Ed. 6, pp. 195, 196; cf. *Xenos* v. *Wickham* (1863), 33 L. J. C. P. at p. 18, per Blackburn, J. As to correcting error in premium by subsequent indorsement on policy, see *Mildred* v. *Maspons* (1883), 8 App. Cas. at p. 878. As to issue of policy, see note to § 21, *ante*.

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to be noted, is not a technical term. It includes a settlement in account when that is the agreed way of doing business. See also note to next section.

The broker in drawing up a policy is not the insurer's agent, or responsible to him for any want of care.[1]

Policy effected through broker.

**§ 53.**—(1.) Unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may be payable in respect of losses, or in respect of returnable premium.[2]

(2.) Unless otherwise agreed, the broker has, as against the assured, a lien upon the policy for the amount of the premium and his charges in respect of effecting the policy;[3] and where he has dealt with the person who employs him as a principal he has also a lien on the policy in respect of any balance on any insurance account which may be due to him from such person, unless when the debt was incurred he had reason to believe that such person was only an agent.[4]

*Illustration.*

A. instructs B., a broker at Hartlepool, to insure his ships. B. employs C., another broker at Liverpool, to effect the insurances. C.

[1] *Empress Ass. Corporation* v. *Bowring* (1905), 11 Com. Cas. 107.

[2] See *Arnould*, Ed. 6, pp. 193, 194; and *Universal Ins. Co.* v. *Merchants Mar. Ins. Co.* (1897), 2 Q. B. at pp. 97, 98 (premium); cf. *Hine* v. *Steamship Ins. Syndicate* (1895), 7 Asp. Mar. Cas. 558, C. A.; *Sweeting* v. *Pearce* (1859), 29 L. J. C. P. 265 (losses).

[3] *Arnould*, Ed. 6, pp. 211, 214; *McArthur*, Ed. 2, p. 40; *Fisher* v. *Smith* (1878), 4 App. Cas. 1, H. L.; and cf. *Mildred* v. *Maspons* (1883), 8 App. Cas. at p. 879.

[4] As to lien for general balance, see *Arnould*, Ed. 6, p. 212; *Westwood* v. *Bell* (1815), 4 Camp. 349; cf. *Cahill* v. *Davidson* (1857), 3 C. B. (N. S.) 106; *Juarez* v. *Williams* (Feb. 3, 1903), Shipping Gazette. The lien is confined to insurance business, *Dixon* v. *Stansfeld* (1850), 10 C. B. 398; and cf. *Elgood* v. *Harris* (1896), 2 Q. B. 491, as to effect of bankruptcy on a set-off.

has a lien on the policies for the premiums and charges, even though A. may have paid B.[1] SECT. 53.

NOTE.—In a case on a company's policy which instead of reciting payment of the premium, contained a promise by the assured to pay it, it was held that the ordinary custom applied, and the broker, not the assured, was liable to the insurer for the premium.[2] Collins, J., there says, "A Lloyd's policy contains a recital that the premium has been paid; but supposing that the recital were made in a policy not under seal, so as not to amount to an estoppel, then upon the contract of insurance there would be an obligation upon the person insured to pay the premium. But that obligation is treated as discharged, although it is not discharged in fact; it is considered to be discharged by reason of a fiction based upon a custom which has received judicial sanction. It is a well-recognized practice in marine insurance for the broker to treat himself as responsible to the underwriter for the premium; by a fiction he is deemed to have paid the underwriter, and to have borrowed from him the money with which he pays."

As regards payment of the premium, the London practice is for the underwriter to allow abatements of 5 per cent. and 10 per cent., known respectively as brokerage and discount, to the assured or his broker. If no broker is employed, the assured has the benefit of both abatements. If he employs a broker, the 5 per cent. is retained by the broker as his remuneration. Thus:—

| | £ | *s.* | *d.* |
|---|---|---|---|
| Premium ... ... ... ... | 3 | 0 | 0 |
| Brokerage, 5 per cent. ... ... | 0 | 3 | 0 |
| | 2 | 17 | 0 |
| Discount, 10 per cent. ... ... | 0 | 5 | 8 |
| The underwriter receives net ... | 2 | 11 | 4 |

If a broker is employed, the broker receives from the assured £2 14*s.* 4*d.*, and pays the underwriter £2 11*s.* 4*d.* The 10 per cent. discount is allowed nominally on the condition of the premium being paid when due, the due date being, in the case of insurance companies, the eighth day of the month next following that in which the insurance has been effected. In the case of Lloyd's underwriters, the due date is nominally the same.

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[1] *Fisher* v. *Smith* (1878), 4 App. Cas. 1, H. L.

[2] *Universo Ins. Co.* v. *Merchants' Mar. Ins. Co.* (1897), 1 Q. B. 205, affirmed 2 Q. B. (1897) 93, C. A.

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Effect of receipt on policy.

§ 54. Where a marine policy, effected on behalf of the assured by a broker, acknowledges the receipt of the premium, such acknowledgment is, in the absence of fraud, conclusive as between the insurer and the assured, but not as between the insurer and broker.[1]

NOTE.—The acknowledgment is not conclusive as between the insurer and the broker.[2] Probably then it is not conclusive as between insurer and assured, where the latter effects the policy directly. But it ought to be conclusive in favour of an assignee for value without notice.[3]

*Loss and Abandonment.*

Included and excluded losses.

§ 55.—(1.) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.[4]

(2.) In particular,—

(*a.*) The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the

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[1] *Arnould*, Ed. 6, p. 197, and note to § 53.

[2] *Taylor* on Evidence, § 774.

[3] See further, note to last section, and cf. *Roberts* v. *Security Co. Ltd.* (1897), 1 Q. B. 111 (accident policy).

[4] *Arnould*, Ed. 6, p. 727; *Broom's* Legal Maxims, Ed. 7, p. 175; *Carver's* Carriage by Sea, Ed. 3, §§ 87–90; *Devaux* v. *Salvador* (1835), 4 Ad. & El. at p. 431 (collision); *Jackson* v. *Union Mar. Ins. Co.* (1874), L. R. 10 C. P. at p. 148, Ex. Ch. (freight); *Cory* v. *Burr* (1883), 8 App. Cas. at p. 398 (barratry); *Reischer* v. *Borwick* (1894), 2 Q. B. at p. 550, C. A. (collision); *Trinder* v. *Thames and Mersey Mar. Ins. Co.* (1898), 2 Q. B. at p. 124, C. A. (negligent navigation); *Brankelow* v. *Canton Ins. Office* (1899), 2 Q. B. 178, 186, C. A. (loss of freight due to form in which bills of lading were given).

loss would not have happened but for the misconduct or negligence of the master or crew.[1]

(*b.*) Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against.[2]

(*c.*) Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils. [3]

*Illustrations.*

1. Policy on goods, which consists of hides and tobacco. Sea-water is shipped during a storm, which wets the hides. The hides become putrid, and the fumes from them spoil the flavour of the tobacco. The damage to the tobacco is proximately caused by perils of the seas.[4]

2. Policy on cargo warranted "free from all consequences of hostilities." During the American war the Confederates extinguish

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[1] *McArthur*, Ed. 2, p. 143; *Arnould*, Ed. 6, p. 731; *Thompson* v. *Hopper* (1858), E. B. & E. at p. 1047, Ex. Ch. (act of assured himself); *Dixon* v. *Sadler* (1839), 5 M. & W. 405 (bad seamanship of master); *Trinder* v. *Thames and Mersey Ins. Co.* (1898), 2 Q. B. 114, C. A. (negligent navigation by master and co-owner).

[2] *Tatham* v. *Hodgson* (1796), 6 T. R. 656 (mortality among slaves); *Taylor* v. *Dunbar* (1869), L. R. 4 C. P. 206 (cargo of meat); *Pink* v. *Fleming* (1890), 25 Q. B. D. 356 (cargo of fruit); cf. *Shelbourne* v. *Law Investment Corpn.* (1898), 2 Q. B. at p. 629 (collision, delay during repairs). See note, *post*, as to freight.

[3] *McArthur*, Ed. 2, p. 141; *The Xantho* (1887), 12 App. Cas. at p. 509 (wear and tear, sea damage); *Thames and Mersey Mar. Ins. Co.* v. *Hamilton* (1887), 12 App. Cas. 484 (donkey-engine explosion); *Koebel* v. *Saunders* (1864), 33 L. J. C. P. 310 (*vice propre*). As to rats, see *Hunter* v. *Potts* (1815), 4 Camp. 203; *Laveroni* v. *Drury* (1852), 22 L. J. Ex. 2; but see *Hamilton* v. *Pandorf* (1887), 12 App. Cas. 518, where the action of the rats was not the proximate cause of loss.

[4] *Montoya* v. *London Assurance* (1851), 6 Exch. 451.

SECT. 55. the light on Cape Hatteras. Owing to the absence of the light, the ship runs on to the rocks and is wrecked. The proximate cause of loss is the perils of the seas, and the insurer is liable.[1]

3. Policy on living animals warranted free from mortality and jettison. In a storm some of the animals are so injured as to cause their death. The insurer is liable notwithstanding the warranty.[2]

4. Voyage policy on goods at and from K. to Y. While ship is loading at K., the weight of the cargo brings the discharge pipe below water. In consequence of a valve being negligently left open, water from the discharge pipe gets into the hold and damages the cargo. This is a loss proximately caused by perils of the seas, or other perils of a like kind, for which the insurer is liable.[3]

5. Policy on a parcel of gold shipped by a Russian ship to Turkey. The ship is stranded in Turkey, and the gold taken charge of by the Russian Consul. As the ship is Russian, the Russian Consular Court has jurisdiction, and that court awards salvage charges against the gold which would not be payable by English law. The assured has to pay these charges to get his gold. This is a loss by perils of the seas, for which the insurer is liable.[4]

6. Policy on goods shipped in a French ship. The ship is injured by collision, and the master, not having the funds requisite for the necessary repairs, gives a bottomry bond on ship, freight, and cargo. The ship and freight not being sufficient to satisfy the bond, the assured has to pay the amount deficient to get his goods. The insurer is not liable. The loss is not caused by perils of the seas, but by the want of funds on the part of the master.[5]

7. Policy on cargo of fruit warranted free from average "unless damage be consequent on collision." The ship gets into collision and has to go into port for repairs. The cargo has to be landed and re-shipped, and it is damaged partly by handling and partly by the

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[1] *Ionides* v. *Universal Mar. Ins. Assn.* (1863), 32 L. J. C. P. 170. Most of the cargo was destroyed by the sea, but a small part was saved, and a further part could have been saved but for the action of the Confederates, who prevented its being landed. *Held*, as to this part, that the warranty exempted the insurers from liability.

[2] *Lawrence* v. *Aberdein* (1821), 5 B. & Ald. 107, 24 R. R. 299. Mortality = mortality from natural causes.

[3] *Davidson* v. *Burnand* (1868), L. R. 4 C. P. 117.

[4] *Dent* v. *Smith* (1869), L. R. 4 Q. B. 414.

[5] *Greer* v. *Pool* (1880), 5 Q. B. D. 272.

delay. The collision is not the proximate cause of the damage, and the insurer is not liable.[1]

8. Policy on ship, warranted free from capture and seizure. The master engages in smuggling, and in consequence she is seized by the Spanish revenue authorities. The proximate cause of the loss is the seizure, not the barratry of the master. The insurer is not liable.[2]

9. Policy on ship and machinery, including donkey-engine. Owing to a valve being kept closed, which ought to have been kept open, water is forced into, and splits open, the chamber of the donkey-pump. The insurer is not liable for this accident, for it is not caused by perils of the seas, or by any peril covered by the ordinary form of policy.[3]

10. Policy on freight from New South Wales to Valparaiso. The cargo consists of coal. The coal heats, and is in imminent danger of taking fire. Half of it has to be landed at Sydney. The rest is carried on and delivered. This is a partial loss of freight caused by fire (or other like perils) within the meaning of the policy.[4]

11. Policy on chartered freight for £3000. The master signs bills of lading without reserving a lien on the cargo as a whole. Part of the goods are jettisoned, and, in consequence, the actual freight received is only £2400. The assured cannot recover the difference, viz. £600, from the insurer, for the proximate cause of this loss was not the perils of the seas, but the form in which the bills of lading were given.[5]

12. Cargo of rice. Rats gnaw a hole in a pipe which passes through the cargo, and sea-water enters through the hole and damages the rice. The sea damage is the proximate cause of the loss, not the rats.[6]

13. Time policy on ship. The ship starts on a voyage with a short quantity of coal, and engages the services of a trawler to tow her to her port of discharge. The owner of the trawler gets judgment for salvage services, which assured has to pay. The steamer met with no extraordinary weather, and might in time have proceeded

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[1] *Pink* v. *Fleming* (1890), 25 Q. B. D. 396, C. A.; cf. *Field Steamship Co.* v. *Burr* (1899), 1 Q. B. 579, C. A.

[2] *Cory* v. *Burr* (1883), 8 App. Cas. 393.

[3] *Thames and Mersey Ins. Co.* v. *Hamilton* (1887), 12 App. Cas. 484, 494. (The *Inchmaree* case.)

[4] The *Knight of St. Michael* (1898), P. 30; cf. *Iredale* v. *China Traders Ins. Co.* (1900), 2 Q. B. at p. 518, C. A. The insurer on *goods* is not liable if the combustion is caused by *vice propre*. See note to § 40.

[5] *Williams* v. *Canton Insurance Office* (1901), A. C. 462.

[6] *Hamilton* v. *Pandorf* (1887), 12 App. Cas. 518 (bill of lading case, but the principle was said to apply to insurance).

SECT. 55. to her port under sail. The loss is not due to the perils of the seas, but to the improper deficiency of coal.[1]

NOTE.—No principle of marine insurance law is better established than the rule *causa proxima, non remota, spectatur*. "It were infinite," says Lord Bacon, "for the law to judge the causes of causes, and their impulsion one of another; therefore it contenteth itself with the immediate cause."[2] But though the rule is universally admitted, lawyers have never attempted to work out any philosophical theory of cause and effect, and probably it is as well for commerce that they should not have made the attempt.[3] The numerous decisions on the rule are rough and ready applications of it to particular facts. As might be expected, many of the decisions are difficult to reconcile. But the apparent inconsistencies may be regarded as depending rather on inferences of fact than on matters of law. Subsect. (2) embodies important deductions from the general rule of proximate cause laid down in subsect. (1).

*Subsect.* (2) (*a*). As Collins, L.J., points out, a man may lawfully stipulate against the consequences of his own negligence,[4] and he may stipulate against the consequences of his servants' negligence or misconduct. In the case of negligent or unskilful navigation, it now appears to be settled that the loss is regarded as caused proximately by perils of the seas, and only remotely by the negligence or unskilfulness of the master or crew. But when the loss is consequent on the wilful act or default of the assured, that act or default must be regarded as proximately causing the loss. *Dolus circuitu non purgatur*.[5] Where, however, a ship is lost through the barratry of the master, who is a part owner, the co-owners are entitled to recover.[6]

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[1] *Ballantyne* v. *Mackinnon* (1896), 2 Q. B. 455, C. A.; see at p. 461 as to "inherent vice."

[2] Maxims of the Law, cited *Devaux* v. *Salvador* (1835), 4 A. & E. at p. 431; 43 R. R. at p. 383; cf. *Greenock Steamship Co.* v. *Maritime Ins. Co.* (1903), 1 K. B. at p. 374, distinguishing *causa causans* from *causa sine qua non*.

[3] *Inman* v. *Bischoff* (1882), 7 App. Cas. at p. 683.

[4] *Westport Coal Co.* v. *McPhail* (1898), 2 Q. B. at p. 132.

[5] Cf. *Trinder* v. *Thames and Mersey Mar. Ins. Co.* (1898), 2 Q. B. at p. 127, C. A.

[6] *Westport Coal Co.* v. *McPhail* (1898), 2 Q. B. at p. 132; and see *Small* v. *U. K. Mar. Ins. Assn.* (1897), 2 Q. B. 311, C. A. (mortgagor and mortgagee).

Compare the language of sect. 506 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), which authorizes insurances effected "against the happening, without the owner's actual fault or privity" of certain events in respect of which the liability of owners is limited under that Act.

*Subsect.* (2) (*b*). As a rule, the insurer is not liable for damage caused by delay, though the delay result from a peril insured against. But difficult cases arise with regard to freight, especially as regards time charters. Where the adventure is frustrated by a peril insured against, and freight is thereby lost, the insurer is liable.[1] Thus, where a ship was delayed by the operation of perils of the seas, and the charterer justifiably refused to load, it was held to be a loss of freight by perils of the seas.[2] On the other hand, in the *City of Paris* case,[3] a policy was effected "on freight outstanding." The ship was hired to the Admiralty, and the charter-party provided that if the ship became inefficient the charterers might make such abatement out of the freight as they thought fit. The ship struck on a rock and became inefficient for a time. The charterers made an abatement from the freight. *Held*, that the insurers were not liable, as the loss was not proximately caused by the perils of the seas, but by the action of the Admiralty. The line between the principles laid down by these cases is difficult to draw with certainty, and, as the result, special clauses are often inserted to protect the insurer or the assured, as the case may be, from the consequences of delay.[4] Loss of time-freight, resulting from detention for repair of general average damage, is not allowed in general average.[5]

*Subsect.* (2) (*c*). The final words at the end of subsect. (2) (*c*) are awkward. They were inserted to cover the decision in the *Inchmaree* case (illustration 9), where it was held that a donkey-engine explosion at sea had nothing to do with any maritime peril. The accident might just as well have happened on dry land, and therefore the

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[1] See *Re Jamieson* (1895), 2 Q. B. at p. 95.

[2] *Jackson* v. *Union Mar. Ins. Co.* (1874), L. R. 10 C. P. 125, Ex. Ch.; see, too, *The Alps* (1893), P. 109; and *The Bedouin* (1894), P. 1, C. A., also cases of chartered freight.

[3] *Inman* v. *Bischoff* (1882), 7 App. Cas. 670. See to like effect *Manchester Liners* v. *British and Foreign Mar. Ins. Co.* (1901), 7 Com. Cas. 26.

[4] See, *e.g.*, *Bensaude* v. *Thames and Mersey Ins. Co.* (1897), A. C. 609, H. L.; *Turnbull* v. *Hull Underwriters' Association* (1900), 2 Q. B. 402 (warranty, free from any claim consequent on loss of time).

[5] *The Leitrim* (1902), P. 256.

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insurer was not liable. So, too, a distinction must be drawn between the actual operation of a peril insured against, and the apprehension of its operation. As Willes, J., says in one case, the insurer is not liable for a loss caused by the prudence of the master or owner.[1] "It has often been observed," says Blackburn, J., "that a sale by the master is not one of the underwriter's perils, and is only material as showing that there is no longer anything which can be done to save the thing sold for whom it may concern."[2]

Partial and total loss.

§ 56.—(1.) A loss may be either total or partial. Any loss other than a total loss, as hereinafter defined, is a partial loss.[3]

(2.) A total loss may be either an actual total loss, or a constructive total loss.[4]

(3.) Unless a different intention appears from the terms of the policy, an insurance against total loss includes a constructive, as well as an actual, total loss.[5]

(4.) Where the assured brings an action for a total loss and the evidence proves only a partial loss, he may, unless the policy otherwise provides, recover for a partial loss.[6]

(5.) Where goods reach their destination in specie, but by reason of obliteration of marks, or otherwise, they are incapable of identification, the loss, if any, is partial and not total.[7]

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[1] *Philpott* v. *Swann* (1861), 11 C. B. (N. S.) at p. 282.

[2] *Rankin* v. *Potter* (1873), L. R. 6 H. L. at p. 122.

[3] *McArthur*, Ed. 2, p. 242; *Arnould*, Ed. 6, p. 1016.

[4] *Arnould*, Ed. 6, pp. 951, 988; *Roux* v. *Salvador* (1836), 3 Bing. N. C. at p. 285, Ex. Ch.

[5] *Adams* v. *Mackenzie* (1863), 13 C. B. (N. S.) 446; *Sailing Ship Blairmore* v. *Macredie* (1898), A. C. at p. 598; and see *Forwood* v. *North Wales Ins. Co.* (1880), 9 Q. B. D. 732, C. A. as to by-laws of a mutual society.

[6] *Arnould*, Ed. 6, p. 1163; *Benson* v. *Chapman* (1849), 2 H. L. C. 696; *King* v. *Walker* (1864), 2 H. & C. 384.

[7] *Spence* v. *Union Mar. Ins. Co.* (1868), L. R. 3 C. P. 427, and note to § 57.

NOTE.—A loss must be either total or partial. A total loss of part is a partial loss. For example, if 100 bags of seed be insured, and 10 be destroyed by perils insured against, this is a partial loss (cf. *Arnould*, Ed. 6, p. 1017). An apparent, but not a real, exception to this rule occurs when two or more distinct interests are covered by a single valuation. This is provided for by §§ 72 and 76 (1).

*Primâ facie*, and the presumption is a strong one, an insurance against total loss covers a constructive, as well as an actual, total loss. But the presumption may be rebutted, see *McArthur*, Ed. 2, p. 312.

Actual total loss.

**§ 57.—(1.) Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.**[1]

**(2.) In the case of an actual total loss no notice of abandonment need be given.**[2]

*Illustrations.*

1. Hides are insured from Valparaiso to Bordeaux. In consequence of sea damage they arrive at Rio in a state of incipient putridity, and are sold there. Their state is such that they would be wholly putrid if carried on to Bordeaux. This is an actual total loss.[3] *Sed qu.* now?

2. Insurance on goods in barges, as interest may appear. A cargo of rice valued at £450 is declared. The barge is sunk, and the rice remains under water for two tides. The rice is so damaged that the consignee refuses to accept it. Afterwards it is kiln-dried at a cost of £60, and then sold for £110. The rice still remains in specie, so this is only a partial loss.[4]

3. A ship is deserted in a sinking condition. She is afterwards

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[1] *Arnould*, Ed. 6, pp. 951, 988; *McArthur*, Ed. 2, p. 145; *Fleming* v. *Smith* (1848), 1 H. of L. Cas. at 535; *Lohre* v. *Aitchison* (1878) 3 Q. B. D. at p. 562; *Cossman* v. *West* (1887), 13 App. Cas. 160; *Rankin* v. *Potter* (1873), L. R. 6 H. L. at p. 127.

[2] *Kaltenbach* v. *Mackenzie* (1878), 3 C. P. D. at p. 471, C. A.; cf. *Rankin* v. *Potter* (1873), L. R. 6 H. L. at p. 106.

[3] *Roux* v. *Salvador* (1836), 3 Bing. N. C. 266, Ex. Ch.; cf. *Farnworth* v. *Hyde* (1865), 18 C. B. (N. S.) 835, as dealt with L. R. 2 C. P. at p. 226.

[4] *Francis* v. *Boulton* (1895), 65 L. J. Q. B. 153.

SECT. 57. towed into port by salvors and sold, by order of the Court, for less than the salvage costs. This is an actual total loss.[1]

4. Insurance on "profit on charter" warranted free from all average. The assured, having chartered a ship for a lump sum, puts her up as a general ship. The bill of lading freight exceeds the chartered freight, but in consequence of sea damage to cargo only a portion of it becomes payable, and the portion payable is less than the charter freight which assured has to pay. This is a total loss of profit on charter.[2]

NOTE.—Where by a peril insured against the goods of different owners are damaged and become so inextricably mixed as to be incapable of identification (*e.g.* marks obliterated), the loss is partial, not total.[3] See further, the note to § 60.

Before the Act the rule as to goods was stated thus—goods are deemed to be an actual total loss where they are so damaged as to cease to exist in specie, or as that they cannot be rendered capable of arriving at their destination in specie. Goods cease to exist in specie when they no longer answer to the commercial denomination under which they were insured.[4] A subsection to this effect was cut out in Committee, and the possible result may be, that goods which still exist in specie, though they could not be rendered capable of arriving at their destination in specie, must henceforth be regarded as a constructive total loss.

Missing ship.

**§ 58. Where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed.[5]**

NOTE.—Under the Continental Codes, arbitrary limits of time are fixed, after the expiration of which a missing ship may be presumed to be lost.

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[1] *Cossman* v. *West* (1887), 13 App. Cas. 160, P. C. reviewing the cases.

[2] *Asfar* v. *Blundell* (1896), 1 Q. B. 123, C. A. Semble an actual total loss. But distinguish *Williams* v. *Canton Ins. Office*, A. C. (1901) 462 H. L.

[3] *Spence* v. *Union Mar. Ins. Co.* (1868), L. R. 3 C. P. 427, and § 56 (5).

[4] *McArthur*, Ed. 2, p. 146; *Roux* v. *Salvador* (1836), 3 Bing. N. C. 266, 287, Ex. Ch.; *Asfar* v. *Blundell* (1896), 1 Q. B. at p. 127, C. A.

[5] *Green* v. *Brown* (1744), 2 Stra. 1199; *McArthur*, Ed. 2, p. 109.

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Effect of transhipment, etc.

§ 59. Where, by a peril insured against, the voyage is interrupted at an intermediate port or place, under such circumstances as, apart from any special stipulation in the contract of affreightment, to justify the master in landing and re-shipping the goods or other moveables, or in transhipping them, and sending them on to their destination, the liability of the insurer continues, notwithstanding the landing or transhipment.[1]

NOTE.—The English rules as to transhipment are not very well settled.[2] In the United States, and under some of the foreign codes, it is the duty of the master to tranship whenever it is reasonable to do so.

Concerning the master's authority or duty to tranship as between shipper and shipowner, see *Carver's* Carriage by Sea, Ed. 3, §§ 294, 304. The extent of his powers is determined by the law of the flag.[3]

Constructive total loss defined.

§ 60.—(1.) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.[4]

(2.) In particular, there is a constructive total loss,

(i.) Where the assured is deprived of the possession

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[1] *Arnould*, Ed. 6, p. 358; *McArthur*, Ed. 2, p. 263; cf. *Bold* v. *Rotherham* (1846), 8 Q. B. at p. 808.

[2] *Hansen* v. *Dunn* (1906), 11 Com. Cas. 100 (general principles as to transhipment), is the most recent exposition.

[3] *Carver's* Carriage by Sea, Ed. 3, § 204; and see *Cammell* v. *Sewell* (1860), 29 L. J. Ex. 350, Ex. Ch. (power to sell).

[4] *Arnould*, Ed. 6, p. 951; *McArthur*, Ed. 2, p. 146; *Kaltenbach* v. *Mackenzie* (1878), 3 C. P. D. at pp. 473 and 479, per Lord Esher; *Shepherd* v. *Henderson* (1884), 7 App. Cas. at p. 70, per Lord Blackburn; cf. *Moss* v. *Smith* (1850), 19 L. J. C. P. at p. 228.

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of his ship or goods by a peril insured against, and (*a*) it is unlikely that he can recover the ship or goods, as the case may be, or (*b*) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered;[1] or

(ii.) In the case of damage to a ship, where she is so damaged by a peril insured against, that the cost of repairing the damage would exceed the value of the ship when repaired.[2]

In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired.[3]

(iii.) In the case of damage to goods, where the cost

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[1] *Arnould*, Ed. 6, pp. 1041, 1058; *Roux* v. *Salvador* (1836), 3 Bing. N. C. at p. 286 (goods); *Rodocanachi* v. *Elliott* (1874), L. R. 9 C. P. 518, Ex. Ch. (goods in besieged town); *Sailing Ship Blairmore* v. *Macredie* (1898), A. C. 593; and see illustrations to § 62.

[2] *McArthur*, Ed. 2, pp. 147, 149; *Arnould*, Ed. 6, p. 1031; *Moss* v. *Smith* (1850), 19 L. J. C. P. 225; *Lohre* v. *Aitchison* (1878), 3 Q. B. D. at pp. 562, 563, affirmed on this point, *Aitchison* v. *Lohre* (1879), 4 App. Cas. at p. 762; *Rankin* v. *Potter* (1873), L. R. 6 H. L. at p. 116. In applying this test, the real value and not the policy valuation is to be regarded, *Irving* v. *Manning* (1847), 1 H. of L. Cas. 287, and § 28 (4) *ante*. Cf. *Angel* v. *Merchants' Mar. Ins. Co.* (1903), 1 K. B. 811, C. A. (value of wreck not to be added to cost of repairs). As to construction of a special clause, "the insured value to be taken as the repaired value," see *North Atlantic Steamship Co.* v. *Barr* (1904), 9 Com. Cas. 164.

[3] *Kemp* v. *Halliday* (1866), L. R. 1 Q. B. 520, Ex. Ch. Conversely, freight which has been earned is not to be taken into account, *Parker* v. *Budd* (1896), 2 Com. Cas. 133; see further *McArthur*, Ed. 2, p. 148. This subsection was redrafted in Committee.

of repairing the damage and forwarding the goods to their destination would exceed their value on arrival.[1] SECT. 60.

*Illustrations.*

1. Policy on ship. The ship gets on a rock and the master *bonâ fide* comes to the opinion that she cannot be saved. He therefore sells her for £18. The buyer gets her off the rock and repairs her at a cost of £750, when she is worth £1200. This is not a total loss.[2] Ship.

2. A ship is damaged by sea perils and puts into a foreign port. The master, after communicating with the owners, has her repaired at a cost exceeding her repaired value. After her arrival in London the owners give notice of abandonment. This is ineffectual. There is only a partial loss.[3]

3. Ship of a special class and size is valued at £17,000. In consequence of sea damage she puts into Mauritius, where she is sold for £1400. Her cost four years before the insurance was £20,000. The cost of repairing her would have been £10,500, and her selling value when repaired would have been £7500; but a ship of that class and size, fitted for the particular trade, could not be built or bought for £10,500. The assured can only claim for a partial loss.[4]

4. Policy on ship with stipulation that if the ship is stranded for six months, and it is impracticable to save her, the assured may abandon her. The ship strands and remains stranded for more than six months, but it would be practicable to save her eventually. This is a constructive total loss under the policy.[5]

5. Policy on ship valued at £23,000, the insured value to be taken as the repaired for purpose of C. T. L. The ship strands in Sicily, and notice of abandonment is given but not accepted. She is got off, temporarily repaired, and brought home. The cost of permanent repairs is estimated at £22,500. The value of the wreck, unrepaired, is £7000 only. This cannot be taken into account. She is not a constructive total loss.[6]

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[1] *McArthur*, Ed. 2, pp. 150, 152; *Farnworth* v. *Hyde* (1866), L. R. 2 C. P. 294, Ex. Ch. (sea damage to goods).

[2] *Gardner* v. *Salvador* (1831), 1 Moo. & R. 116; 42 R. R. 767.

[3] *Fleming* v. *Smith* (1848), 1 H. L. Cas. 513.

[4] *Grainger* v. *Martin* (1862), 2 B. & S. 456; affirmed 4 B. & S. 9, Ex. Ch.

[5] *Rowland* v. *Maritime Insurance Co.* (1901), 6 Com. Cas. 160.

[6] *Angel* v. *Merchants' Mar. Ins. Co.* (1903), 1 K. B. 811, C. A.

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Goods.

6. Policy on goods. The ship becomes a constructive total loss, and the goods have to be landed in a damaged condition. There is a constructive total loss of the goods if the cost of landing, warehousing, conditioning, reshipping, and forwarding them to their destination (*minus the original freight*) would exceed their value on arrival.[1]

7. Insurance on goods from Bombay to London with liberty to send them through France. On arrival in Paris they are detained in consequence of the siege, and it is uncertain what will become of them. The assured may treat this as a constructive total loss.[2]

8. Policy on cargo of salt. The ship meets with bad weather, and is towed into a port of refuge by salvors. The salt is landed in a damaged condition, and is sold under a decree of the Court for salvage costs. This is a partial loss, not a constructive total loss.[3]

Freight.

9. Policy on freight valued at £2000. The ship strikes on a rock. The master puts into Pernambuco, and, instead of abandoning as he might have done, repairs the ship at a cost exceeding her repaired value, borrowing the money on bottomry. The ship arrives with her cargo. On arrival the ship is sold to satisfy the claim of the lender on bottomry, and the freight also is paid to him. The owner cannot repudiate the acts of the master, and, as freight has been earned, there is no loss of freight.[4]

10. Policy on freight. The ship becomes a constructive total loss at her port of destination, but freight is earned. On the abandonment of the ship by the assured, the freight passes to insurers on ship. The assured cannot claim for a loss of freight, for it has been earned.[5]

11. Policy on chartered freight from Chittagong to Dundee. The ship is wrecked fifty miles from Dundee, and notice of abandonment is properly given in respect of ship, cargo, and freight. Underwriters employ salvors, who bring the cargo into Dundee. This is a total loss

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[1] *Farnworth* v. *Hyde* (1866), L. R. 2 C. P. 204, Ex. Ch. Average adjusters are agreed that this case is commercially wrong so far as relates to the deduction of freight; *McArthur*, Ed. 2, p. 151; *Lowndes*, Ed. 2, p. 137; *Gow* on Insurance, p. 157.

[2] *Rodocanachi* v. *Elliott* (1873), L. R. 8 C. P. 649; affirmed L. R. 9 C. P. 520, Ex. Ch.

[3] *De Mattos* v. *Saunders* (1872), L. R. 7 C. P. 570; cf. *Meyer* v. *Ralli* (1876), 1 C. P. D. 358.

[4] *Benson* v. *Chapman* (1849), 2 H. L. C. 696, 723.

[5] *Scottish Maritime Insurance Co.* v. *Turner* (1853), 1 Macq. H. L. Cas. 334.

of freight. No freight is earned, because the goods are brought to their destination under a salvage contract, and not under the contract of affreightment.[1] SECT. 60.

NOTE.—For further illustrations, see § 62, and compare § 57.

The Bill originally contained a subsection dealing with freight, which was agreed to by the Lord Chancellor's Committee, but it was contended that it was too broadly expressed, and it was afterwards cut out. Constructive total loss of freight is therefore now governed by the general provision contained in subsection (1) of this section.[2]

There is a constructive total loss, says Mr. McArthur, "when the subject insured, though existing in specie, is justifiably abandoned, on account of its destruction being highly probable, or because it cannot be preserved from actual total loss unless at a cost greater than its value would be if such expenditure were incurred."[3]

It is commonly laid down that, for the purpose of determining whether the assured is entitled to treat a loss as a constructive total loss, regard must be had to the course which would be pursued by a prudent uninsured owner under the circumstances of the case.[4] But as decisions multiply "the prudent uninsured owner" test becomes of diminishing importance, because the decisions tend to settle as a matter of law the course which a prudent uninsured owner would be bound to take. This, perhaps, is fortunate, because the test is not an easy one to apply. When the test is applicable, the question is, not what the particular owner, if uninsured, would do, but what a man of average prudence ought to do under similar circumstances.[5]

Constructive total loss lies midway between actual loss on the one hand and partial loss on the other. It is in effect a hybrid loss, and

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[1] *Guthrie* v. *North China Ins. Co.* (1902), 7 Com. Cas., 130, C. A.

[2] See as to freight, *McArthur*, Ed. 2, p. 152; *Moss* v. *Smith* (1850), 19 L. J. C. P. 225; *Rankin* v. *Potter* (1873), L. R. 6 H. L. at pp. 102, 104; *Jackson* v. *Union Marine Ins. Co.* (1873), L. R. 8 C. P. 572; *Re Jamieson* (1895), 2 Q. B. at p. 95, C. A.

[3] *McArthur*, Ed. 2, p. 146.

[4] *Roux* v. *Salvador* (1836), 3 Bing. N. S. at p. 286 (goods); *Irving* v. *Manning* (1847), 1 H. of L. Cas., at p. 306 (ship); *Rankin* v. *Potter* (1873), L. R. 6 H. L. at p. 155; *Sailing Ship Blairmore* v. *Macredie* (1898), A. C. 503 H. L. (ship); but perhaps the test does not apply to freight; see *Philpot* v. *Swann* (1861), 11 C. B. (N. S.) at p. 282, per Willes, J.

[5] The prudent or reasonable man of English law corresponds with the *bonus pater familias* of Roman law. The standard is an objective one, and any personal equation must be excluded from consideration; cf. *Angel* v. *Merchants' Mar. Ins. Co.* (1903), 1 K. B. at p. 819, C. A.

SECT. 60. its dual character has complicated the decisions. In some instances notice of abandonment has been given as a matter of precaution, and a case is treated as one of constructive total loss when the facts would have justified its being treated as an actual total loss. In other instances due notice of abandonment has not been given, and the case has to be treated as a partial loss, though the facts show a constructive total loss. Again, when there is a warranty F.P.A., and the loss is heavy, juries sometimes struggle to bring the case within the line of constructive total loss. The result is that the outlines of the law are somewhat blurred.

Take the case of a consignment of tobacco as a normal instance. If it is so sea damaged as no longer to answer to the description of tobacco, there is an actual total loss. If by any process the tobacco could be reconditioned, so as to make it saleable as tobacco, but the cost of the operation is prohibitive, there is a constructive total loss. If a portion only of the consignment is spoilt, or if the whole of it is damaged, but not so damaged that it cannot be made into saleable tobacco and forwarded to its destination at a reasonable cost, there is a partial loss.

In the majority of cases the distinction between actual total loss and constructive total loss corresponds with the distinction which has been drawn between physical impossibility and mercantile impossibility.[1] A merchant trades for profit, not for pleasure, and the law will not compel him to carry on business at a loss. A commercial operation is regarded as impracticable, from the mercantile point of view, when the cost of performing it is prohibitive.

The same general principle as to loss by frustration of the adventure seems to cover goods, freights, and profits. See the application of the rule to goods criticized, *Lowndes*, Ed. 2, p. 238, but it is settled law. "It is well established," says Lord Bramwell, "that there may be a loss of the goods by a loss of the voyage in which the goods are being transported, if it amounts, to use the words of Lord Ellenborough, to a destruction of the contemplated adventure."[2]

With the object of avoiding the uncertainty and complication of the English rule, the laws of most foreign countries arbitrarily detail certain facts which authorize the assured to abandon and claim for a total loss. Thus, in the United States, unless the policy otherwise

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[1] *Moss* v. *Smith* (1850), 19 L. J. C. P. at p. 228, per Maule, J.; cf. *Rankin* v. *Potter* (1873), L. R. 6 H. L. at p. 104.

[2] *Rodocanachi* v. *Elliott*, L. R. 9 C. P. at p. 522, Ex. Ch. See illustration 7.

provides, there is a constructive total loss if the damage to a ship exceeds 50 per cent. of her repaired value. (*Phillips* on Insurance, § 1539.) In France, among other conditions, the assured may abandon when the damage to the subject-matter insured amount to three-fourths of its value. (Code de Commerce, art. 369.)

Mr. Justice Willes in 1867 furnished a memorandum on constructive total loss and valuation to the Royal Commission on Unseaworthy Ships.[1] It may still be usefully referred to. See, too, a valuable paper read to the International Law Association by Mr. T. G. Carver, Q.C., in which he discusses the English and foreign laws as to constructive total loss, and suggests the following definition :—(*a*) Where, by a peril insured against a ship is so damaged or so placed that the cost of recovering and making her fit for the same service as before will probably exceed her value when recovered and repaired, there is a constructive total loss of the ship. (*b*) Where, by a peril insured against, the owner of an insured subject is deprived of the possession or control and use of it indefinitely, or for a period which is unreasonable, having regard to the adventure on which it is insured, there is a constructive total loss of the subject.[2]

Effect of constructive total loss.

**§ 61. Where there is a constructive total loss the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss.[3]**

NOTE.—As Cotton, L.J., puts it, "A constructive total loss is when the damage is of such a character that the assured is entitled, if he thinks fit, to treat it as a total loss."[4]

The section, of course, does not apply to a case where by the terms of the policy the assured is only entitled to claim for an actual total loss, see § 56 (3), *ante*.

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[1] Report, 1874, Vol. II., App. No. lvii., p. 426.

[2] International Law Association, 18th Report, 1899, pp. 106, 172.

[3] *Arnould*, Ed. 6, pp. 951–953; *Roux* v. *Salvador* (1836), 3 Bing. N. C. at pp. 286, 287, Ex. Ch.; *Fleming* v. *Smith* (1848), 1 H. of L. Cas. 513; *Rankin* v. *Potter* (1873), L. R. 6 H. L. at pp. 118, 131, 135; and *Kaltenbach* v. *Mackenzie* (1878), 3 C. P. D. 467, 479, C. A., where abandonment and notice of abandonment are distinguished. As to election, see *ibid.*, and *Browning* v. *Provincial Ins. Co.* (1873), L. R. 5 P. C. 263.

[4] *Kaltenbach* v. *Mackenzie* (1878), 3 C. P. D. at p. 479.

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Notice of abandonment.

§ 62.—(1.) Subject to the provisions of this section, where the assured elects to abandon the subject-matter insured to the insurer he must give notice of abandonment. If he fails to do so the loss can only be treated as a partial loss.[1]

(2.) Notice of abandonment may be given in writing, or by word of mouth, or partly in writing and partly by word of mouth, and may be given in any terms which indicate the intention of the assured to abandon his insured interest in the subject-matter insured unconditionally to the insurer.[2]

(3.) Notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, but where the information is of a doubtful character the assured is entitled to a reasonable time to make inquiry.[3]

(4.) Where notice of abandonment is properly given, the rights of the assured are not prejudiced by the fact that the insurer refuses to accept the abandonment.[4]

(5.) The acceptance of an abandonment may be either express or implied from the conduct of the insurer. The mere silence of the insurer after notice is not an acceptance.[5]

(6.) Where notice of abandonment is accepted the

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[1] *Arnould*, Ed. 6, pp. 953–970; *McArthur*, Ed. 2, p. 153. As to origin of notice of abandonment, see *Kaltenbach* v. *Mackenzie* (1878), 3 C. P. D. at p. 471, C. A., where the whole subject is discussed.

[2] *Arnould*, Ed. 6, p. 957; *Currie* v. *Bombay Ins. Co.* (1869), L. R. 3 P. C. at p. 78.

[3] *Arnould*, Ed. 6, p. 960; *Currie* v. *Bombay Ins. Co.* (1869), L. R. 3 P. C. at p. 79; *Rankin* v. *Potter* (1873), L. R. 6 H. L. at p. 105; *Kaltenbach* v. *Mackenzie* (1878), 3 C. P. D. at pp. 472, 478.

[4] *McArthur*, Ed. 2, p. 156: and illustrations below.

[5] *Arnould*, Ed. 6, pp. 968, 969; *Provincial Ins. Co.* v. *Leduc* (1874), L. R. 6 P. C. 224.

abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice.[1]

(7.) Notice of abandonment is unnecessary where at the time when the assured receives information of the loss there would be no possibility of benefit to the insurer if notice were given to him.[2]

(8.) Notice of abandonment may be waived by the insurer.[3]

(9.) Where an insurer has re-insured his risk, no notice of abandonment need be given by him.[4]

*Illustrations.*

1. Policy on ship. On the 7th of February assured is informed that she is a constructive total loss. On the 23rd of February she is sold for what she will fetch. On the 10th of March notice of abandonment is given. This is too late.[5]

2. A ship is captured by the enemy. The owner, hearing of this capture, gives notice of abandonment. The ship is recaptured and restored to her owner before action brought. The notice of abandonment is ineffectual. This is only a partial loss.[6]

3. A ship insured against war risks is captured, and the assured gives notice of abandonment. The insurer declines to accept it. The assured commences an action. After the issue of the writ, the Prize Court, on the termination of the war, decrees the restoration of the

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[1] *Arnould*, Ed. 6, p. 968; *Provincial Ins. Co.* v. *Leduc* (1874), L. R. 6 P. C. 224 (implied acceptance, waiver of breach of warranty). Where notice of abandonment is not accepted, there is a conflict between the English and Scottish rules. See note, *post*, p. 91.

[2] *Arnould*, Ed. 6, p. 959; *Farnworth* v. *Hyde* (1865), 18 C. B. (N. S.), 835; *Rankin* v. *Potter* (1873), L. R. 6 H. L. 83; *Kaltenbach* v. *Mackenzie* (1878), 3 C. P. D. 467, C. A.

[3] *Arnould*, Ed. 6, p. 958; *Houstman* v. *Thornton* (1816), Holt N. P. 242.

[4] *Uzielli* v. *Boston Mar. Ins. Co.* (1884), 15 Q. B. D. 11, C. A.

[5] *Kaltenbach* v. *Mackenzie* (1878), 3 C. P. D. 467, C. A.

[6] *Bainbridge* v. *Neilson* (1808), 10 East, 329; cf. *Dean* v. *Hornby* (1854), 3 E. & B. 180, 190.

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ship. This is a valid abandonment, and the assured can recover for a total loss.[1]

4. A ship is sunk in deep water in harbour. Notice of abandonment is given, but not accepted, and then the underwriter, on his own initiative, and at great expense, recovers the ship before action brought. The notice is valid, and the assured can recover for a total loss.[2]

5. Chartered freight on homeward voyage is insured by policy on prior outward voyage. On the outward voyage the ship becomes a constructive total loss, so freight on homeward voyage is lost. No notice of abandonment need be given.[3]

6. Policy on chartered freight from Pensacola to England. The ship gets into Havannah as a constructive total loss, and is abandoned. The cargo is brought home by the insurers. The adjustment is made at Liverpool, but by agreement in accordance with the law of Havannah. Under that law *pro rata* freight to Havannah is payable. The insurer is entitled to this freight.[4]

7. Policy on freight from New Zealand to San Francisco. The ship strands near Honolulu, and the cargo, which consists of coal, gets wetted. Ship and cargo are both sold at Honolulu. If the coal had been dried and sent on, the costs would have been more than its worth. There is a total loss of freight, and no notice of abandonment is necessary.[5]

NOTE.—The term "abandonment" is used in three different, but allied, senses. First, and strictly, it denotes the voluntary cession by the assured to the insurer of whatever remains of the subject-matter insured in case of a constructive total loss. Secondly, but incorrectly, it is used as equivalent to notice or tender of abandonment, that is to say, the act by which the assured signifies to the insurer his election to abandon what remains and claim for a total loss. Thirdly, it denotes the cession which takes place, by operation of law, of

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[1] *Ruys* v. *Royal Exchange* (1897), 2 Q. B. 135, reviewing previous cases. *Aliter* it seems in Scotland, *Sailing Ship Blairmore* v. *Macredie* (1898), A. C. 593, at pp. 606, 609. See note next page.

[2] *Sailing Ship Blairmore* v. *Macredie* (1898), A. C. 593.

[3] *Rankin* v. *Potter* (1873), L. R. 6 H. L. 83.

[4] *London Assurance* v. *Williams* (1893), Times L. R. 97; affirmed, *ibid.* p. 257, C. A.

[5] *Trinder* v. *Thames and Mersey Mar. Ins. Co.* (1898), 2 Q. B. at p. 119, C. A.

whatever remains of the subject-matter insured when the insurer settles for a total loss; see Note D., *post*, p. 166.

Suppose notice of abandonment is given, and the insurer does not either refuse or accept it. Can the assured withdraw the notice? Lord Blackburn's language appears to imply that he cannot, on the ground that an election once made is determined for ever.[1] But with the assent of the insurer the notice may be withdrawn. *Cuilibet licet renunciare juri pro se introducto.*[2]

It is an open question whether notice must be given if the subject-matter must inevitably perish before notice could be received and acted on, though the subject-matter exists when the election to abandon is made.[3]

Notice of abandonment can only be given by or on behalf of the owner of the subject-matter insured, *e.g.* it cannot be given by a pledgee of the policy, but it can be given by a joint owner who manages for the rest.[4]

It seems that where due notice of abandonment has not been given, the right to give notice of abandonment may revive on change of circumstances.[5]

According to the law of Scotland and of most foreign countries, the validity of a notice of abandonment must be determined by reference to the state of facts at the time when notice is given, but in England, as Lord Herschell says, the rule is "that if in the interval between the notice of abandonment and the time when legal proceedings are commenced there has been a change of circumstances reducing the loss from a total to a partial one, or, in other words, if at the time of action brought the circumstances are such that a notice of abandonment would not be justifiable, the assured can only recover for a partial loss," but this rule does not extend to a change of circumstances when brought about by the action of the insurer.[6] The issue of the writ is therefore all important in England. Until that be done, the notice of abandonment is liable to be defeated. A subsection embodying the English rule was cut out in Committee on objection taken by the Scottish members.

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[1] Cf. *Rankin* v. *Potter* (1873), L. R. 6 H. L. at p. 119.

[2] See *Arnould*, Ed. 6, pp. 968, 970.

[3] *Kaltenbach* v. *Mackenzie* (1878), C. P. D. at p. 475, per Brett, L.J.

[4] *Arnould*, Ed. 6, p. 956; *Jardine* v. *Leathly* (1863), 32 L. J. Q. B. 132.

[5] *Stringer* v. *Eng. Mar. Ins. Co.* (1870), L. R. 5 Q. B. 599, at p. 604.

[6] *Sailing Ship Blairmore* v. *Macredie* (1898), A. C. at p. 610. See at pp. 606, 609 as to Scottish rule.

SECT. 63.

Effect of abandonment.

§ 63.—(1.) Where there is a valid abandonment, the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto.[1]

(2.) Upon the abandonment of a ship the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss,[2] less the expenses of earning it incurred after the casualty; and where the ship is carrying the owners' goods the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss.[3]

*Illustrations.*

1. Ship insured from Quebec to Liverpool. She is first damaged by an iceberg, and again damaged in entering the dock at Liverpool. The cargo is delivered and freight paid. After survey the ship is found to be not repairable, and the owner abandons her to the insurer. The freight belongs to the insurer on ship.[4]

2. Policy on ship. The ship halfway on the voyage becomes a total loss and is abandoned to the insurers, but the cargo is landed, and sent on by the master in another ship to its destination. The insurer on ship is not entitled to the freight so earned.[5]

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[1] *Arnould*, Ed. 6, p. 973; *McArthur*, Ed. 2, p. 157; *Stewart* v. *Greenock Ins. Co.* (1848), 2 H. of L. Cas. at p. 183; *Rankin* v. *Potter* (1873), L. R. 6 H. L., at pp. 118, 144; and § 80.

[2] *Sea Ins. Co.* v. *Hadden* (1884), 13 Q. B. D. 706, C. A.

[3] *Miller* v. *Woodfall* (1857), 27 L. J. Q. B. 120; see at p. 123 as to the American rule of apportionment.

[4] *Stewart* v. *Greenock Ins. Co.* (1848), 2 H. of L. Cas. 159; on these facts there is no loss of freight for which assured can claim against insurer on freight, *Scottish Mar. Ins. Co.* v. *Turner* (1853), 1 Macq. H. L. 334.

[5] *Hickie* v. *Rodocanachi* (1859), 28 L. J. Ex. 273. But the insurer is entitled to *pro rata* freight earned under a foreign contract of affreightment; see *London Assurance* v. *Williams* (1893), Times L. R. 97, affirmed *ibid.*, p. 257, C. A.

3. Policy on ship, which has been chartered. The ship is injured by collision and cannot earn freight. Her injuries are such that she is abandoned to the insurer. The insurer on ship is not entitled to the damages which assured may recover from the ship in fault for loss of freight.[1]

4. Policy on ship from Pensacola to Hartlepool. Part of the freight is prepaid. The ship is stranded getting in to Hartlepool, but the cargo is delivered, and freight earned. Assured abandons the ship. The insurer is not entitled to the prepaid freight, but only to the balance payable on arrival.[2]

NOTE.—As to effect of under-insurance, see § 81, and see § 79. All authorities agree that abandonment operates as a cession or transfer of whatever remains of the subject-matter insured, from the assured to the insurer. But is the transfer absolute or conditional? In the first place, a valid abandonment may be defeated by a subsequent change of circumstances before action brought, *e.g.* in the case of capture and recapture: see § 62 and notes. In the second place, can the insurer disclaim an onerous property which is properly abandoned to him? See that question discussed in the note to § 79, and see further, Note D on abandonment, *post*, p. 166. An amendment made in the Commons Committee to subsect. (1) strengthens the view that he can disclaim. The words "is entitled to whatever remains" were altered to "is entitled *to take over*, etc."

The proprietary rights which pass to the insurer on a valid abandonment must be distinguished from the fuller rights which pass to the insurer when he pays for a total loss. As Lord Blackburn says, "the right of the assured to recover damages from a third person is not one of those rights which are incident to the property in the ship. It does pass to the underwriters in case of *payment* for a total loss, but on a different principle; and on the same principle it does pass to the underwriters who have satisfied a claim for a partial loss, though no property in the ship passes."[3]

It has been suggested by text writers that abandoned freight should be apportioned between the insurer on ship and the insurer on freight: see a curious case where this was done by consent.[4]

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[1] *Sea Ins. Co.* v. *Hadden* (1884), 13 Q. B. D. 706, C. A.

[2] *The Red Sea* (1896), P. 20, C. A.

[3] *Arnould*, Ed. 7, pp. 1388, 1392; *Simpson* v. *Thomson* (1877), 3 App. Cas. at p. 292.

[4] *Sharpe* v. *Gladstone* (1805), 7 East, 35.

SECT. 63. Upon abandonment, any act or thing done subsequent to the casualty causing the loss by the assured or his agents for the protection of the subject-matter insured, is at the risk of the insurer and for his benefit, provided such an act or thing be done in good faith and reasonably.[1]

## *Partial Losses (including Salvage and General Average and Particular Charges).*

Particular average loss.

§ 64.—(1.) A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss.[2]

Particular charges.

(2.) Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average.[3]

NOTE.—The expression "particular average loss" involves a redundancy, but the use of the term among lawyers is inveterate. "A general average differs from a particular average in its nature and incidence. The former is a partial loss, voluntarily incurred for the common safety, and made good proportionably by all parties concerned in the adventure; the latter is a partial loss, fortuitously caused by a maritime peril, and which has to be borne by the party upon whom it falls."[4]

The distinction in English law between "particular average" and "particular charges" corresponds with the distinction in French law between "avarie particulière matérielle" and "avarie particulière en frais."[5] As to particular charges, see § 65 (2), § 76 (2) and § 78; and as to

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[1] *Rankin* v. *Potter* (1873), L. R. 6 H. L. at p. 119.

[2] *Arnould*, Ed. 6, p. 927; *Gow* on Insurance, p. 189; *McArthur*, Ed. 2, pp. 163, 212, 241; *Kidston* v. *Empire Ins. Co.* (1866), L. R. 1 C. P. at p. 544; *Price* v. *A 1 Small Damage Assn.* (1889), 22 Q. B. D. at p. 590, C. A.

[3] *Ibid.*, and *McArthur*, Ed. 2, p. 201; *Arnould*, Ed. 7, p. 978.

[4] *McArthur*, Ed. 2, p. 163.

[5] *Gow* on Insurance, p. 221.

particular average warranties (or franchises, as they are sometimes inaccurately called), see § 76. SECT. 64.

See further, Note C on definition of "average," *post*, p. 164, and the illustrations to §§ 69, 71 and 76.

Salvage charges.

**§ 65.**—(1.) Subject to any express provision in the policy, salvage charges incurred in preventing a loss by perils insured against may be recovered as a loss by those perils.[1]

(2.) "Salvage charges" means the charges recoverable under maritime law by a salvor independently of contract. They do not include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them, for the purpose of averting a peril insured against. Such expenses, where properly incurred, may be recovered as particular charges or as a general average loss, according to the circumstances under which they were incurred.[2]

*Illustrations.*

1. A ship valued at £2600 is insured with D. for £1200. After encountering very bad weather, the ship is rescued by a steamer, with which no contract is made, and which afterwards obtains an award of £800 as salvage money. The owner does not abandon the ship, but elects to repair her. D.'s proportion of the expenses of repair comes to £1200; that is to say, the full sum insured. He is not liable for any portion of the salvage or general average expenses in excess of the £1200.[3]

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[1] *McArthur*, Ed. 2, pp. 171, 312; *Aitchison* v. *Lohre* (1879), 4 App. Cas. at p. 765; cf. *Steamship Balmoral* v. *Marten* (1901), 2 K. B. at p. 904, C. A. This subsection was redrafted in Committee.

[2] *McArthur*, Ed. 2, pp. 171, 261; cf. *Anderson* v. *Ocean Mar. Ins. Co.* (1884), 10 App. Cas. 107. As to the meaning of "salvage," see *Aitchison* v. *Lohre* (1879), 4 App. Cas. at pp. 765, 766; *Carver's* Carriage by Sea, §§ 361–445.

[3] *Aitchison* v. *Lohre* (1879), 4 App. Cas. 755; discussed *Montgomery* v. *Indemnity Mutual Mar. Ins. Co.* (1901), 1 K. B. at p. 152.

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2. Time policy on ship. The ship starts on a voyage with a short quantity of coal, and engages the services of a trawler to tow her to her port of discharge. The owner of the trawler gets judgment for salvage services, which assured has to pay. The steamer met with no extraordinary weather, and might in time have sailed to her port. The loss is not due to the perils of the seas, but to the improper deficiency of coal.[1]

NOTE.—The decision of the House of Lords in 1879 (*Aitchison* v. *Lohre*),[2] that salvage charges could not be recovered under the "sue and labour clause" occasioned some surprise (see *Arnould*, Ed. 6, p. 792). The case proceeded on the ground that salvors, who intervene voluntarily and not under contract, are not the agents of the assured, for English law does not recognize the foreign doctrine of "agents of necessity." The practical effect of the decision is this. As salvage charges, strictly so called, are recoverable under the policy, and not under the sue and labour clause, they cannot, like particular charges, be recovered in addition to the sum insured, but the total liability of the insurer is limited to the sum insured.[3] The payment of salvage charges under a foreign adjustment is usually provided for by a special clause in the policy, a common form of which runs: "General average and salvage charges payable according to foreign statement, if so made up, or per York-Antwerp Rules, 1890, if in accordance with the contract of affreightment."

The expression "salvage" requires definition, because it is used in various senses. In maritime law it is applied alike to the salvor's service and the salvor's reward. It is used to denote the services of a salvor, who intervenes voluntarily, and whose rights are given him by maritime law, and also the services of a salvor who is employed by the ship, and whose rights depend on contract. In insurance law it is also used to denote the thing saved, as, for instance, in the phrase "without benefit of salvage," or when a loss is referred to as a "salvage loss."[4]

Life salvage, apart from the salvage of property, is the creation of modern statutes, and the shipowner's liability therefore is not covered

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[1] *Ballantyne* v. *McKinnon* (1896), 2 Q. B. 455, C. A.

[2] *Aitchison* v. *Lohre* (1879), 4 App. Cas. at p. 765; and cf. *Uzielli* v. *Boston Mar. Ins. Co.* (1884), 15 Q. B. D. 11, C. A.

[3] Cf. *Montgomery* v. *Indemnity Mutual Mar. Ins. Co.* (1901), 1 K. B. at p. 152, per Mathew, J.

[4] Cf. *Sharpe* v. *Gladstone* (1805), 7 East, at p. 37.

by the ordinary form of policy on ship. It must be covered by a special insurance.[1] SECT. 65.

In the present section the term is used to denote salvage strictly so called, that is to say, the salvor's reward, under maritime law, for saving property, or property and life conjointly. "With regard to salvage, general average, and contribution," says Lord Bowen, "the maritime law differs from the common law. That has been so from the time of the Roman law downwards. The maritime law, for the purposes of public policy, and for the advantage of trade, imposes in these cases a liability upon the thing saved—a liability which is a special consequence arising out of the character of mercantile enterprise, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances." [2]

As to the adjustment of salvage charges, see § 73 (2), *post.*

General average loss.

§ 66.—(1.) A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.[3]

(2.) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.[4]

(3.) Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution

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[1] *Nourse* v. *Liverpool Sailing Ship Association* (1896), 2 Q. B. 16, C. A.; cf. *Kennedy's* Law of Civil Salvage, p. 46.

[2] *Falcke* v. *Scottish Ins. Co.* (1887), 34 Ch. D. at p. 248; *Kennedy's* Law of Civil Salvage, p. 6.

[3] *McArthur*, Ed. 2, p. 164; *Lowndes* on General Average, Ed. 4, p. 20 *Ocean Steamship Co.* v. *Anderson* (1883), 13 Q. B. D. at p. 666, C. A.; *Svensden* v. *Wallace* (1884), 13 Q. B. D. at p. 84, C. A.

[4] *Ibid.*; *Iredale* v. *China Traders' Ins. Co.* (1900), 2 Q. B. at p. 519, C. A. The usual phrase is "ship and cargo" instead of "common adventure," but cases might be put where there was a common adventure, but no cargo, *e.g.* ship in ballast going out to earn chartered freight.

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from the other parties interested, and such contribution is called a general average contribution.[1]

(4.) Subject to any express provision in the policy, where the assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him; and in the case of a general average sacrifice he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute.[2]

(5.) Subject to any express provision in the policy, where the assured has paid, or is liable to pay, a general average contribution in respect of the subject insured, he may recover therefor from the insurer.[3]

(6.) In the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connection with the avoidance of, a peril insured against.[4]

(7.) Where ship, freight, and cargo, or any two of those interests, are owned by the same assured, the liability of the insurer in respect of general average losses or contributions is to be determined as if those subjects were owned by different persons.[5]

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[1] *Lowndes* on Average, Ed. 4, p. 304; *Svensden* v. *Wallace* (1885), 10 App. Cas. at p. 415.

[2] *McArthur*, Ed. 2, p. 134; *Dickinson* v. *Jardine* (1868), L. R. 3 C. P. 639; *The Mary Thomas* (1894), P. at p. 125, C. A.

[3] *McArthur*, Ed. 2, p. 206; *The Brigella* (1893), P. 198; 7 Asp. Mar. Cas. at p. 405.

[4] *Harris* v. *Scaramanga* (1872), L. R. 7 C. P. at p. 496.

[5] *Montgomery* v. *Indemnity Mutual Marine Ins. Co.* (1901), 1 K. B. 147; affirmed 1 K. B. (1902) 734, C. A. This subsection was redrafted in Committee. The word "subjects" more correctly should be "interests."

*Illustrations.*

1. Policy on goods. Certain goods are jettisoned by a general average act. The insurer of these goods must pay the insured value of them as an ordinary loss under the policy, but he then stands in the place of the assured as regards claims for contribution from the other contributories.[1]

2. Policy on ship from London to Liverpool and thence to Calcutta. The ship strands on a bank in Ireland. Half the cargo, consisting of salt, is jettisoned. The remainder is brought back much damaged to Liverpool. The amount to be made good in general average must be ascertained by valuing the jettisoned salt at the price it would have fetched in Liverpool, and the probability that it would have been damaged like the rest must be taken into account.[2]

3. Policy on cargo of corn from Varna to Marseilles, general average "as per foreign statement." The ship springs a leak, part of the corn is sea-damaged, and the voyage has to be broken up at Constantinople. Average is adjusted according to the law prevailing there, and the damage to the wheat is charged to general average, though, according to English law, it would be particular average excluded by the memorandum. The insurer is liable to pay this sum.[3]

4. Policy on goods. Both ship and goods belong to the same owner. In stormy weather the mast has to be cut away for the safety of ship and cargo. The shipowner is entitled to a general average contribution from the insurer on goods in respect of the general average sacrifice.[4]

5. Policy on ship. Under charter party the ship sails in ballast for Savannah, where she is to load a cargo of cotton for England. On the voyage out the ship grounds, and a general average loss is incurred in respect of the ship's machinery. The chartered freight is

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[1] *Dickinson* v. *Jardine* (1868), L. R. 3 C. P. 639. (London usage to hold insurer only liable for the share of the loss cast upon the assured of the jettisoned goods held invalid.) See, too, *Owen's* Notes and Clauses, Ed. 3, p. 249.

[2] *Fletcher* v. *Alexander* (1868), L. R. 3 C. P. 375.

[3] *Mavro* v. *Ocean Mar. Ins. Co.* (1875), L. R. 10 C. P. 415, Ex. Ch.; cf. *The Mary Thomas* (1894), P. 808, C. A.; and *De Hart* v. *Compañia Anonima Aurora* (1903), 1 K. B. 109 (general average payable as per foreign statement, stipulation in charter party as to general average).

[4] *Montgomery* v. *Indemnity Mutual Mar. Ins. Co.* (1901), 1 K. B. 147; affirmed (1902), 1 K. B. 734, C. A.

SECT. 66. liable to contribute, and the amount of the contribution can be deducted from the sum due under the policy on ship.[1]

NOTE.—The definition of general average given by Lawrence, J., in 1801, still remains the standard definition. "All loss," he says, "which arises in consequence of an extraordinary sacrifice made, or expense incurred, for the preservation of the ship and cargo comes within general average, and must be borne proportionately by all who are interested."[2]

Subsects. (1) to (3) are merely explanatory, and perhaps belong more properly to the law of general average than to the law of marine insurance. As Barnes, J., says, "The obligation to contribute to general average exists between the parties to the adventure, whether they are insured or not. The circumstance of a party being insured can have no influence on the adjustment of general average, the rules of which are entirely independent of insurance. If a contracting party is insured he can claim an indemnity against his underwriter in respect of the contribution which he has been compelled to pay in general average, but that is all. I do not forget that in some cases an assured may have a right to recover in full for the loss of sacrificed property, but the underwriters have the right to contribution from the various contributories, and, subject to certain differences of values, the result to the underwriters should be practically the same as if the assured had only claimed his contribution from them."[3]

Subsect. (7) was twice altered during the passage of the Bill through Parliament, and is not now very happily expressed. It was intended to affirm the recently established rule that there might be a claim on the insurer for a loss in the nature of a general average loss though there were no contributing interests, owing to single ownership. But take this case. A mast is jettisoned for the benefit of ship and cargo. If they are owned by different owners the assured on ship gets the full value of the mast from the underwriter on ship, but the latter then becomes entitled to contribution from the cargo owner.[4] But where the shipowner is the same person as the cargo owner it would be absurd to pay him the full value of the mast and thereby become entitled to claim from him the cargo contribution. No doubt

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[1] *Steamship Carisbrooke Co.* v. *London and Provincial Mar. Ins. Co.* (1901), 6 Com. Cas. 291.

[2] *Birkley* v. *Presgrave* (1801), 1 East, at p. 228.

[3] *The Brigella* (1893), P. at p. 195; 7 Asp. Mar. Cas. at p. 404.

[4] *Dickinson* v. *Jardine* (1868), L. R. 3 C. P. 369.

as a matter of adjustment the contributory value of the cargo will have to be deducted.

The whole subject of general average is in an unsatisfactory condition.[1] The liability to contribute is a common law liability, independent of insurance, and consequently the liability of the assured under the contract of affreightment may differ from that of the insurer under the policy. For example, suppose goods are insured with a warranty free from capture and seizure. General average expenses may be incurred in avoiding capture, but the insurer would not be liable for them. The English rule of law, though not always logically carried out in details, is narrower than the consistent practice of average adjusters, and considerably narrower than the rule which prevails in nearly all foreign countries. In England general average is only payable when the sacrifice was made, or the expenditure incurred, for the *preservation* of the ship and cargo. Foreign laws for the most part include in general average nearly all expenses incurred for the *benefit* of the common adventure. As to the place of adjustment, and the law to be followed, see note to § 91, *post.*

In practice the normal English rule only applies in exceptional cases, because nearly every policy contains a foreign adjustment clause. Lloyd's clause runs :—"General average and salvage charges payable as per foreign official adjustment, if so made up, or per York-Antwerp Rules [1890] if in accordance with the contract of affreightment." The York-Antwerp Rules, though generally accepted, only cover a portion of the field.

It seems a moot point whether salvage charges, properly so called, can ever be recovered as general average (*McArthur*, Ed. 2, p. 171, n.). Mr. Carver contends that they cannot.[2]

Concerning general average as between ship, freight, and cargo, see *Carver's* Carriage by Sea, Ed. 3 (1900), §§ 361–445.

It is the duty of the shipowner and his agents to take such steps as may be reasonable to provide that all general average contributions (whether due to himself or others) are adjusted and collected, and he has a lien on the cargo until this be done.[3]

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[1] See discussion in *McArthur*, Ed. 2, p. 186, and article by T. G. Carver, on Port of Refuge Expenses, *Law Quarterly Review*, vol. viii. p. 229.

[2] See *Carver's* Carriage by Sea, Ed. 3, §§ 394–396, distinguishing salvors, properly so called, who intervene voluntarily, from salvors employed by the ship.

[3] *McArthur*, Ed. 2, p. 199; *Lowndes* on Average, Ed. 4, p. 335; *Crooks* v. *Allan* (1879), 5 Q. B. D. 38; approved *Strang, Steel & Co.* v. *Scott* (1889), 14 App. Cas. at p. 607.

SECT. 67.

*Measure of Indemnity.*

Extent of liability of insurer for loss.

**§ 67.** (1.) The sum which the assured can recover in respect of a loss on a policy by which he is insured, in the case of an unvalued policy, to the full extent of the insurable value, or, in the case of a valued policy, to the full extent of the value fixed by the policy, is called the measure of indemnity.

(2.) Where there is a loss recoverable under the policy, the insurer, or each insurer if there be more than one, is liable for such proportion of the measure of indemnity as the amount of his subscription bears to the value fixed by the policy, in the case of a valued policy, or to the insurable value, in the case of an unvalued policy.[1]

NOTE.—Insurance is a contract of indemnity, but in marine insurance the indemnity is conventional, and the following sections supply the standard or measure for ascertaining it. The adjustment of marine losses proceeds upon the hypothesis that the subject-matter insured is fully covered by insurance. Suppose a ship valued at £10,000 is insured for £1000 only. The shipowner is said to be "his own insurer" for £9000, and any loss which occurs must be adjusted on this basis, see § 81.[2] The following cases may be put in illustration of this principle:—

1. A cargo valued at £10,000 is insured for £1000 by ten underwriters, who each subscribe for £100. It is damaged by sea perils to the extent of £1000. Each underwriter is liable for £10 only.

2. A ship valued at £5000 is insured for £1000. The ship is stranded, and the owner spends £1000 in trying to get her off, but eventually she is totally lost. The insurer must pay £1000 on the policy, and £200 (*i.e.* one-fifth) under the suing and labouring clause.

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[1] Cf. *Lohre* v. *Aitchison* (1878), 3 Q. B. D. at pp. 564, 565, C. A. affirmed on this point, but reversed on another, 4 App. Cas. 759.

[2] Fire insurance losses are adjusted on a different basis. See *post*, p. 162. See principle explained by Walton, J., in *Anglo-Californian Bank* v. *London and Prov. Mar. Ins. Co.* (1906), 10 Com. Cas. at pp. 8, 9.

It is immaterial whether the real value of the ship be £4500 or £5500.[1]

As to the suing and labouring clause, which is a distinct engagement in the policy, see § 79; and for a quasi exception, see § 74.

Total loss.

§ 68. Subject to the provisions of this Act, and to any express provision in the policy, where there is a total loss of the subject-matter insured:—

(1.) If the policy be a valued policy, the measure of indemnity is the sum fixed by the policy.[2]

(2.) If the policy be an unvalued policy, the measure of indemnity is the insurable value of the subject-matter insured.[3]

NOTE.—As to valued and unvalued policies, see §§ 27 and 28, and as to insurable value and the rules for determining it, see § 16.

Partial loss of ship.

§ 69. Where a ship is damaged, but is not totally lost, the measure of indemnity, subject to any express provision in the policy, is as follows:—

(1.) Where the ship has been repaired, the assured is entitled to the reasonable cost of the repairs, less the customary deductions,[4] but not exceeding the sum insured in respect of any one casualty.[5]

(2.) Where the ship has been only partially repaired, the assured is entitled to the reasonable cost

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[1] See *McArthur*, Ed. 2, p. 269; and § 78, *post*.

[2] *Arnould*, Ed. 6, p. 1157; *Irving* v. *Manning* (1847), 1 H. of L. Cas. at pp. 305, 307; *Sailing Ship Blairmore* v. *Macredie* (1898), A. C. at p. 610.

[3] *Arnould*, Ed. 6, p. 1156; *Irving* v. *Manning* (1847), 1 H. of L. Cas. at pp. 305, 307; and as to "insurable value," see § 16 and notes.

[4] As to the customary deductions, see *post*, p. 154.

[5] *McArthur*, Ed. 2, pp. 212, 219; *Aitchison* v. *Lohre* (1879), 4 App. Cas. at p. 762; *Pitman* v. *Universal Mar. Ins. Co.* (1882), 9 Q. B. D. at p. 208.

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of such repairs, computed as above, and also to be indemnified for the reasonable depreciation, if any, arising from the unrepaired damage, provided that the aggregate amount shall not exceed the cost of repairing the whole damage, computed as above.[1]

(3.) Where the ship has not been repaired, and has not been sold in her damaged state during the risk, the assured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage, computed as above.[2]

*Illustrations.*

1. Policy on hull and machinery. The ship is injured in a collision and has to put into dock for repairs. The cargo becomes putrid, and the shipowner incurs expenses in landing it. These expenses cannot be recovered under the policy on ship.[3]

2. Policy on ship. In consequence of damage the ship is put into dry dock for repairs. The owners take the opportunity to have her surveyed for Lloyd's classification, but this does not increase the time in dock. The insurer must pay the whole expenses of docking the ship.[4]

NOTE.—In the case of wooden ships, except on first voyage, the custom is to make an arbitrary deduction of "one-third new for old" from the cost of the repairs.[5] But this rule is inapplicable to iron ships, and the practice is to provide for them by special clauses. Lloyd's

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[1] *McArthur*, Ed. 2, p. 220; cf. *Stewart* v. *Steele* (1852), 5 Scott N. R. 927, at p. 948.

[2] *Ibid.*

[3] *Field Steamship Co.* v. *Burr* (1899), 1 Q. B. 579, C. A.

[4] *Ruabon Steamship Co.* v. *London Assurance* (1900), A. C. 6 H. L., distinguishing the *Vancouver Case* (1886), 11 App. Cas. 573.

[5] See *McArthur*, Ed. 2, p. 213; *Pitman* v. *Universal Mar. Ins. Co.* (1882), 9 Q. B. D. at p. 215; cf. *Henderson* v. *Shankland* (1896), 1 Q. B at p. 530, C. A.

clause for steamers and iron ships runs, "No thirds to be deducted except as regards hemp rigging and ropes, sails, and wooden deck."[1] The "customary deductions" are set out, *post*, p. 154. They were originally set out as a schedule to the Bill, but the schedule was cut out afterwards as it was thought better to leave it to custom, which may alter from time to time to meet new needs. SECT. 69.

The Act does not provide for the case where the ship is not repaired but *is* sold in her damaged state during the risk. In that case according to the majority of the Court in *Pitman* v. *Universal Mar. Ins. Co.*,[2] the assured is entitled to the reasonable cost of repairing such damage, computed as above, but not exceeding the actual depreciation in the value of the ship as ascertained by the sale. Lord Esher dissented from the judgment, thinking the principle it laid down a dangerous innovation, and that the estimated cost of repair, less the usual deductions, should be the sole measure of indemnity. The decision is unsatisfactory, because the other judges on appeal expressly refrained from deciding what was to be taken as the basis of depreciation. The sale price is one factor in the comparison, but what is the other factor? Is it the value of the ship at the commencement of the risk, or at the time of the casualty, or what other value? The matter must be left for future decision.

As to total loss following a partial loss, see § 77, *post*.

Partial loss of freight.

**§ 70.** Subject to any express provision in the policy, where there is a partial loss of freight, the measure of indemnity is such proportion of the sum fixed by the policy, in the case of a valued policy, or of the insurable value, in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight at the risk of the assured under the policy.[3]

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[1] See *McArthur*, Ed. 2, pp. 313, 403.

[2] *Pitman* v. *Universal Mar. Ins. Co.* (1882), 9 Q. B. D. 192, at pp. 218, 219, C. A.; *McArthur*, Ed. 2, p. 220; cf. *Stewart* v. *Steele* (1852), 5 Scott N. R. 927, at p. 948.

[3] See *McArthur*, Ed. 2, p. 235; *Lowndes*, Ed. 2, p. 195; *Denoon* v. *Home and Col. Ins. Co.* (1872), L. R. 7 C. P. at p. 351; *The Main* (1894), P. 320; *United States Shipping Co.* v. *Empress Assurance Corpn.* (1906), 1906 2 K.B. 157. Times, December 6. As to the facts which constitute a partial, as distinguished from a total loss of freight, see *Rankin* v. *Potter* (1873), L. R. 6 H. L. at pp. 98–100, per Brett, J.

SECT. 70. NOTE.—As to insurable value in the case of freight, see § 16 (2), *ante*.

Partial loss of goods, merchandise, etc.

**§ 71.** Where there is a partial loss of goods, merchandise, or other moveables, the measure of indemnity, subject to any express provision in the policy, is as follows:—

(1.) Where part of the goods, merchandise, or other moveables insured by a valued policy is totally lost, the measure of indemnity is such proportion of the sum fixed by the policy as the insurable value of the part lost bears to the insurable value of the whole, ascertained as in the case of an unvalued policy.[1]

(2.) Where part of the goods, merchandise, or other moveables insured by an unvalued policy is totally lost, the measure of indemnity is the insurable value of the part lost, ascertained as in case of total loss.[2]

(3.) Where the whole or any part of the goods or merchandise insured has been delivered damaged at its destination, the measure of indemnity is such proportion of the sum fixed by the policy, in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the difference between the gross sound and damaged values at the

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[1] *McArthur*, Ed. 2, p. 246; *Lewis* v. *Rucker* (1761), 2 Burr. 1167; *Irving* v. *Manning* (1847), 1 H. of L. Cas. at p. 305.

[2] *McArthur*, Ed. 2, p. 246; *Lewis* v. *Rucker* (1761), 2 Burr. 1167; *Irving* v. *Manning* (1847), 1 H. of L. Cas. at p. 305; cf. *Tobin* v. *Harford* (1863), 32 L. J. C. P. 134, 136; see § 16 (3) as to insurable value.

place of arrival bears to the gross sound value.[1]

(4.) "Gross value" means the wholesale price, or, if there be no such price, the estimated value, with, in either case, freight, landing charges, and duty paid beforehand; provided that in the case of goods or merchandise customarily sold in bond, the bonded price is deemed to be the gross value. "Gross proceeds" mean the actual price obtained at a sale where all charges on sale are paid by the sellers.[2]

*Illustrations.*

1. Unvalued policy on coffee from Jamaica to London. The insurable value, *i.e.* the invoice cost, plus shipping expenses and charges of insurance, is £200. Half the coffee is damaged on the voyage. The value of the damaged coffee in London is half that of the undamaged coffee. The selling price in London fixes the measure or percentage of depreciation, but not the amount the insurer has to pay. That must be determined by applying the depreciation to the insurable value, so that in this case the insurer has to pay £50.[3]

2. Policy on 40 bales of cotton, which are shipped as part of a cargo of 1600 bales of cotton belonging to different owners. Owing to sea perils 200 bales have to be jettisoned, and the rest are damaged

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[1] *McArthur*, Ed. 2, p. 247; *Johnson* v. *Sheddon* (1802), 2 East, 580 (the "brimstone case"). As to estimating the value of jettisoned goods, cf. *Fletcher* v. *Alexander* (1868), L. R. 3 C. P. 375 (general average case). The values must, of course, be reduced to the same cash basis.

[2] *McArthur*, Ed. 2, p. 253; cf. *Gow* on Insurance, p. 198; Rules of Practice of Association of Average Adjusters, 1906, *post*, p. 173. Where any sale or other preliminary charges on damaged goods or merchandise are paid or payable by the buyers, such charges must be added to the gross proceeds before establishing the ratio of damage, as above provided, and in the event of a claim being established, such charges are subsequently recoverable from the insurer as "extra charges." *McArthur*, Ed. 2, p. 271; cf. *Gow* on Insurance, p. 125; *Francis* v. *Boulton* (1895), 65 L. J. Q. B. 153 (conditioning charges).

[3] *Usher* v. *Noble* (1810), 12 East, 639, and § 16, *ante*. The test adopted excludes the rise or fall of the London market.

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and the marks wholly obliterated. The 1400 bales are sold for the benefit of whom it may concern. This is a partial loss, and the assured is entitled to recover as if five of his 40 bales had been jettisoned, and the rest damaged to the extent shown by the sale of the whole.[1]

3. Policy on 1700 packages of tea, valued at £6000. Part of the tea is sea-damaged, and the remainder, which arrives undamaged, sells in consequence for a smaller price. The insurer is not liable for the depreciation so caused.[2]

4. Policy on cargo of sheet iron in separate packages, average payable "on each packet separately or on the whole." Damage is sustained before the termination of the risk. The whole of the iron is unpacked and examined. The damaged iron is sold, and the rest is repacked and sent on. The insurer is not liable for the expenses incurred in examining and repacking the packages which were not damaged.[3]

NOTE.—The policy of the rules contained in subsects. (3) and (4) has often been criticized, but they are only *primâ facie* rules, applicable to ordinary merchandise. There are many matters to which they could not apply, *e.g.* loss of part of a machine, rendering the whole valueless.[4] Such cases are usually provided for by special clauses. See, further, § 75, *post*. As to insurable value, see § 16 (3).

Apportionment of valuation.

**§ 72.**—(1.) Where different species of property are insured under a single valuation, the valuation must be apportioned over the different species in proportion to their respective insurable values, as in the case of an unvalued policy. The insured value of any part of a species is such proportion of the total insured value of the same as the insurable value of the part bears to the insurable

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[1] *Spence* v. *Union Mar. Ins. Co.* (1868), L. R. 3 C. P. 427.

[2] *Cator* v. *Great Western Ins. Co.* (1873), L. R. 8 C. P. 552, 561. There was a special warranty as to sea-damage, but the judgment establishes the general principle. See this case distinguished, *Brown Brothers* v. *Fleming* (1902), 7 Com. Cas. 245 (policy on cases of whisky, damage to labels and packing by sea perils).

[3] *Lysaght* v. *Coleman* (1895), 1 Q. B. 49, C. A.

[4] Cf. *British Columbia Co.* v. *Nettleship* (1868), L. R. 3 C. P. 499 (measure of damage against shipowner); and see § 75, *post*.

value of the whole ascertained in both cases as provided by this Act.[1]

(2.) Where a valuation has to be apportioned, and particulars of the prime cost of each separate species, quality, or description of goods cannot be ascertained, the division of the valuation may be made over the net arrived sound values of the different species, qualities, or descriptions of goods.[2]

NOTE.—As to "insurable value," see § 16 (3), *ante;* and for the mode of ascertaining the value referred to in subsect. (1), see sect. 71 as read with sect. 16.

General average contributions and salvage charges.

**§ 73.**—(1.) Subject to any express provision in the policy, where the assured has paid, or is liable for, any general average contribution, the measure of indemnity is the full amount of such contribution if the subject-matter liable to contribution is insured for its full contributory value; but if such subject-matter be not insured for its full contributory value, or if only part of it be insured, the indemnity payable by the insurer must be reduced in proportion to the under insurance, and where there has been a particular average loss which constitutes a deduction from the contributory value, and for which the insurer is liable, that amount must be deducted from the insured value in order to ascertain what the insurer is liable to contribute.[3]

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[1] *McArthur*, Ed. 2, pp. 244–246; *Gow* on Insurance, p. 191; Rules of Practice of Association of Average Adjusters, 1906, *post*, p. 173; and see § 76, *post*.

[2] *Ibid.*

[3] See *McArthur*, Ed. 2, pp. 206, 210; *Gow* on Insurance, p. 301; Rules of Practice of Association of Average Adjusters, 1906. As to the effect to be given to the foreign general average clause, see *McArthur*, Ed. 2, p. 208, and *Greer* v. *Poole* (1880), 5 Q. B. D. 272; *The Mary Thomas* (1894), P. 108, C. A. As to contribution by goods where ship is a constructive total loss, see *Henderson* v. *Shankland* (1896), 1 Q. B. 525, C. A.

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(2.) Where the insurer is liable for salvage charges the extent of his liability must be determined on the like principle.[1]

*Illustration.*

Policy on ship valued at £33,000, for that sum. Her real value is £40,000. The ship incurs certain general average and salvage expenses which are adjusted abroad on her real value. The assured can only recover thirty-three fortieths of the amount so adjusted from the insurer.[2]

NOTE.—This section deals with adjustment. As to liability, see § 66, *ante*. Suppose goods are insured for £1500 by a valued policy. General average is incurred, of which £80 is found to be the proportion payable by the owner of the goods, their contributory value being taken at £1600. The insurer is liable for 15-16ths of £80, viz. £75. But if the contributory value of the goods be £1200, the insurer is liable for the whole £80. See § 81 as to under insurance.

Liabilities to third parties.

**§ 74.** Where the assured has effected an insurance in express terms against any liability to a third party, the measure of indemnity, subject to any express provision in the policy, is the amount paid or payable by him to such third party in respect of such liability.[3]

NOTE.—An insurance against liability to a third person is a distinct engagement added to the ordinary policy. In a case where it was held that the "sue and labour" clause in the policy could not be read in with the running-down clause, so as to supplement it, the Court, speaking of the latter, say, "It is in each case a special contract, very

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[1] See footnote (3) on p. 109.

[2] *Steamship Balmoral* v. *Marten* (1901), 2 K. B. 896, C. A.; affirmed A. C. (1902) 511, H. L.

[3] *Arnould*, Ed. 6, pp. 23, 24, and 730; *McArthur*, Ed. 2, pp. 320, 370, and the ordinary forms of running-down clauses; *The Niobe* (1891), A. C. 401, H. L. (collision); cf. *Joyce* v. *Kennard* (1871), L. R. 7 Q. B. 78 (lighterman's liability); *Cunard Steamship Co.* v. *Marten* (1902), 2 K. B. 624, 629 (carriers' liability).

different from the contract of insurance in its ordinary form; and the liability under it does not depend upon the ordinary perils covered by the policy, but upon the special matters mentioned in the clause itself." [1]

Running-down clauses were introduced into policies in consequence of the decision in *Devaux* v. *Salvador*,[2] that the insurer under the ordinary form of policy was not liable for the balance which one ship had to pay to the other when both were to blame for a collision. The forms at first introduced have again been modified to meet other decisions.[3]

The insurer is liable under the ordinary form of policy for injury caused by collision to the assured's ship, whether she be in fault or not.[4] The construction of a collision or running-down clause depends entirely on the language used by the parties in the particular clause in question.[5]

Though the shipowner's liability for collision under British law is limited by statute, he is expressly authorized to insure: see Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), § 506, *post*, p. 159.

General provisions as to measure of indemnity.

§ 75.—(1.) Where there has been a loss in respect of any subject-matter not expressly provided for in the foregoing provisions of this Act, the measure of indemnity shall be ascertained, as nearly as may be, in accordance

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[1] *Xenos* v. *Fox* (1868), L. R. 3 C. P. at p. 635; affirmed L. R. 4 C. P. 665.

[2] *Devaux* v. *Salvador* (1836), 4 Ad. & E. 420.

[3] See *Tatham* v. *Burr* (1898), A. C. at p. 385.

[4] *Davidson* v. *Burnand* (1868), L. R. 4 C. P. at p. 121, per Willes, J. As to the scope to be given to the term "collision," see *Chandler* v. *Blogg* (1897), 1 Q. B. 32 (collision with sunken barge); *The Niobe* (1891), A. C. 401 (collision with tug); and cases cited in next note.

[5] The undermentioned recent cases may be referred to:—*The Niobe* (1891), A. C. 401 (tug and tow regarded as identical); *The Munroe* (1893), P. 248 (meaning of sunken wreck); *Union Mar. Ins. Co.* v. *Borwick* (1895), 2 Q. B. 279 ("piers or similar structures" include artificial bank); *Shelbourne* v. *Law Investment Ins. Corpn.* (1898), 2 Q. B. 626 (loss by detention during repairs not recoverable); *Tatham* v. *Burr* (1898), A. C. 382 (removal of obstructions under statutory powers); *Burger* v. *Indemnity Mutual Mar. Ins. Co.* (1900), 2 Q. B. 348, C. A. (injury to ship or vessel itself); *Margetts* v. *Ocean Guarantee Corporation* (1901), 2 K. B. 792 (collision with anchor of another vessel).

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with those provisions, in so far as applicable to the particular case.[1]

(2.) Nothing in the provisions of this Act relating to the measure of indemnity shall affect the rules relating to double insurance, or prohibit the insurer from disproving interest wholly or in part, or from showing that at the time of the loss the whole or any part of the subject-matter insured was not at risk under the policy.[2]

Particular average warranties.

**§ 76.**—(1.) Where the subject-matter insured is warranted free from particular average, the assured cannot recover for a loss of part, other than a loss incurred by a general average sacrifice, unless the contract contained in the policy be apportionable; but, if the contract be apportionable, the assured may recover for a total loss of any apportionable part.[3]

(2.) Where the subject-matter insured is warranted free from particular average, either wholly or under a certain percentage, the insurer is nevertheless liable for salvage charges, and for particular charges and other expenses properly incurred pursuant to the provisions of the suing and labouring clause in order to avert a loss insured against.[4]

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[1] See notes to §§ 71 and 74, and such cases as *Baring* v. *Marine Ins. Co.* (1893), W. N., p. 164 (stock sent abroad by registered letter).

[2] See § 32 (double insurance), and note to § 27 as to short interest.

[3] *McArthur*, Ed. 2, pp. 242, 341; *Gow* on Insurance, p. 191; *Ralli* v. *Janson* (1856), 6 E. & B. 422 (bags of seed), read with *Duff* v. *Mackenzie* (1857), 3 C. B. (N. S.) 16 (master's effects), and *Cator* v. *Great Western Ins. Co.* (1873), L. R. 8 C. P. at p. 559. In *Duff* v. *Mackenzie* it was held that where the goods were different in specie the contract was apportionable, but it is submitted that this is only one test of severability. For cases on the F.P.A. warranty, see *Hagedorn* v. *Whitmore* (1816), 1 Stark. 157; *Navone* v. *Haddon* (1850), 9 C. B. 30; *Kidston* v. *Empire Ins. Co.* (1866), L. R. 1 C. P. at p. 548 (reviewing cases); *De Mattos* v. *Saunders* (1872), L. R. 7 C. P. 570.

[4] *McArthur*, Ed. 2, p. 312; *Kidston* v. *Empire Ins. Co.* (1866), L. R. 1 C. P. 535; and § 79.

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(3.) Unless the policy otherwise provides, where the subject-matter insured is warranted free from particular average under a specified percentage, a general average loss cannot be added to a particular average loss to make up the specified percentage.[1]

(4.) For the purpose of ascertaining whether the specified percentage has been reached, regard shall be had only to the actual loss suffered by the subject-matter insured. Particular charges and the expenses of and incidental to ascertaining and proving the loss must be excluded.[2]

*Illustrations.*

1. Policy on master's effects, "free of all average." The effects include articles of different species, *e.g.* feather bed, chronometer, spy-glass, etc. Some of the effects are totally lost by perils of the seas, others are saved. The assured can recover for those which are totally lost.[3]

2. Policy on iron rails, warranted "free from particular average unless the ship be stranded." The ship is not stranded, but becomes a constructive total loss. The rails are saved, landed, and sent on to their destination in another ship at an increased freight. The assured cannot recover the extra freight he has had to pay.[4]

3. Policy on 2000 bags of linseed "warranted free from average, unless general, etc." 1000 bags are so sea-damaged as to become rotten and valueless. The insurer is not liable. This is not a

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[1] *Price* v. *A 1 Small Damage Assn.* (1889), 22 Q. B. D. 580, C. A.; and cf. *Oppenheim* v. *Fry* (1863), 3 B. & S. at p. 884. The decision has been criticized as being contrary to the mercantile understanding. See *McArthur*, Ed. 2, pp. 135, 386.

[2] As to two last paragraphs, see Rules of Practice of Association of Average Adjusters, 1906. The expenses of protest, survey, and other proofs of loss are not included in the 3 per cent. See *post*, p. 177.

[3] *Duff* v. *Mackenzie* (1857), 3 C. B. (N. S.) 16.

[4] *Great Indian Peninsula Railway* v. *Saunders* (1861), 1 B. & S. 41; affirmed 2 B. & S. 266; discussed and explained *Kidston* v. *Empire Ins. Co.* (1866), L. R. 1 C. P. at p. 548.

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separate insurance of each bag, but of the whole of the linseed, and the warranty applies accordingly.[1]

4. Policy on disbursements and advances warranted free from all average. The disbursements include outlay, before the ship sails, on provisions, stores, port dues, and insurance. The ship was chartered to take a cargo to South America, and the intention of the assured was to obtain a homeward cargo there. On the voyage out the ship catches fire, and the assured abandons the voyage and brings the ship home for repairs. This is an average and not a total loss.[2]

5. Policy on ship from London to Calcutta warranted "free from average under 3 per cent., etc." The ship loses a boat, and afterwards sustains other sea damage, which, if added to the loss of the boat, brings up the total to more than 3 per cent. The losses can be aggregated.[3]

6. Time policy on ship warranted "free from average under 3 per cent., etc." The ship makes several distinct voyages during the currency of this policy, and on the several voyages incurs small damages. These cannot be added together to make up the 3 per cent.[4]

7. Policy on ship warranted "free from average under 3 per cent., etc." The ship goes into dock to have her bottom cleaned in ordinary course. It is then discovered that her stern post has been broken while at sea. This takes eight days to repair. The cleaning would have taken only three days. The dock dues can be apportioned, so as to bring up the particular average loss to more than 3 per cent.[5]

NOTE.—A policy, or rather the contract contained in it, is apportionable where the policy itself provides for apportionment, or where by usage it is treated as apportionable.

The particular average warranty is sometimes spoken of as a franchise, but in England it is a condition, and not a limitation or

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[1] *Ralli* v. *Janson* (1856), 6 E. & B. 422, Ex. Ch.

[2] *Lawther* v. *Black* (1900), 6 Com. Cas. 5, aff. 6 Com. Cas. 196, C. A.; cf. *Price* v. *Maritime Insurance Co.* (1901), 2 K. B. 412, C. A., as to distance freight.

[3] *Blackett* v. *Royal Exchange* (1832), 2 Cr. & J. 244.

[4] *Stewart* v. *Merchants' Mar. Ins. Co.* (1885), 16 Q. B. D. 619, C. A. But cf. *McArthur*, Ed. 2, p. 297.

[5] *Marine Ins. Co.* v. *China Trans-Pacific Co.* (1886), 11 App. Cas. 573; discussed *Ruabon Steamship Co.* v. *London Assurance* (1900), A. C. 6, H. L. See Rules of Practice of Association of Average Adjusters in this connection, *post*, p. 173.

franchise. Thus if a ship, warranted free from average under 3 per cent., is damaged to the extent of 5 per cent., the assured is entitled to recover the whole 5 per cent. and not merely the balance of 2 per cent.[1]

In the case of a voyage policy, successive losses may be added together to make up the specified percentage.[2]

In the case of a time policy, successive losses on the same voyage may be added together, but losses occurring on different voyages cannot be added together to make up the specified percentage.[3]

These rules have been questioned on the ground of expediency, and sub-clauses embodying them were cut out from the Bill.

Successive losses.

§ 77.—(1.) Unless the policy otherwise provides, and subject to the provisions of this Act, the insurer is liable for successive losses, even though the total amount of such losses may exceed the sum insured.[4]

(2.) Where, under the same policy, a partial loss, which has not been repaired or otherwise made good, is followed by a total loss, the assured can only recover in respect of the total loss.

Provided that nothing in this section shall affect the liability of the insurer under the suing and labouring clause.[5]

*Illustrations.*

1. A ship is insured against perils of the seas, but not against fire. She is sea-damaged, but the sea-damage is not repaired. Afterwards she is destroyed by fire. The assured cannot recover anything on this policy.[6]

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[1] As to the French "franchise," see *Gow*, p. 195.

[2] *McArthur*, p. 295; and illustration 5.

[3] *Stewart* v. *Merchants' Mar. Ins. Co.* (1885), 16 Q. B. D. 619, C. A.; see this case criticized, *McArthur*, Ed. 2, p. 297.

[4] *Arnould*, Ed. 6, p. 985; *Le Cheminant* v. *Pearson* (1812), 4 Taunt. 367; cf. *Aitchison* v. *Lohre* (1879), 4 App. Cas. at p. 763.

[5] *McArthur*, Ed. 2, p. 220; *Livie* v. *Janson* (1810), 12 East, 648. As to proviso, see *ibid.* at p. 655.

[6] *Livie* v. *Janson* (1810), 12 East, 648, at p. 654, where this case is put.

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2. A ship is insured by her owners by a time policy. After insurance she is chartered. On the voyage out the ship is damaged, and the repairs are paid for by the charterers, and the cost specially insured. On the voyage home she is totally lost. The shipowner can only recover for the total loss.[1]

NOTE.—In *Lidgett* v. *Secretan*,[2] where the assured recovered for both a partial and total loss, the losses were covered by different and consecutive policies, and the fact that the insurer was the same person in both cases was held to be immaterial.

"It is clear," says Lord Abinger, "that whenever the underwriter adjusts a partial loss, he still remains liable on the policy, and may go on paying partial losses exceeding in the whole cent. per cent., and may ultimately have to pay a total loss of cent. per cent. Such a case is possible."[3]

As to suing and labouring clause, see next section.

Suing and labouring clause.

**§ 78.**—(1.) Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage.[4]

(2.) General average losses and contributions and salvage charges, as defined by this Act, are not recoverable under the suing and labouring clause.[5]

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[1] *The Dora Forster* (1900), P. 241.

[2] *Lidgett* v. *Secretan* (No. 2), L. R. 6 C. P. 616.

[3] *Brooks* v. *MacDonnell* (1835), 1 Y. & C. 500, at p. 515; 41 R. R. at p. 342.

[4] *McArthur*, Ed. 2, p. 262; *Gow* on Insurance, p. 226; *Lowndes*, Ed. 2, p. 202; *Lohre* v. *Aitchison* (1878), 3 Q. B. D. at p. 567, C. A. (reversed on another point); and *Kidston* v. *Empire Ins. Co.* (1866), L. R. 1 C. P. 535, affirmed L. R. 2 C. P. 357, Ex. Ch.; cf. *Duus Brown & Co.* v. *Binning* (1906), 11 Com. Cas. 190.

[5] *Aitchison* v. *Lohre* (1879), 4 App. Cas. 755, especially at pp. 765, 768. For definition of salvage charges, see § 65, *ante*.

(3.) Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause.[1]

(4.) It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimizing a loss.[2]

*Illustrations.*

1. Insurance on chartered freight, warranted free from particular average. The ship in consequence of sea-damage becomes a constructive total loss, but the cargo is landed and sent on in another ship. The expenses of landing, warehousing, and reloading the cargo can be recovered as particular charges under the sue and labour clause.[3]

2. Policy containing a collision clause. The assured is sued for running down another ship, and incurs costs in defending the action. These costs are not recoverable from the insurer under the sue and labour clause.[4]

3. Policy on freight. A ship bound for L. is stranded at P. The cargo is landed, and, in order to earn freight, is sent on by rail to L. at a cost of £200. It might have been sent on by ship at a cost of £70. The insurer on freight is liable for £70 only, under the sue and labour clause.[5]

4. Policy for £1000 on ship and cargo valued at £4000. Expenses are incurred under the sue and labour clause to the extent of £2000. The insurer is liable to contribute £500.[6]

5. Live cattle are insured against all risks. The ship, owing to sea perils, is detained in a port of refuge for some weeks. The cost of

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[1] *Kidston* v. *Empire Ins. Co.* (1866), L. R. 1 C. P. at pp. 546, 547, per Willes, J.; *Meyer* v. *Ralli* (1876), 1 C. P. D. 358.

[2] *McArthur*, Ed. 2, p. 263; *Kidston* v. *Empire Ins. Co.* (1866), L. R. 1 C. P. at p. 544; *Currie* v. *Bombay Ins. Co.* (1869), L. R. 3 P. C. 72.

[3] *Kidston* v. *Empire Ins. Co.* (1866), L. R. 1 C. P. 535; affirmed L. R. 2 C. P. 357, Ex. Ch.

[4] *Xenos* v. *Fox* (1869), L. R. 4 C. P. 665, Ex. Ch.

[5] *Lee* v. *Southern Ins. Co.* (1870), L. R. 5 C. P. 397.

[6] *Dixon* v. *Wentworth* (1879), 4 C. P. D. at pp. 377, 378. The case is overruled only so far as it decided that salvage expenses were recoverable under the clause. See, too, *Cunard Steamship Co.* v. *Marten* (1902), 2 K. B. at p. 629.

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extra fodder supplied to the cattle during the detention is recoverable under the sue and labour clause.[1]

6. A ship valued at £2600 is insured with D. for £1200. After encountering very heavy weather the ship is rescued by a steamer with which no contract is made, and which afterwards obtains an award of £800 for salvage. The owner, instead of abandoning, elects to repair the ship at a cost of £2600. The insurer is only liable for £1200. He is not liable under the sue and labour clause for any additional sum for salvage charges, for the salving steamer is not the "factor, servant, or assign" of the assured.[2]

7. A ship is insured by A., an underwriter, who re-insures with B., who again re-insures with C. for £100. The ship becomes a constructive total loss. A. settles with the original assured, and then at great expense refloats the ship and sells her. His expenses amount to 112 per cent. on the insured value. If B. pays A., he can only recover £100 from C., for A., the first insurer, is not the factor, servant, or assign of B. within the meaning of the sue and labour clause.[3]

8. Policy effected by shipowner "to cover shipowner's liability of any kind to owners of mules and cargo up to £20,000 owing to the omission of the negligence clause in the contract." The mules are worth £40,000. The ship is stranded, and expenses are incurred in landing some of the mules which were saved. The sue and labour clause does not apply to a policy in this form, and the expenses so incurred cannot be recovered under the clause.[4]

9. A ship insured against total loss is stranded, and abandoned. The insurers employ a firm of ship repairers, who succeed in getting her off and saving her, and the assured fails in his claim for a total loss. The insurers cannot counter-claim under the sue and labour clause, or otherwise, for the expenses of salving the ship.[5]

NOTE.—The assured and his agents are bound by law to use all reasonable efforts to avert or minimize a loss.[6] The suing and

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[1] *The Pomeranian* (1895), P. 349.

[2] *Aitchison* v. *Lohre* (1879), 4 App. Cas. 755.

[3] *Uzielli* v. *Boston Marine Insurance Co.* (1884), 15 Q. B. D. 11 C. A.

[4] *Cunard Steamship Co.* v. *Marten* (1902), 2 K. B. 624, affirmed 2 K. B. (1903), p. 511, C. A.

[5] *Croman* v. *Stanier* (1903), 1 K. B. 87, distinguishing *The Pickwick* (1852), 16 Jur. 669.

[6] *Benson* v. *Chapman* (1849), 2 H. L. C. 496; *Notara* v. *Henderson* (1872), L. R. 7 Q. B. 225, Ex. Ch. (shipper *v.* shipowner).

labouring clause enables the assured to recover the expenditure involved in those efforts from the insurer. The Continental Codes embody the conditions of the suing and labouring clause, so that under those codes the liability of the insurer is determined by law, whereas in England it rests on contract.

The sue and labour clause is usually supplemented by the "waiver clause," which provides that "no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver or acceptance of abandonment."[1] For forms of the sue and labour and waiver clauses, see Lloyd's policy, *post*, p. 140.

The sue and labour clause is not a contract of indemnity, therefore if an assured shipowner is sued for work done in endeavouring to salve his ship, he cannot bring in his underwriters under the third party procedure.[2]

As to general average and salvage, see note to §§ 65 and 73, *ante*. Sue and labour expenses are apportioned on the like principle.[3]

### *Rights of Insurer on Payment.*

Right of subrogation.

**§ 79.**—(1.) Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured,[4] he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss.[5]

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[1] *McArthur*, Ed. 2, p. 272; *Lowndes*, Ed. 2, p. 165.

[2] *Johnston* v. *The Salvage Association* (1887), 19 Q. B. D. 458, C. A.

[3] *Cunard Steamship Co.* v. *Marten* (1902), 2 K. B. at p. 629.

[4] The words as to total loss of part were added after some discussion by the Lord Chancellor's Committee. Before the Act they were very doubtful law.

[5] *Arnould*, Ed. 7, p. 1386; *McArthur*, Ed. 2, p. 158; *Rankin* v. *Potter* (1873), L. R. 6 H. L. at pp. 118, 119, 144; *Simpson* v. *Thomson* (1877), 3 App. Cas. at p. 284, 292; *Burnand* v. *Rodocanachi* (1882), 7 App. Cas. at p. 339; *Darrell* v. *Tibbitts* (1880), 5 Q. B. D. at p. 563, C. A., per Lord Esher.

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(2.) Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss.[1]

*Illustrations.*

1. Goods insured by a valued policy are captured and sold. The underwriters pay down 50 per cent. of the loss on account. Afterwards the assured receives half the proceeds of the goods from the captors. The insurers are not entitled to this or any part of it.[2]

2. A ship is missing, and the insurer pays for a total loss. If the ship afterwards arrives she belongs to the insurer.[3]

3. Policy on goods. The ship is captured by a Brazilian cruiser as a blockade-runner. The assured offers to abandon. The insurer declines to accept the abandonment, but eventually compromises the claim by paying 35 per cent. Some years afterwards, the Brazilian Government, under a Convention with Great Britain, make compensation. The insurer is not entitled to any part of the compensation so paid.[4]

4. Insured goods are jettisoned. The insurer of these goods must pay as for a total loss, but he then stands in the place of the assured as regards claims for general average contribution.[5]

5. A ship valued at £6000 is insured for £6000. Her real value is £9000. She is run down by another ship, and the insurers pay for a total loss. Afterwards the assured recovers £5000 damages from

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[1] *Simpson* v. *Thomson* (1877), 3 App. Cas. at p. 292, H. L.; *Arnould*, Ed. 7, p. 1388. See § 81 as to effect of under-insurance.

[2] *Tunno* v. *Edwards* (1810), 12 East, 488; 11 R. R. 458.

[3] *Houstman* v. *Thornton* (1816), Holt N. P. 242.

[4] *Brooks* v. *Macdonnell* (1835), 41 R. R. 336.

[5] *Dickinson* v. *Jardine* (1868), L. R. 3 C. P. 639; and Rules of Practice of Average Adjusters' Association, 1906.

the owners of the ship in fault. The insurers are entitled to the whole of this sum as salvage.[1]

6. Cargo insured under a valued policy is destroyed by a Confederate cruiser. The cargo is worth more than the valuation. After the war, compensation is paid to the cargo owner by the United States under an Act which expressly refuses to recognize claims made by or on behalf of insurers. The insurers who have paid for a total loss are not entitled to this compensation.[2]

7. Two ships belonging to the same owner come into collision. The insurers of the ship not in fault have no claim against the ship in fault, for they stand in the place of the assured, who cannot have a claim against himself.[3]

8. Goods, on which freight has been prepaid, are lost through the negligence of the shipowner. Subject to any special provision in the contract of affreightment, the shipper can recover as damages the prepaid freight for the benefit of the insurers on freight.[4]

9. A ship is run down, and the insurer pays for a total loss. The insurer on ship is not entitled to the damages recovered by the shipowner from the ship in fault for loss of freight.[5]

10. Wool is damaged in a collision between lighters. The insurers pay the claim, and the assured assigns to them his rights against the owner of the lighter in fault. That owner cannot set up the defence that the payment was outside the policy.[6]

NOTE.—The right of subrogation is a necessary incident of a contract of indemnity, and it operates on every right and remedy "by which the loss insured against can be or has been diminished."[7] If the

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[1] *North of England Ins. Assn.* v. *Armstrong* (1870), L. R. 5 Q. B. 244, doubted, *Burnand* v. *Rodocanachi* (1882), 7 App. Cas. at p. 342; and see *Arnould*, Ed. 7, p. 1390, and see § 81.

[2] *Burnand* v. *Rodocanachi* (1882), 7 App. Cas. 333, explained *Castellain* v. *Preston* (1883), 11 Q. B. D. at p. 404, per Lord Bowen; and *Stearns* v. *Village Main Reef Co.* (1904), 10 Com. Cas. 89, C. A.

[3] *Simpson* v. *Thomson* (1877), 3 App. Cas. 279, H. L.; discussed *Midland Ins. Co.* v. *Smith* (1881), 6 Q. B. D. at p. 565; and *Lowndes*, Ed. 2, p. 226.

[4] *Dufourcet* v. *Bishop* (1886), 18 Q. B. D. 373.

[5] *Sea Ins. Co.* v. *Hadden* (1884), 13 Q. B. D. 706, C. A.

[6] *King* v. *Victoria Ins. Co.* (1896), A. C. 250, P. C.

[7] *Castellain* v. *Preston* (1883), 11 Q. B. D. at pp. 388, 404, C. A.; and cf. *West of England Fire Ins. Co.* v. *Isaacs* (1896), 2 Q. B. 377 (fire policy).

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assured is indemnified it seems the insurer may recover from a third party more than he has paid.[1] But suppose a ship valued at £5000 is insured for £4000, how is the subrogation to be apportioned? Presumably the assured, being "his own insurer" for £1000, is entitled to a fifth of the salvage.[2] The cases do not suggest a rule of apportionment, but such a rule seems required. It is recognized in French law. See *Pothier*, Traité d'Assurance, § 133, and see § 81, *post*, as to effect of under-insurance.

The authorities fully bear out the proposition that whatever remains of the subject-matter insured vests in the insurer when he settles for a total loss. "The assured," says Lord Cottenham, "must give up to the underwriters all the remains of the property recovered, together with all benefit and advantage belonging or incident to it, or rather such property *vests in* the underwriters."[3] But is the vesting absolute or conditional, that is to say, can the insurer disclaim the property if it is onerous? Suppose a ship is wrecked in harbour and the insurer pays for a total loss. There may be an obligation to remove the wreckage, the expense of which would exceed the value of the wreckage. The question has been discussed, but not decided, in England.[4] In France, it seems, the insurer can disclaim. See *Pothier*, Traité d'Assurance, § 136. In Committee the words "is entitled *to take over*" were substituted for the words "is entitled to," and this amendment strengthens the view that the insurer is not compelled to accept an onerous property.

Again, in the case of a British ship, at any rate, it is the equitable and not the legal title which vests in the insurer. Speaking broadly, the insurer, in the absence of special contract, must exercise all remedies in the name of the assured.[5] It follows that the insurer is entitled to the use of the assured's name; but if the insurer wishes to bring an action he must, of course, indemnify the assured as regards costs.

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[1] *North of England Ins. Assn.* v. *Armstrong* (1870), L. R. 5 Q. B. 244; but cf. *Burnand* v. *Rodocanachi* (1882), 7 App. Cas. at p. 342, as to valuation.

[2] *Arnould*, Ed. 6, p. 980; and Ed. 7, p. 1390. But see other cases of difficulty suggested, *Lowndes*, Ed. 2, pp. 227, 229.

[3] *Stewart* v. *Greenock Mar. Ins. Co.* (1848), 2 H. L. C. at p. 183.

[4] *Eglinton* v. *Norman* (1877), 3 Asp. Mar. Cas. 471, C. A.; and see *Arrow Shipping Co.* v. *Tyne Improvement Commissioners* (1894), A. C. 508, H. L.; and *Barraclough* v. *Brown* (1897), A. C. 615.

[5] *Simpson* v. *Thomson* (1877), 3 App. Cas. 290, 293; but see *King* v. *Victoria Ins. Co.* (1896), A. C. 250 (special assignment of rights).

As to the effect of the rule of subrogation on the doctrine of contribution between insurers of the same property, see note to § 33, *ante*, and see further, note, *post*, p. 166, as to abandonment.

Right of contribution.

§ 80.—(1.) Where the assured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract.[1]

(2.) If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt.[2]

NOTE.—Under the foreign codes provision is made for successive liability to avoid the complication of the English rule (see *Arnould*, Ed. 6, pp. 329–331). Co-insurers are not co-sureties, but in many respects they have similar relations *inter se*. As Martin, B., says, when two or more policies are effected on the same subject-matter and interest "the policies are one insurance as between all the underwriters, but not one insurance for all purposes."[3] But for a qualification of this principle as regards return of premium, see note to § 84, and as to double insurance, see § 32, *ante*.

Effect of under insurance.

§ 81. Where the assured is insured for an amount less than the insurable value, or, in the case of a valued policy, for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance.[4]

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[1] *Arnould*, Ed. 6, p. 329; *Lowndes*, Ed. 2, p. 35; *Leake* on Contracts, Ed. 3, pp. 62, 655; *Newby* v. *Reed* (1763), 1 W. Bl. 416; *North British Ins. Co.* v. *London and Globe Ins. Co.* (1877), 5 Ch. D. at p. 583, C. A.

[2] Subsect. (2) is consequential.

[3] *Bruce* v. *Jones* (1863), 32 L. J. Ex. at p. 135.

[4] Added at instance of Lord Chancellor's Committee. Cf. *Arnould*, Ed. 6, p. 980, and Ed. 7, p. 1374; *Pothier*, Traité d'Assurance, § 133, and note to § 79.

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NOTE.—All marine adjustment rests on the hypothesis that the subject-matter insured is to be regarded as fully insured. Suppose a ship, valued at £3000, is insured with A. for £1000 and with B. for £1000. If she is damaged by collision to the extent of £300, A. is liable for £100 and B. is liable for £100. That being so, it is obviously immaterial to A. and B. whether the remaining £1000 is uninsured, or whether it is insured with C. The same principle must be applied to salvage. Suppose, then, that the assured recovers £300 in damages from another ship which caused the collision. A. and B. will each be entitled to £100 of these damages, and the assured who is "his own insurer" will be entitled to the remaining £100. As to valued policies, see § 27 (3).

### *Return of Premium.*

Enforcement of return.

**§ 82.** Where the premium, or a proportionate part thereof, is, by this Act, declared to be returnable:—

(*a.*) If already paid, it may be recovered by the assured from the insurer, and,

(*b.*) If unpaid, it may be retained by the assured or his agent.[1]

NOTE.—The broker is directly responsible to the insurer for the payment of the premium, but when returnable it is repayable to the assured.[2]

There is said to have been a custom that when the premium was returnable, the insurer was nevertheless allowed to make a deduction of one-half per cent. (*Arnould*, Ed. 6, p. 1121). But this custom is now believed to be obsolete.

Return by agreement.

**§ 83.** Where the policy contains a stipulation for the return of the premium, or a proportionate part thereof, on the happening of a certain event, and that event happens, the premium, or, as the case may be, the

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[1] *Arnould*, Ed. 6, pp. 194, 197, 206; *Shee* v. *Clarkson* (1810), 11 R. R. 473; 12 East, 507 (broker); cf. *McArthur*, Ed. 2, p. 40.

[2] *Arnould*, Ed. 6, p. 198. See also §§ 52, 53, *ante*.

proportionate part thereof, is thereupon returnable to the assured.[1] SECT. 83.

§ 84.—(1.) Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured.[2] Return for failure of consideration.

(2.) Where the consideration for the payment of the premium is apportionable and there is a total failure of any apportionable part of the consideration, a proportionate part of the premium is, under the like conditions, thereupon returnable to the assured.[3]

(3.) In particular—

(*a.*) Where the policy is void, or is avoided by the insurer as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or illegality on the part of the assured; but if the risk is not apportionable, and has once attached, the premium is not returnable.[4]

(*b.*) Where the subject-matter insured, or part thereof, has never been imperilled, the premium, or, as the case may be, a proportionate part thereof, is returnable:

Provided that where the subject-matter has been insured "lost or not lost," and has arrived

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[1] *Arnould*, Ed. 6, p. 1115; *Owen's* Notes and Clauses, Ed. 3, p. 122; *Kellner* v. *Le Mesurier* (1803), 4 East, 396, 7 R. R. 581; *Gorsedd Steamship Co.* v. *Forbes* (1900), 5 Com. Cas. 413 (return after loss); cf. Rules of Practice of Association of Average Adjusters, 1906, *post*, p. 173.

[2] *McArthur*, Ed. 2, p. 43.

[3] *Ibid.*, pp. 43, 44.

[4] *Arnould*, Ed. 6, p. 1109; and as to the proviso, see *ibid.*, p. 1100; *Leake* on Contracts, Ed. 3, p. 32.

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in safety at the time when the contract is concluded, the premium is not returnable unless, at such time, the insurer knew of the safe arrival.[1]

(*c.*) Where the assured has no insurable interest throughout the currency of the risk the premium is returnable, provided that this rule does not apply to a policy effected by way of gaming or wagering.[2]

(*d.*) Where the assured has a defeasible interest which is terminated during the currency of the risk the premium is not returnable.[3]

(*e.*) Where the assured has over-insured under an unvalued policy, a proportionate part of the premium is returnable.[4]

(*f.*) Subject to the foregoing provisions, where the assured has over-insured by double insurance, a proportionate part of the several premiums is returnable.[5]

Provided that, if the policies are effected at different times, and any earlier policy has at any time borne the entire risk, or if a claim has been paid on the policy in respect of the full sum insured thereby, no premium is returnable in respect of that policy, and when the double insurance is effected

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[1] *Arnould*, Ed. 6, p. 1111; and as to the proviso, see *Bradford* v. *Symondson*, 7 Q. B. D. 456, C. A.

[2] *Arnould*, Ed. 6, p. 1109, and see § 4 (2) *ante*.

[3] *Boehm* v. *Bell* (1799), 8 T. R. 154.

[4] *Arnould*, Ed. 6, p. 1112.

[5] *Ibid.*, p. 1113; *McArthur*, Ed. 2, p. 44, and see § 32 as to double insurance.

knowingly by the assured no premium is returnable.[1] SECT. 84.

*Illustrations.*

1. Goods are insured from London to a port in an enemy's country. The ship is captured. The insurance is void, as trading with an enemy, and the premium is not returnable.[2]

2. A ship insured at and from A., sails from A. with an insufficient crew, and is lost. The insurer is not liable, and the premium is not returnable.[3]

3. Cotton, at sea and overdue, valued at £30,000, is insured by policies effected on the 12th of April for £20,000, and by policies effected on the 13th of April for £16,000. In case of safe arrival, no premium is returnable on the policies effected on the 12th, for they bore the whole risk till the other policies were effected. But premium on £6000, the extent of the over-insurance, is returnable on the policies effected on the 13th.[4]

4. Policy on goods at sea. The assured represents to the insurer that the ship sailed from Baltimore on the 12th of January. As a fact she sailed on the 1st of January. The insurer is not liable. If the representation was an honest mistake, the premium is returnable, *aliter* if it was made dishonestly.[5]

5. Insurance on profits and commission "without benefit of salvage." The policy is illegal under 19 Geo. 2, c. 37, and the premium is not returnable.[6]

6. A., who has insured the cargo on a ship believed to be overdue, re-insures his risk with B. At the time the re-insurance is effected the ship has safely arrived, but neither party knows this. The re-insurance policy attaches, and the premium is not returnable.[7]

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[1] *Fisk* v. *Masterman* (1841), 8 M. & W. 165. The final words were added at the instance of the Lord Chancellor's Committee, but they were redrafted in the Commons Committee.

[2] *Vandyck* v. *Hewitt* (1800), 1 East, 96; 5 R. R. 516; see, too, *Palyart* v. *Leckie* (1817). 6 M. & S. 290, when the voyage was abandoned.

[3] *Annen* v. *Woodman* (1810), 3 Taunt. 299.

[4] *Fisk* v. *Masterman* (1841), 8 M. & W. 165.

[5] *Anderson* v. *Thornton* (1853), 8 Exch. 425.

[6] *Allkins* v. *Jupe* (1877), 2 C. P. D. 375, see at p. 388 as to possibility of salvage in such a case; cf. § 5, *ante*, reproducing this statute.

[7] *Bradford* v. *Symondson* (1881), 7 Q. B. D. 456, C. A.

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7. Insurance on 500 bales of cotton to be shipped by a particular ship. Only 250 bales are shipped. Half the premium is returnable.[1]

NOTE.—Apart from agreement, the return of the premium seems to rest on the doctrine of failure of consideration. The principle has been generalized in subsects. (1) and (2), as the subordinate rules in subsect. (3) may not be exhaustive.

"The general rule of law," says Bovill, C.J., "is that where a contract has been in part performed, no part of the money paid under such contract can be recovered back. There may be some cases of partial performance which form an exception to this rule, as, for instance, if there were a contract to deliver ten sacks of wheat, and six only were delivered, the price of the remaining four might be recovered back. But there the consideration is clearly severable."[2]

The case of double insurance gives rise to complications. "The assured has the right to elect under which policy or set of policies he will claim for a loss, and under which policy or set of policies he will claim for a return of premium; but the underwriters, having settled with the assured, must proceed to readjust the entire claim among themselves, so that each underwriter shall ultimately bear his proportionate part both of the loss and of the return premium."[3] But as regards return premium this rule is subject to qualification. When, as commonly happens, the risk under some of the policies attaches before the risk under later policies, so that under the earlier policies the entire risk is run for a time, then the premium is only returnable by the underwriter of the later policies.[4] This qualification is really a deduction from subsect (3) (*a*). To get rid of this complication, and to discourage over-insurance, Lord Herschell proposed that in case of double insurance, premium should not be returnable, but the clause now stops somewhat short of this.

### *Mutual Insurance.*

Modification of Act in case of mutual insurance.

**§ 85.—(1.) Where two or more persons mutually agree to insure each other against marine losses there is said to be a mutual insurance.**[5]

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[1] Cf. *McArthur*, Ed. 2, p. 44.

[2] *Whincup* v. *Hughes* (1871), L. R. 6 C. P. at p. 81.

[3] *McArthur*, Ed. 2, p. 44. See, too, § 32.

[4] *Fisk* v. *Masterman* (1841), 8 M. & W. 165; *Lowndes*, Ed. 2, p. 36.

[5] *McArthur*, Ed. 2, p. 345; and for history of mutual insurance, see *Marine Mutual Ins. Assn. Ltd.* v. *Young* (1880), 4 Asp. Mar. Cas. at p. 358.

(2.) The provisions of this Act relating to the premium do not apply to mutual insurance, but a guarantee, or such other arrangement as may be agreed upon, may be substituted for the premium.[1]

(3.) The provisions of this Act, in so far as they may be modified by the agreement of the parties, may in the case of mutual insurance be modified by the terms of the policies issued by the association, or by the rules and regulations of the asoociation.[2]

(4.) Subject to the exceptions mentioned in this section, the provisions of this Act apply to a mutual insurance.[3]

NOTE.—Mutual marine associations consisting of more than twenty members must be registered under the Companies Acts,[4] and the insurances effected by them must be embodied in marine policies in conformity with the Stamp Acts.[5] "Mutual insurance," says Matthew, J., "is the simplest thing in the world if you have not to record it in written documents. It is a system by which every one insured is at once underwriter and assured. This very simple principle was acted upon successfully for many years, till technical difficulties began to be interposed. The first technical difficulty was this: all mutual insurance associations were ordered by statute to be incorporated as joint stock companies. The second technical difficulty was, that under statutes framed for different purposes, which were positive in their terms, every contract of marine insurance had to be recorded in a written document; there must be a policy of insurance. These two conditions having to be complied with, the mutual associations set themselves to work to reconcile the rules of the law with the conduct

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[1] *McArthur*, Ed. 2, p. 346; *Lion Ins. Assn.* v. *Tucker* (1883), 12 Q. B. D. at p. 187, C. A.

[2] *Ocean Iron Steamship Assn.* v. *Leslie* (1889), 22 Q. B. D. 722; *British Marine Mutual Ins. Co.* v. *Jenkins* (1900), 1 Q. B. 299; *North Eastern Steamship Assn.* v. *Red "S" Steamship Co.* (1905), 10 Com. Cas. 245.

[3] *British Marine Mutual Ins. Co.* v. *Jenkins* (1900), 1 Q. B. 299.

[4] *Re Padstow Ass. Assn.* (1882), 20 Ch. D. 137, C. A.

[5] *Edwards* v. *Aberayron Mutual Ins. Society* (1875), 1 Q. B. D. 563, Ex. Ch.

SECT. 85. of their business, and different regulations have been adopted to meet the decisions."[1]

The policies issued by mutual associations omit the ordinary provision as to premium. The omission is provided for by rules of the association which regulate members' contributions to losses. Their policies therefore have to be construed together with the rules and regulations of the association.

*Supplemental.*

Ratification by assured.

**§ 86. Where a contract of marine insurance is in good faith effected by one person on behalf of another, the person on whose behalf it is effected may ratify the contract even after he is aware of a loss.**[2]

NOTE.—This is an old rule of insurance law. It was questioned in *Williams* v. *North China Ins. Co.*,[3] but affirmed. "I think," says Cockburn, C.J., "that this is a legitimate exception from the general rule, because the case is not within the principle of that rule. Where an agent effects an insurance subject to ratification, the loss is very likely to happen before ratification, and it must be taken that the insurance so effected involves that possibility as the basis of the contract." The insurance can only be ratified by the person on whose behalf it is effected.[4] Thus, if A. takes out a policy in his own name on behalf of B., the transaction cannot be adopted by C.[5] See further the notes to § 23 (1), *ante*.

Implied obligations varied by agreement or usage.

**§ 87.—(1.) Where any right, duty, or liability would arise under a contract of marine insurance by implication**

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[1] *Ocean Iron Steamship Assn.* v. *Leslie* (1889), 22 Q. B. D. at p. 724.

[2] *Arnould*, Ed. 6, p. 166; *Williams* v. *North China Ins. Co.* (1876), 1 C. P. D. 757, C. A., see at p. 764.

[3] *Williams* v. *North China Ins. Co.* (1876), 1 C. P. D. 757, C. A., see at p. 764. As to the common law rule, to which this is an exception, see *Keighley* v. *Durant*, A. C. (1901), 240 H. L.

[4] *Boston Fruit Co.* v. *British and Foreign Mar. Ins. Co.* (1905), 1 K. B. 637, C. A.; affirmed A. C. (1906), 336 H. L. (policy effected for shipowner cannot afterwards be adopted by charterer).

[5] *Byas* v. *Miller* (1897), 3 Com, Cas. 39.

of law, it may be negatived or varied by express agreement, or by usage, if the usage be such as to bind both parties to the contract.[1] SECT. 87.

(2.) The provisions of this section extend to any right, duty, or liability declared by this Act, which may be lawfully modified by agreement.

NOTE.—This section is suggested by § 55 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71). The cases are analogous. As Pothier long ago pointed out, marine insurance is a consensual contract, and in the absence of positive legal prohibition, the parties may make any stipulation they please.

As regards "express agreement," the maxims of the law are *Expressum facit cessare tacitum*, and *Modus et conventio vincunt legem*. For example, it is a well-known rule of law that deviation is ground for avoiding the insurance, but the parties may agree to a deviation clause. On the other hand, the parties cannot by agreement dispense with the provisions against gaming and wagering which are prohibited in the public interest. But, speaking generally, the main object of the Act is to declare the law, that is to say, to indicate to the parties what the law will do if they do not make any express bargain, leaving them free to make any bargain they like to suit their own needs.

As regards usage, it is to be noted that when one party relies on and gives evidence of usage, the other party is at liberty to prove—"first, the non-existence of the usage; or, secondly, its illegality or unreasonableness; or, thirdly, that in fact it formed no part of the agreement between the parties."[2] Usage.

Speaking, in 1791, of a marine policy, Buller, J., says, "it is founded on usage and must be governed by usage."[3] This proposition must now be taken with qualifications. A usage may be either a general usage of trade, or a particular usage, prevailing only among particular classes or in particular localities. When a general usage has been affirmed by judicial decision, it becomes incorporated with the law merchant, and thenceforward evidence of any usages inconsistent

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[1] *McArthur*, Ed. 2, pp. 33–35; *Hart* v. *Standard Ins. Co.* (1889), 22 Q. B. D. at p. 501, C. A.

[2] *Taylor* on Evidence, § 1077. As to usage in maritime law generally, see *Carver's* Carriage by Sea, §§ 160–200.

[3] *Brough* v. *Whitmore* (1791), 4 T. R. at p. 210.

SECT. 87. therewith is inadmissible.[1] A particular usage must be proved by evidence in each case, at any rate till it becomes so notorious that the Courts will take judicial notice of it.[2] It is only binding in so far as it forms an implied term of the contract between the parties concerned.

As a marine policy is an instrument in writing, evidence of usage is not admissible to contradict anything which is plainly expressed.[3] Such evidence is only admissible either to explain what is technical or ambiguous, or, as lawyers put it, to annex incidents to the contract.[4]

Reasonable time, etc., a question of fact.

**§ 88.** Where by this Act any reference is made to reasonable time, reasonable premium, or reasonable diligence, the question what is reasonable is a question of fact.[5]

NOTE.—This section follows the lines of § 56 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71).

Slip as evidence.

**§ 89.** Where there is a duly stamped policy, reference may be made, as heretofore, to the slip or covering note, in any legal proceeding.[6]

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[1] *Goodwin* v. *Robarts* (1875), L. R. 10 Ex. at p. 357, Ex. Ch.

[2] Cf. *Ex parte Turquand* (1885), 14 Q. B. D. at p. 645.

[3] *Arnould*, Ed. 6, p. 291; *Parkinson* v. *Collier*, 2 Park. Ins. 653.

[4] For illustrations of the part played by usage, see *Universo Ins. Co.* v. *Merchants' Mar. Ins. Co.* (1897), 2 Q. B. 93 (liability of broker for premium); *Attwood* v. *Sellar* (1880), 5 Q. B. D. 286, C. A. (practice of average adjusters to charge certain general average expenses to particular average, invalid); *Stephens* v. *Australasian Ins. Co.* (1872), L. R. 8 C. P. at p. 23 (declarations on floating policies); *Dickinson* v. *Jardine* (1868), L. R. 3 C. P. 639 (special usage as to jettison, invalid); *Sweeting* v. *Pearce* (1861), 30 L. J. C. P. 109 (usage of Lloyd's as to settlement of losses); *Blackett* v. *Royal Exchange* (1832), 2 Cr. & J. 244 (usage not to pay for boat slung outside, invalid); *Palmer* v. *Blackburn* (1822), 1 Bing. 60, 64 (measure of indemnity, gross freight).

[5] As to reasonable time, see *Carlton Steamship Co.* v. *Castle Mail Packets Co.* (1898), A. C. at p. 491, per Lord Herschell; *Currie* v. *Bombay Native Ins. Co.* (1869), L. R. 3 P. C. at p. 79; as to premium, see note to § 31.

[6] *McArthur*, Ed. 2, p. 23; *Arnould*, Ed. 6, p. 260; *Leake* on Contracts Ed. 3, pp. 270, 342; *Ionides* v. *Pacific Mar. Ins. Co.* (1872), L. R. 7 Q. B. 517, Ex. Ch.

Sect. 89.

Note.—Lord Blackburn says, "As the slip is clearly a contract for marine insurance, and is equally clearly not a policy, it is, by virtue of these enactments (the stamp laws), not valid—that is, not enforceable at law or in equity; but it may be given in evidence, wherever it is, though not valid material."[1] For example, the slip is evidence for the purpose of correcting an error in the name of the ship. So, too, if the insurer seeks to avoid the policy on the ground of concealment of a material fact, the date of the slip would be material to show whether, when the fact came to the knowledge of the assured, the contract had or had not been concluded.[2]

Interpretation of terms.

§ 90. In this Act, unless the context or subject-matter otherwise requires—

"Action" includes counter-claim and set off:[3]

"Freight" includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money:[4]

"Moveables" mean any moveable tangible property, other than the ship, and include money, valuable securities, and other documents:[5]

"Policy" means a marine policy.

Note.—In ordinary shipping law the term "freight" is sometimes used to denote the goods or cargo laden on board ship. More commonly it is used to denote the sum payable to a shipowner by a third

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[1] *Ionides* v. *Pacific Mar. Ins. Co.* (1871), L. R. 6 Q. B. at p. 685 (name of ship); cf. *Empress Assurance Corporation* v. *Bowring* (1905), 11 Com. Cas. 107 (evidence not admitted).

[2] *Cory* v. *Patton* (1872), L. R. 7 Q. B. 704; cf. *Lishman* v. *Northern Mar. Ins. Co.* (1875), L. R. 10 C. P. 179, Ex. Ch.

[3] Cf. § 62 (1) of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71).

[4] *Arnould*, Ed. 6, p. 31; *Flint* v. *Flemyng* (1830), 1 B. & Ad. 45; see note, *post*.

[5] See *Baring Brothers* v. *Mar. Ins. Co.* (1893), W. N. p. 164 (postal packet containing stock certificates); *The Pomeranian* (1895), P. 349 (live cattle); *Sleigh* v. *Tyser* (1900), 2 Q. B. 333 (live cattle). The term "goods" in a marine policy has a restricted meaning. See *post*, p. 151.

SECT. 90. person for the use of a ship as a vehicle for merchandise.[1] In insurance law the term has a wider meaning. In a case where it was held that an insurance "on freight" did not cover coolies' passage money, Willes, J., after commenting on the different meanings of the word, says it has been "decided that 'freight' sufficiently represents the interest of the shipowner in the carriage of his own goods, and includes the value of their carriage."[2] It is immaterial to the insurer whether the ship be regarded as hired to an actual or to a hypothetical charterer. As to "advance freight," see § 12.

Savings.

**§ 91.**—(1.) Nothing in this Act, or in any repeal effected thereby, shall affect:—

54 & 55 Vict. c. 39.

(*a.*) The provisions of the Stamp Act, 1891, or any enactment for the time being in force relating to the revenue;[3]

25 & 26 Vict. c. 89.

(*b.*) The provisions of the Companies Act, 1862, or any enactment amending or substituted for the same:[4]

(*c.*) The provisions of any statute not expressly repealed by this Act.

(2.) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance.[5]

NOTE.—In continental countries marine and mercantile cases are relegated to special commercial tribunals. In England, as in the United States, they are dealt with by the ordinary courts of justice. The law merchant is part of the common law, and its special rules are

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[1] By English law, apart from special contract, freight is only payable on right delivery of the cargo, and freight *pro ratâ itineris* is not recognized. Cf. *Carver's* Carriage by Sea, Ed. 3, § 542.

[2] *Denoon* v. *Home and Col. Ass. Co.* (1872), L. R. 7 C. P. at p. 349.

[3] See the stamp provisions set out, *post*, pp. 155-8.

[4] See the notes to § 85.

[5] As to fraud and misrepresentation, see *Leake* on Contracts, Ed. 3, pp. 291, 330; as to illegality, *ibid.* p. 620; as to mistake, *ibid.* pp. 262-287, and *Spalding* v. *Crocker* (1897), 13 Times L. R. 396.

enforced as part of the ordinary law of the land. Marine insurance is a contract, and, in so far as that contract has not special incidents peculiar to itself, it is dealt with on the same footing as other contracts. If the law of contract were codified in England, the special rules relating to marine insurance would form a chapter in that code. SECT. 91.

*Conflict of Laws.*—Mr. Dicey sums up the decisions in the following rules. An underwriter is bound by an average adjustment duly taken according to the law of the place of adjustment, that is to say, when the voyage is completed in due course, by the law of the port of destination, or, when the voyage is not so completed, by the law of the place where the voyage is rightly broken up and the ship and cargo part company. An English insurer of goods shipped by an English merchant on board a foreign ship is not affected by the law of the flag.[1] Conflict of laws.

As Lush, L.J., says, an insurer on an English policy may, if he chooses, stipulate "that such policy shall be construed in whole or in part according to the law of any foreign state, as if it had been made in and by a subject of the foreign state, and the policy in question does so stipulate as regards general average; but, except when it is so stipulated, the policy must be construed according to our law, and without regard to the nationality of the vessel."[2]

The differences in time in different places raise some curious points. Suppose a ship is insured in London with A. up to midnight of the 31st of December, without any special provision as to time, and with B. from the 1st of January. The ship founders in the West Indies on the 31st of December at 10 p.m. according to ship's time. According to London time A.'s policy would have expired, and the risk would be on B.'s policy. In the case of an English policy it seems that, in the absence of any provision to the contrary, the liability must be determined according to Greenwich time: see the Statutes (Definition of Time) Act, 1880 (43 & 44 Vict. c. 9), which applies to every English "Act of Parliament, deed, or other legal instrument." But if the policy were effected in India the point would be a debatable one. Calculation of time.

The stamp laws are part of the *lex fori*. Therefore, if a risk under a Lloyd's policy is re-insured with a Swedish insurance company, the

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[1] *Dicey's* Conflict of Laws, pp. 597, 598; cf. *Wavertree Co.* v. *Love* (1897), A. C. 373, P. C.

[2] *Greer* v. *Poole* (1880), 5 Q. B. D. 272 (English policy with foreign adjustment clause).

SECT. 91. re-insurance policy must conform to the English stamp laws if it is sought to enforce it in England.[1]

Effect on policy of subsequent hostilities.

Subject to the provisions of any license to trade,[2] the insurer is not liable for any loss suffered by an alien enemy during the continuance of hostilities, even though the policy may have been effected before the commencement of hostilities. For example.[3]

1. Policy on goods from London to Bayonne, effected on behalf of a Frenchman. War afterwards breaks out between England and France, and the goods are captured by a Spanish cruiser, *i.e.* by a British ally. The insurer is not liable, even though the action is brought after peace has been concluded.[4]

2. Policy on gold bullion from Johannesburg to London, effected by a company registered and carrying on business in the South African Republic. On October 2nd the gold is seized in transit by the Government of the South African Republic. On that day war with England was anticipated, but it did not break out until October 11th. The assured is entitled to recover.[5]

3. Policy on gold bullion from the mine in the Transvaal to London effected in May. In October war breaks out between the Transvaal Government and England, and the gold is seized. The assured are a company registered in Natal, though working the mine in the Transvaal. The gold is not enemy's property, and the insurer is liable under the policy.[6]

As a general rule, after hostilities have ceased, an alien enemy may enforce a contract made before the commencement of hostilities, for the plea in such an action that the plaintiff is an alien enemy is only a plea in abatement.[7] But obviously this rule does not apply to insurance, otherwise by an English contract an alien enemy could indemnify himself against British capture. Lord Ellenborough rests the principle of this clause on the ground of implied condition, but it is really a rule of public policy which cannot be waived or varied. "There are three rules," says Lord Davey, "which are established in our common law. The first is that the King's subjects cannot trade with an alien enemy, *i.e.* a person owing allegiance to a Government at war with the king,

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[1] *Royal Exchange* v. *Vega* (1901), 2 K. B. 567.

[2] *Morgan* v. *Oswald* (1812), 3 Taunt. 554.

[3] *Brandon* v. *Curling* (1803), 4 East, 410.

[4] *Ibid.*

[5] *Driefontein Consolidated Mines* v. *Janson* (1901), 2 K. B. 419, C. A.; affirmed A. C. (1902), 484 H. L.

[6] *Nigel Gold Mining Co.* v. *Hoade* (1901), 2 K. B. 849, 6 Com. Cases, 268.

[7] *Bullen and Leake's* Precedents of Pleading, Ed. 3, p. 475.

*without the king's licence.* Every contract made in violation of this principle is void, and goods which are the subject of such a contract are liable to confiscation. SECT. 91.

"The second principle is a corollary from the first, but is also rested on distinct grounds of public policy. It is that no action can be maintained against an insurer of an enemy's goods or ships against capture by the British Government. One of the most effectual instruments of war is the crippling of the enemy's commerce, and to permit such an insurance would be to relieve enemies from the loss they incur by the action of British arms, and would, therefore, be detrimental to the interests of the insurer's own country. The principle equally applies where the insurance is made previously to the commencement of hostilities, and was therefore legal in its inception, and whether the person claiming on the policy be a neutral or even a British subject, if the insurance be effected on behalf of an alien enemy.

"The third rule is that, if a loss has taken place before the commencement of hostilities, the right of action on a policy of insurance by which the goods lost were insured is suspended during the continuance of war and revives on the restoration of peace."[1]

Licenses to trade must be construed liberally.[2]

**§ 92.** The enactments mentioned in the Second Schedule to this Act are hereby repealed to the extent specified in that Schedule. Repeals.

NOTE.—For list of repeals, see *post*, p. 153.

**§ 93.** This Act shall come into operation on the first day of January, one thousand nine hundred and seven. Commencement.

**§ 94.** This Act may be cited as the Marine Insurance Act, 1906. Short Title.

NOTE.—This Act, like all Acts passed subsequent to 1889, must be read subject to the provisions of the Interpretation Act, 1889 (52 & 53 Vict. c. 63).

A codifying Act, as Lord Herschell has pointed out, must be construed according to its natural meaning without regard to the previous state of the law. It is only in case of doubt that resort to the previous law is legitimate.[3]

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[1] *Janson* v. *Driefontein Consolidated Mines* (1902), A. C. at p. 499.

[2] *Morgan* v. *Oswald* (1812), 3 Taunt. 554.

[3] *Vagliano* v. *Bank of England* (1891), A. C. at p. 145 H. L.

# SCHEDULES.

## FIRST SCHEDULE.

FORM OF POLICY (*See* § 30).

Lloyd's S.G. policy.

BE IT KNOWN THAT * [1] as well in [2] own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all doth make assurance and cause [3] and them, and every of them, to be insured lost or not lost, at and from [4] Upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the [5] whereof is master under God, for this present voyage,[6] or whosoever else shall go for master in the said ship, or

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* The blanks in the policy are filled up in writing. At the end special Clauses are inserted, or they may be put in the margin. The Company form usually provides a blank in which the amount insured is expressed in words. Lloyd's policy has no such blank, probably because the sum insured is split up among the various "names" subscribing the policy. Taking a policy on goods as an illustration, the blanks might be filled up as follows:—

([1]) "John Brown," or "John Brown and [or] as agent"; ([2]) "his"; ([3]) "himself"; ([4]) "Madras to London"; ([5]) "*Calliope*"; ([6]) "William Smith," but commonly left blank; ([7]) "as above"; ([8]) "as above"; ([9]) usually left blank; ([10]) "A. B. 100 bales of cotton valued at £1000."

by whatsoever other name or names the said ship, or the master thereof, is or shall be named or called; beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship,[7]
upon the said ship, etc.[8]
and so shall continue and endure, during her abode there, upon the said ship, etc. And further, until the said ship, with all her ordnance, tackle, apparel, etc., and goods and merchandises whatsoever shall be arrived at[8]
upon the said ship, etc., until she hath moored at anchor twenty-four hours in good safety; and upon the goods and merchandises, until the same be there discharged and safely landed. And it shall be lawful for the said ship, etc., in this voyage, to proceed and sail to and touch and stay at any ports or places whatsoever[9]
without prejudice to this insurance. The said ship, etc., goods and merchandises, etc., for so much as concerns the assured by agreement between the assured and assurers in this policy, are and shall be valued at[10]

Touching the adventures and perils which we, the assurers, are contented to bear and do take upon us in this voyage: they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods, and merchandises, and ship, etc., or any part thereof. 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

Sue and labour clause.

recovery of the said goods and merchandises, and ship, etc., 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. And it is especially declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver, or acceptance of abandonment. And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we, the assurers, are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured, at and after the rate of.

Waiver clause.

IN WITNESS whereof we, the assurers, have subscribed our names and sums assured in London.

*N.B.*—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded—sugar, tobacco, hemp, flax, hides, and skins are warranted free from average, under five pounds per cent., and all other goods, also the ship and freight, are warranted free from average, under three pounds per cent., unless general, or the ship be stranded.

Memorandum.

NOTE.—*Lloyd's Policy.*—The policy was settled in its present form in 1779, but most of its provisions are of much older date. The "Memorandum" was added in 1749. Lloyd's policy has twice been scheduled to statutes now repealed (see 35 Geo. 3, c. 63, and 30 & 31 Vict. c. 23). The judges have not been complimentary to its drafting.

Mansfield, C.J., has described it as "a very strange instrument." [1] Lawrence, J., has described it as "drawn with much laxity," [2] and Buller, J., says that "a policy of assurance has at all times been considered in courts of law as an absurd and incoherent instrument, but it is founded on usage, and must be governed and construed by usage." [3] The classes concerned nevertheless cling to it with inveterate constancy. Many of the insurance companies have slightly altered some of its provisions, but it is recognized as the typical British policy. Every line, and almost every word, of it has been judicially construed, and has now acquired a conventional meaning.

The policy is framed as a ship and goods policy. Hence presumably the letters *S.G.* in the margin, though some learned persons suggest that those letters stand for "*salutis gratiâ.*"

The policy consists of three inter-related but distinct engagements, namely, the insurance, the sue and labour clause, and the memorandum, and if a collision or "running down" clause be inserted that also is a distinct engagement added to the policy.

All British insurance law has been developed through cases arising on the policy. In so far as those cases appear to establish general principles, which are independent of the terms of the policy, they are summarized in the provisions of the Act. The main rules to be derived from the cases on the printed terms of the policy are summarized in this schedule. The policy itself, as noted above, is framed as an insurance on ship and goods. To make it apply to other interests and to meet the constantly changing requirements of modern commerce, special terms or "clauses" are written in to the policy. These are constantly being altered to meet new requirements. These clauses are business stipulations, and must be construed from a business, and not a technical, point of view.[4] The decisions on these special provisions are numerous, but each case turns on the particular language used. If the special clause be inconsistent with the provisions of the printed policy, the special clause must prevail.[5]

For a general canon of construction, see *Hart* v. *Standard Ins. Co.* (1889), 22 Q. B. D. at p. 501, per Lord Bowen.

For a form of company policy (Alliance Marine), see *Owen's* Notes

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[1] *Le Cheminant* v. *Pearson* (1812), 4 Taunt. 380.

[2] *Marsden* v. *Reid* (1802), 3 East, 579.

[3] *Brough* v. *Whitmore* (1791), 4 T. R. at p. 210.

[4] *Tatham* v. *Burr* (1898), A. C. at p. 386.

[5] *Hydarnes S.S. Co.* v. *Indemnity Mutual Mar. Ass. Co.* (1895), 1 Q. B. 500, C. A.; cf. *Dudgeon* v. *Pembroke* (1877), 2 App. Cas. 284.

and Clauses, Ed. 3, p. 6; and for forms of American policies and clauses, see *ibid.* pp. 230–244. For the form of the oldest extant English policy (1613), see *Martin's* History of Lloyd's, p. 46. For a form of an Italian policy, dated 1523, see *Lowndes*, Ed. 2, p. 233. See further the note on the history of marine insurance, *post*, p. 170.

### *Rules for Construction of Policy.*

*The following are the rules referred to by this Act for the construction of a policy in the above or other like form, where the context does not otherwise require:—*

NOTE.—By § 30 (2) of the Act, *ante*, p. 44, "*subject to the provisions of this Act*, and unless the context of the policy otherwise requires the terms and impressions mentioned in the first schedule to this Act shall be construed as having the scope and meaning in that schedule assigned to them." It is to be noted then that these constructions are subordinate to the provisions of the Act.

Lost or not lost.

1. Where the subject-matter is insured "lost or not lost," and the loss has occurred before the contract is concluded, the risk attaches unless, at such time, the assured was aware of the loss, and the insurer was not.[1]

From.

2. Where the subject-matter is insured "from" a particular place, the risk does not attach until the ship starts on the voyage insured.[2]

At and from.

[Ship.]

3.—(*a.*) Where a ship is insured "at and from" a particular place, and she is at that place in good safety when the contract is concluded, the risk attaches immediately.[3]

(*b.*) If she be not at that place when the contract is concluded, the risk attaches as soon as she arrives there

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[1] *McArthur*, Ed. 2, p. 80; cf. *Mead* v. *Davison* (1835), 3 A. & E. 303; *Gledstanes* v. *Royal Exchange Corporation* (1864), 34 L. J. Q. B. 35 (floating policy); *Bradford* v. *Symondson* (1881), 7 Q. B. D. 456, C. A. (re-insurance); and see § 6 and notes.

[2] *McArthur*, Ed. 2, p. 81; *Arnould*, Ed. 6, p. 388; and § 43 and notes.

[3] *McArthur*, Ed. 2, p. 81; *Palmer* v. *Marshall* (1831), 8 Bing, 79.

in good safety, and, unless the policy otherwise provides, it is immaterial that she is covered by another policy for a specified time after arrival.[1]

(*c.*) Where chartered freight is insured "at and from" a particular place, and the ship is at that place in good safety when the contract is concluded, the risk attaches immediately. If she be not there when the contract is concluded, the risk attaches as soon as she arrives there in good safety.[2] [Freight.]

(*d.*) Where freight, other than chartered freight, is payable without special conditions, and is insured "at and from" a particular place, the risk attaches *pro rata* as the goods or merchandise are shipped; provided that if there be cargo in readiness which belongs to the ship-owner, or which some other person has contracted with him to ship, the risk attaches as soon as the ship is ready to receive such cargo.[3]

NOTE.—The expression "good safety" has a technical meaning. It denotes (*a*) that the ship is in the possession of the assured, and not under capture or arrest, and (*b*) that she exists as a ship, even though damaged.[4]

Paragraph (*d*) relates to ordinary freight. The object of the words "without special conditions" is to exclude advanced or other special freight.

4. Where goods or other moveables are insured "from the loading thereof," the risk does not attach until such [From the loading thereof.]

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[1] *McArthur*, Ed. 2, p. 82; *Haughton* v. *Empire Mar. Ins. Co.* (1865), L. R. 1 Ex. 205.

[2] *McArthur*, Ed. 2, p. 101; *Foley* v. *United Mar. Ins. Co.* (1870), L. R. 5 C. P. 155; cf. *Barber* v. *Fleming* (1870), L. R. 5 Q. B. 59 (freight to be earned on return voyage).

[3] *McArthur*, Ed. 2, p. 100; cf. *Jones* v. *Neptune Ins. Co.* (1872), L. R. 7 Q. B. at pp. 706, 707. But as to advance freight, see § 12, *ante*, p. 19.

[4] *McArthur*, Ed. 2, p. 94; *Gow* on Insurance, p. 55; *Lidgett* v. *Secretan* (1870), L. R. 5 C. P. at p. 198.

goods or moveables are actually on board, and the insurer is not liable for them while in transit from the shore to the ship.[1]

NOTE.—Risk of craft to and from the vessel is commonly included by a supplementary provision.

Safely landed.

5. Where the risk on goods or other moveables continues until they are "safely landed," they must be landed in the customary manner and within a reasonable time after arrival at the port of discharge, and if they are not so landed the risk ceases.[2]

NOTE.—Ordinarily the risk on freight terminates at the same time as the risk on goods; but in the case of chartered freight the terms of the policy often define its termination.[3] The risk on ship under the ordinary form of policy terminates when she has been "moored for twenty-four hours in good safety." As to "good safety," see note to Rule 3. Difficult questions sometimes arise where the cause of loss comes into operation before the expiration of the policy, but the actual loss occurs afterwards.[4] In a case on a policy in the ordinary form, with the added provision that the ship was to be covered "during thirty days' stay in her last port of discharge," it was held that the thirty days must be added to the twenty-four hours given by the policy.[5] Where a ship was to be held covered for "thirty days" it was held that "thirty days" meant thirty consecutive periods of 24 hours.[6]

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[1] *McArthur*, Ed. 2, p. 91; *Arnould*, Ed. 6, p. 378.

[2] *McArthur*, Ed. 2, p. 97; *Arnould*, Ed. 6, p. 392; *Gow* on Insurance, p. 56; cf. *Houlder* v. *Merchants' Mar. Ins. Co.* (1886), 17 Q. B. D. 354 (goods put in lighters for transhipment, risk ended); *Marten* v. *Nippon* (1898), 14 Times L. R. 333 (re-insurance, warehouse clause); *Samuel* v. *Royal Exchange Ass. Co.* (1828), 8 B. & Cr. 119 (ship detained outside port of destination by ice, risk not ended).

[3] *McArthur*, Ed. 2, pp. 100, 101.

[4] See the cases reviewed in *Lidgett* v. *Secretan* (1870), L. R. 5 C. P. at p. 199; cf. *McArthur*, Ed. 2, p. 93.

[5] *Mercantile Mar. Ins. Co.* v. *Titherington* (1864), 5 B. & S. 765 (ship arrived on the 25th of May at 7 p.m. and was lost on the 24th of June at 3 a.m.; held covered). Cf. *Lidgett* v. *Secretan*, *supra*, at p. 200. As to computation of time, see *Cornfoot* v. *Royal Exchange* (1903), 2 K. B. 363.

[6] *Cornfoot* v. *Royal Exchange* (1903), 2 K. B. 363; affirmed 1 K. B. (1904), 40 C. A.

6. In the absence of any further license or usage, the liberty to touch and stay "at any port or place whatsoever" does not authorize the ship to depart from the course of her voyage from the port of departure to the port of destination.[1] Touch and stay.

7. The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves.[2] Perils of the seas.

NOTE.—It is unsafe to attempt a complete definition of the expression "perils of the seas," because in practice the question "what is a peril of the seas" is inextricably woven up with the further question, was the loss proximately caused by the sea peril? Lord Bramwell has tentatively suggested the following definitions, namely, "Every accidental circumstance, not the result of ordinary wear and tear, delay, or of the act of the assured, happening in the course of the navigation of a ship and incidental to the navigation, and causing loss to the subject-matter of the insurance." He then goes on to approve an alternative definition given by Lopes, L.J., namely, "In a seaworthy ship, damage to goods caused by the action of the sea during transit, not attributable to the fault of anybody."[3] These definitions certainly are open to criticism, but the following points may be noted. First, the term "peril" denotes something which is accidental and fortuitous. As Lord Herschell says, "the purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen." Secondly, the expression is "perils *of* the seas," not "perils *on* the seas." For example, the policy enumerates many maritime perils, such as capture, seizure, fire, etc., which are incidental to marine adventure, but which are not perils of the seas; so, too, risks, not ordinarily covered by the policy, may be expressly covered, *e.g.* the risk of mortality in insurance on cattle, and frozen meat risks. Thirdly, the expression "perils of the seas" has

[1] *Arnould*, Ed. 6, p. 471; *Gow* on Insurance, p. 58; cf. §§ 46, 47.

[2] *McArthur*, Ed. 2, p. 110; *Arnould*, Ed. 6, p. 754; cf. *Carver's* Carriage by Sea, Ed. 3, § 85; cf. § 55 (2) *ante*.

[3] *Thames and Mersey Mar. Ins. Co.* v. *Hamilton* (1887), 12 App. Cas. at p. 492 (the *Inchmaree* case); see *Paterson* v. *Harris* (1861), 30 L. J. Q. B. 354, distinguishing the chemical from the mechanical action of the sea; cf. *Blackburn* v. *Liverpool Steam Navigation Co.* (1902), 1 K. B. 290 (bill of lading case).

the same meaning in a marine policy that it has in a bill of lading or charter party, though its application to the contract is different.[1] As to the rule of proximate cause, see § 55, *ante*, and notes thereto.

Fire.

The term "fire" does not cover a loss caused by the explosion of steam, nor a fire caused by the inherent vice of the subject-matter insured, but it does cover a fire voluntarily caused in order to avoid capture by an enemy.[2] A rule to this effect was formerly included in the Bill, but was cut out by the Lord Chancellor's Committee, as it was suggested that the decisions it embodied might some day be questioned. For example—

Policy on hemp. If hemp is put on board in a damaged condition, liable to ferment, and fire is in consequence generated, and the hemp is consumed, the insurer is not liable.[3]

Though the insurer of goods is not liable for a loss caused by fire from *vice propre*, yet, if the goods have to be landed, and freight is thereby lost, the insurer on freight may be liable.[4]

As regards the phrase "unless the ship be stranded, sunk, or *burnt*," it has been held that the ship must be substantially burnt to fulfil the condition.[5]

Pirates.

8. The term "pirates" includes passengers who mutiny and rioters who attack the ship from the shore.[6]

NOTE.—See further, Note E, *post*, p. 168, on definition of piracy. For different purposes the definition varies.

Thieves.

9. The term "thieves" does not cover clandestine theft, or a theft committed by any one of the ship's company, whether crew or passengers.[7]

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[1] *Hamilton* v. *Pandorf* (1887), 12 App. Cas. at p. 525; *Wilson* v. *Owners of Cargo per Xantho* (1887), 12 App. Cas. at p. 509.

[2] See *McArthur*, Ed. 2, p. 115; *Arnould*, Ed. 6, p. 759; *Gordon* v. *Rimmington* (1807), 1 Camp. 123; 10 R. R. 656 (fire to avoid capture); *Thames and Mersey Mar. Ins. Co.* v. *Hamilton* (1887), 12 App. Cas. 484, 493 (explosion of steam).

[3] *Boyd* v. *Dubois* (1811), 3 Camp. 133; cf. *Pirie* v. *Middle Dock Co.* (1881), 4 Asp. Mar. Cas. 388.

[4] *The Knight of St. Michael* (1898), P. 30.

[5] *The Glenlivet* (1894), p. 48, C. A.

[6] *McArthur*, Ed. 2, p. 121; *Arnould*, Ed. 6, p. 770; cf. *Carver's* Carriage by Sea, Ed. 3, §§ 11, 94; *Owen's* Declaration of War, p. 437.

[7] *Arnould*, Ed. 6, p. 770; *Gow* on Insurance, p. 113; cf. *Carver's* Carriage by Sea, Ed. 3, § 94.

NOTE.—The terms "thief" and "theft" are used in a special sense in certain maritime documents.

Among the perils insured against in an ordinary policy, and among the excepted perils in most charter parties and bills of lading are "pirates, rovers, and *thieves*." In this context the term "thief" seems only to apply to a person who commits theft by violent means. "The theft that is insured against by name in the policy means that which is accompanied by violence (*latrocinium*), and not simple theft (*furtum*); it being an elementary rule of the law of insurance that *furtum non est casus fortuitus*" (*Arnould*, Ed. 6. p. 770). Some American policies use the words "pirates and assailing thieves." In a case on a bill of lading containing the exceptions "pirates, robbers, thieves," it was held that the word "thieves" applied only to strangers, and not to persons belonging to the vessel; and Archibald, J., after pointing out that the words were no doubt copied originally from the ordinary marine policy, expresses the opinion that a similar construction must be put upon both instruments.[1]

Restraint of princes.

10. The term "arrests, etc., of kings, princes, and people" refers to political or executive acts, and does not include a loss caused by riot or by ordinary judicial process.[2]

*Illustrations.*

1. Policy on goods owned by a Spaniard from London to Alicante. The ship calls at Corunna, and while there is seized by the Spanish Government for the purposes of transport, there being war between Spain and Morocco. The goods are unladen and damaged. This is a seizure of the goods within the meaning of the policy.[3]

2. Policy on gold from the Transvaal to London warranted free from capture and seizure. The gold is the property of a company registered in the Transvaal. On October 2 the gold while in transit

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[1] *Taylor* v. *Liverpool G. W. Steam Co.* (1874), L. R. 9 Q. B. 546, at p. 551.

[2] *McArthur*, Ed. 2, p. 128; *Arnould*, Ed. 6, p. 765; *Gow* on Insurance, p. 115; *Carver's* Carriage by Sea, Ed. 3, § 82; cf. *Cory* v. *Burr* (1883), 8 App. Cas. at p. 396.

[3] *Aubert* v. *Gray* (1862), 32 L. J. Q. B. 50, Ex. Ch.

is seized by the Transvaal Government in anticipation of war, and on October 11 war is declared. This is a seizure within the meaning of the warranty, and the insurer is not liable.[1]

3. Policy on consignment of bulls from England to Buenos Ayres. The bulls are prevented from landing under a law prohibiting the importation of live cattle from infected countries. The bulls have to be sent on to another country at great expense. This is a loss through the restraint of princes.[2]

4. Voyage policy on a bull to Buenos Ayres, the policy being against all risks, including mortality, but containing a warranty against capture, seizure, and the consequences of detention. There having been cattle disease on board, the bull on arrival is slaughtered by the local authority. The insurer is protected by the warranty.[3]

NOTE.—An insurance against British capture is illegal, see note to § 91. The word "people" in this context, says Lord Kenyon, "means the ruling power of the country."[4]

In a case, in 1883, where a ship, warranted free from capture and seizure, was forcibly seized and practically destroyed by natives in the Brass River, whose object was to plunder the cargo, Cave, J., held that this was a seizure within the warranty. After commenting on the various attempts to define the terms "capture" and "seizure," he says, "The seeming confusion in some of these passages arises from the desire of the authors in question to give a distinct and different meaning to such words as 'capture,' 'seizure,' 'arrest,' 'detention,' and 'restraint,' and the impossibility of accomplishing the task is shown by their attempts to distinguish between 'arrest,' 'restraint,' and 'detention.' I have no doubt that the word 'seizure,' like many other words, is sometimes used with a more general, and sometimes with a more restricted, meaning; and whether it is used in a particular case with the one meaning or the other depends, not on any general rule, but on the context and circumstances of the case."[5] As to takings at sea and the warranty "free from capture and seizure," see *Owen's* Declaration of War, p. 68; as to embargo, *ibid.*, p. 39; and as to blockade, *ibid.*, p. 123.

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[1] *Robinson Gold Mining Co.* v. *Alliance Marine Assurance Co.* (1902), 2 K. B. 489, C. A.; affirmed A. C. (1904), 359 H. L.

[2] *Miller* v. *Law Accident Insurance Co.* (1903), 1 K. B. 712, C. A., reversing on one point, *ibid.* (1902), 2 K. B. 694.

[3] *St. Paul Fire and Mar. Ins. Co.* v. *Morice* (1906), 11 Com. Cas. 153.

[4] *Nesbitt* v. *Lushington* (1792), 4 T. R. at p. 787.

[5] *Johnston* v. *Hogg* (1883), 10 Q. B. D. at p. 435.

11. The term "barratry" includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer.[1] Barratry.

NOTE.—This definition is inclusive, not exhaustive. See Note B, *post*, p. 163, on definitions of barratry, and discussion thereof.

12. The term "all other perils" includes only perils similar in kind to the perils specifically mentioned in the policy.[2] All other perils.

NOTE.—The practical effect of the words is to prevent a narrow and technical construction being placed upon the perils specifically enumerated. If the assured wants to go further than this, he must cover his risk by special terms. For instance, policies on animals are sometimes expressed to be against "all risks," or "all risks, including mortality." The expression "mortality" appears only to include death from natural causes.[3] See § 3 (2), *ante*, defining "maritime perils."

13. The term "average unless general" means a partial loss of the subject-matter insured other than a general average loss, and does not include "particular charges."[4] Average unless general.

NOTE.—In a case where it was held that general average could not be added to particular average to make up the 3 per cent. warranty, Lord Esher says that the words "average unless general" "must be read as equivalent to warranted free from partial loss under 3 per cent., unless it be a general average loss;" and Lord Bowen

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[1] *Arnould*, Ed. 6, p. 774; cf. *Carver's* Carriage by Sea, Ed. 3, §§ 99, 100.

[2] *Arnould*, Ed. 6, p. 789; *Cullen* v. *Butler* (1816), 5 M. & S. at p. 465; *Thames and Mersey Ins. Co.* v. *Hamilton* (1887), 12 App. Cas. 484, reviewing the cases at p. 495; *The Knight of St. Michael* (1898), P. at p. 35 (fire). Compare § 2199 of the Californian Code, which uses the words, "all other dangers peculiar to the seas."

[3] *St. Paul Fire and Mar. Ins. Co.* v. *Morice* (1906), 11 Com. Cas. 153.

[4] See *McArthur*, Ed. 2, pp. 173, 261; see, too, § 64 and § 66 and notes thereto, and Note C on Average, *post*, p. 164.

points out that from the time of Lord Mansfield the words have been read "as an exception, and not a condition, with this consequence, that the occurrence of a general average loss was held not to entitle the assured to recover for a particular average loss."[1] See further, Rule 14, and notes, and Note C, *post*, p. 164.

Stranded.

14. Where the ship has stranded the insurer is liable for the excepted losses, although the loss is not attributable to the stranding, provided that when the stranding takes place the risk has attached and, if the policy be on goods, that the damaged goods are on board.[2]

NOTE.—It is unsafe to attempt a complete legal definition of "stranding." The question is mainly one of fact. Lord Tenterden, in an often-quoted case, says, "Where a vessel takes the ground in the ordinary and usual course of navigation and management in a tide river or harbour upon the ebbing of the tide or from natural deficiency of water so that she may float again upon the flow of tide or increase of water, such an event shall not be considered as stranding within the sense of the memorandum. But where the ground is taken under any extraordinary circumstances of time or place, by reason of some unusual or accidental occurrence, such an event shall be considered as stranding within the meaning of the memorandum. According to the construction that has long been put upon the memorandum, the words 'unless general or the ship be stranded' are to be considered as an exception out of the exception as to the amount of the average or partial loss provided for by the memorandum, and consequently to leave the matter at large, according to the contents of the policy."[3] See also note to last rule.

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[1] *Price* v. *A 1 Small Damage Assn.* (1889), 22 Q. B. D. at pp. 586, 591.

[2] See *McArthur*, Ed. 2, p. 283; *Arnould*, Ed. 6, p. 821; *Thames and Mersey Mar. Ins. Co.* v. *Pitts* (1893), 1 Q. B. 476 (goods in lighters, not on board); *The Alsace Lorraine* (1893), P. 209 (goods landed at port of refuge); cf. *Russell* v. *Erwin* (1890), 6 Times L. R. 353, as to when a barge is stranded.

[3] *Wells* v. *Hopwood* (1832), 3 B. & Ad. 20, at p. 34; see this passage approved in *Letchford* v. *Oldham* (1880), 5 Q. B. D. 538, 545, C. A., where the cases are reviewed.

15. The term "ship" includes the hull, materials and outfit, stores and provisions for the officers and crew, and, in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade, and also, in the case of a steamship, the machinery, boilers, and coals and engine stores, if owned by the assured.[1] Ship.

NOTE.—This definition is inclusive, and not necessarily exhaustive. See § 16, *ante*; and see § 30 (2).

16. The term "freight" includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money.[2] Freight.

NOTE.—The term "freight" is used throughout the Act in the same sense as in the policy. See § 90, *ante*.

17. The term "goods" means goods in the nature of merchandise, and does not include personal effects or provisions and stores for use on board. Goods.

In the absence of any usage to the contrary, deck cargo and living animals must be insured specifically, and not under the general denomination of goods.[3]

NOTE.—The expression "goods," in ordinary law, covers all moveable tangible property.[4] But when used in a policy, the nature of the contract imposes a restricted meaning. If the insurer is required

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[1] See *McArthur*, Ed. 2, p. 67; and § 16, *ante*.

[2] See *Arnould*, Ed. 6, p. 31; *Flint* v. *Flemyng* (1830), 1 B. & Ad. 45; *Denoon* v. *Home and Colonial Ass. Co.* (1872), L. R. 7 C. P. at p. 349.

[3] See *McArthur*, Ed. 2, p. 58; *Arnould*, Ed. 6, pp. 24–28; *Gow* on Insurance, pp. 44-46. As to meaning of "merchandise" in a contract of affreightment, see *Carver's* Carriage by Sea, Ed. 3, § 263. The rule as to deck cargo probably does not apply to inland voyages by river or canal, *Apollinaris Co.* v. *Nord Deutsche Ins. Co.* (1904), 1 K. B. 252, *cessante ratione, cessat ipsa lex.*

[4] See, *e.g.*, *Chalmers'* Sale of Goods Act, 1893, § 62, and notes.

to undertake anything more than an ordinary risk, the policy ought to disclose the particular nature or the subject-matter insured. Hence it has been held that machinery is not covered by a policy on goods.[1] So, too, if the policy is on a particular kind of goods, goods of another kind cannot be substituted.[2] The construction of the rule would presumably be influenced by the fact whether or not the particular subject-matter was in fact made known to the insurer before the conclusion of the contract. See further, § 26 and notes thereto.

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[1] *Scott* v. *Mannheim Ins. Co.*, Times, April 19, 1899.
[2] *Mackenzie* v. *Whitworth* (1875), 1 Ex. D. at p. 41.

# SECOND SCHEDULE.



## ENACTMENTS REPEALED.

| Session and Chapter. | Title or Short Title. | Extent of Repeal. |
|---|---|---|
| 19 Geo. 2. c. 37. | An Act to regulate insurance on ships belonging to the subjects of Great Britain, and on merchandizes or effects laden thereon.[1] | The whole Act. |
| 28 Geo. 3. c. 56. | An Act to repeal an Act made in the twenty-fifth year of the reign of his present Majesty, intituled "An Act for regulating Insurances on Ships, and on goods, merchandizes, or effects," and for substituting other provisions for the like purpose in lieu thereof.[2] | The whole Act so far as it relates to marine insurance. |
| 31 & 32 Vict. c. 86. | The Policies of Marine Assurance Act, 1868.[3] | The whole Act. |

[1] See § 4, pp. 8 and 9, reproducing this statute.

[2] See *Arnould*, Ed. 6, p. 107, for history of this legislation, and § 23 (1).

[3] See § 50, reproducing this statute.

## CUSTOMARY DEDUCTIONS.

(*See Section* 69 (1).)

In the adjustment of claims for particular average in a policy on ship, in the absence of any special provision in the policy, the following items for repairing damage or making good losses are recoverable from the insurer without deduction, new for old:—

Graving dock expenses.

Cost of removals.

Use of shears, stages, and graving dock appliances, and cost of cartage and carriage.

Cost of anchors and of provisions and stores which have not been in use.

Cost of temporary repairs.

Cost of straightening bent ironwork.

All repairs of damage sustained by a vessel on her first voyage.

Chain cables are subject to a deduction of one-sixth.

All other repairs of damage sustained after the first voyage are subject to a deduction of one-third.[1]

Metal sheathing must be dealt with by allowing in full the cost of a weight equal to the gross weight of metal sheathing stripped off, minus proceeds of the old metal. Nails, felt, and labour metalling are subject to one-third, also the cost of replacing metal lost.

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[1] See *McArthur*, Ed. 2, pp. 184, 213; cf. *Gow* on Insurance, p. 339, and Rules of Practice of Association of Average Adjusters, *post*, p. 173.

# APPENDIX I.—STATUTES.

## THE STAMP ACT, 1891.

(54 & 55 Vict. c. 39.)

*Policies of Insurance.*

**91.** For the purposes of this Act the expression "policy of insurance" includes every writing whereby any contract of insurance is made or agreed to be made, or is evidenced, and the expression "insurance" includes assurance.[1] Meaning of policy of insurance.

*Policies of Sea Insurance.*

**92.**—(1.) For the purposes of this Act the expression "policy of 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 of, or any other interest[2] which may be lawfully insured in or relating to, any ship or vessel, and includes any insurance of goods, merchandise, or property for any transit which includes not only a sea risk, but also any other risk incidental to the transit insured from the commencement of the transit to the ultimate destination covered by the insurance. Meaning of policy of sea insurance.

(2.) Where any person, in consideration of any sum of money paid or to be paid for additional freight or otherwise, agrees to take upon himself any risk attending goods, merchandise, or property of any description whatever while on board of any ship or vessel, or engages to indemnify the owner of any such goods, merchandise, or property from any risk, loss, or damage, such agreement or engagement shall be deemed to be a contract for sea insurance.

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[1] As to the provisions which follow, see generally *Highmore's* Stamp Laws, pp. 147–153, and see correspondence with Inland Revenue in *Owen's* Notes and Clauses, Ed. 3, and *Allen's* Stamp Duties on Sea Insurances.

[2] The word "interest" in this context clearly includes liability.

Contract to be in writing. 25 & 26 Vict. c. 63.

**93.**—(1.) A contract for sea insurance (other than such insurance as is referred to in the fifty-fifth section of the Merchant Shipping Act Amendment Act, 1862)[1] shall not be valid unless the same is expressed in a policy of sea insurance.

(2.) No policy of sea insurance made for time shall be made for any time exceeding twelve months.[2]

(3.) A policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding twelve months.[3]

Policy for voyage and time chargeable with two duties.

**94.** Where any sea insurance is made for a voyage and also for time, or to extend to or cover any time beyond thirty days after the ship shall have arrived at her destination and been there moored at anchor, the policy is to be charged with duty as a policy for a voyage, and also with duty as a policy for time.

No policy valid unless duly stamped.

**95.**—(1.) A policy of sea insurance may not be stamped at any time after it is signed or underwritten by any person, except in the two cases following; that is to say,

(*a.*) Any policy of mutual insurance having a stamp impressed thereon may, if required, be stamped with an additional stamp provided that at the time when the additional stamp is required the policy has not been signed or underwritten to an amount exceeding the sum or sums which the duty impressed thereon extends to cover:

(*b.*) Any policy made or executed out of, but being in any manner enforceable within, the United Kingdom, may be stamped at any time within ten days after it has been first received in the United Kingdom on payment of the duty only.

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[1] Section 55 of the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), is now repealed, and reproduced in § 506 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60). The saving effected by this section is curious. The object of the Merchant Shipping Act was to make it clear that although the shipowner's common-law liability was limited by the Act, he was nevertheless entitled to insure against this limited liability. The apparent effect of the saving is to dispense with the necessity for a policy in those cases.

[2] This provision is reproduced in § 25 (2) of the Act, *ante*, p. 36. It must be read with § 11 of the Finance Act, 1901, *post*, p. 159, which, with certain conditions and qualifications, authorizes continuation clauses in marine policies.

[3] The effect of these provisions is reproduced in § 23 of the Act, *ante*, p. 34. The words "the names of the subscribers or underwriters," though more applicable to individual insurers, include a body corporate.

(2.) Provided that a policy of sea insurance shall for the purpose of production in evidence be an instrument which may legally be stamped after the execution thereof, and the penalty payable by law on stamping the same shall be the sum of one hundred pounds.

Legal alterations in policies may be made under certain restrictions.

**96.** Nothing in this Act shall prohibit the making of any alteration which may lawfully be made in the terms and conditions of any policy of sea insurance after the policy has been underwritten; provided that the alteration be made before notice of the determination of the risk originally insured, and that it do not prolong the time covered by the insurance thereby made beyond the period of six months in the case of a policy made for a less period than six months, or beyond the period of twelve months in the case of a policy made for a greater period than six months, and that the articles insured remain the property of the same person or persons, and that no additional or further sum be insured by reason or means of the alteration.[1]

Penalty on assuring unless policy duly stamped.

**97.**—(1.) If any person—

(*a.*) becomes an assurer upon any sea insurance, or enters into any contract for sea insurance, or directly or indirectly receives or contracts or takes credit in account for any premium or consideration for any sea insurance, or knowingly takes upon himself any risk, or renders himself liable to pay, or pays, any sum of money upon any loss, peril, or contingency relative to any sea insurance, unless the insurance is expressed in a policy of sea insurance duly stamped, or

(*b.*) makes or effects, or knowingly procures to be made or effected, any sea insurance, or directly or indirectly gives or pays, or renders himself liable to pay, any premium or consideration for any sea insurance, or enters into any contract for sea insurance, unless the insurance is expressed in a policy of sea insurance duly stamped, or

(*c.*) is concerned in any fraudulent contrivance or device, or is guilty of any wilful act, neglect, or omission, with intent to evade the duties payable on policies of sea insurance, or whereby the duties may be evaded,

he shall for every such offence incur a fine of one hundred pounds.

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[1] At common law a contract may be altered with the consent of the parties thereto. A material alteration made by one party, without the consent of the other, avoids the contract, and, if the alteration is made fraudulently, it may amount to forgery. As to the alterations which do or do not require a new stamp, see *Arnould*, Ed. 6, p. 267; *McArthur*, Ed. 2, pp. 47–49.

(2.) Every broker, agent, or other person negotiating or transacting any sea insurance contrary to the true intent and meaning of this Act, or writing any policy of sea insurance upon material not duly stamped, shall for every such offence incur a fine of one hundred pounds; and shall not have any legal claim to any charge for brokerage, commission, or agency, or for any money expended or paid by him with reference to the insurance, and any money paid to him in respect of any such charge shall be deemed to be paid without consideration, and shall remain the property of his employer.

(3.) If any person makes or issues, or causes to be made or issued, any document purporting to be a copy of a policy of sea insurance, and there is not at the time of the making or issue in existence a policy duly stamped whereof the said document is a copy, he shall for such offence, in addition to any other fine or penalty to which he may be liable, incur a fine of one hundred pounds.

## FIRST SCHEDULE.

* * * * *

| | £ | s. | d. |
|---|---|---|---|
| POLICY OF SEA INSURANCE— | | | |
| (1.) Where the premium or consideration does not exceed the rate of 2*s.* 6*d.* per centum of the sum insured . . . . . | 0 | 0 | 1 |
| (2.) In any other case— | | | |
| (*a.*) For or upon any voyage— | | | |
| In respect of every full sum of £100, and also any fractional part of £100 thereby insured | 0 | 0 | 3 |
| (*b.*) For time— | | | |
| In respect of every full sum of £100, and also any fractional part of £100 thereby insured— | | | |
| Where the insurance shall be made for any time not exceeding six months . | 0 | 0 | 3 |
| Where the insurance shall be made for any time exceeding six months and not exceeding twelve months . . | 0 | 0 | 6 |

And see §§ 91, 92, 93, 94, 95, 96, and 97.

## SALE OF GOODS ACT, 1893.

(56 & 57 Vict. c. 71.)

§ 20.—Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer; but when the property therein is transferred to the buyer, the goods are at the buyer's risk, whether delivery has been made or not. Risk *primâ facie* passes with property.

Provided that where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party.[1]

§ 32.—(3.) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during sea transit.[2] Duty of seller as to insurance.

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## THE MERCHANT SHIPPING ACT, 1894.

(57 & 58 Vict. c. 60.)

§ 506.—An insurance effected against the happening, without the owner's actual fault or privity, of any or all of the events in respect of which the liability of owners is limited under this Part (VIII.) of this Act, shall not be invalid by reason of the nature of the risk.[3] Insurances of certain risks not invalid.

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## THE FINANCE ACT, 1901.

(1 Edw. 7, c. 7.)

§ 11.—(1.) Notwithstanding anything contained in the Stamp Act, 1891, a policy of sea insurance made for time may contain a continuation clause as defined in this section, and such a policy shall Provision as to continuation clauses in policies of sea insurance. 54 & 55 Vict. c. 39.

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[1] See notes to these provisions in *Chalmers'* Sale of Goods Act.

[2] *Ibid.*

[3] Part VIII. limits the liability of the owners of British ships. The object of this section is to make it clear that although the liability of a shipowner is limited, he is still at liberty to insure. See *ante*, p. 155, as to the saving in the Stamp laws for this provision.

not be invalid on the ground only that by reason of the continuation clause it may become available for a period exceeding twelve months.

(2.) There shall be charged on a policy of sea insurance containing such a continuation clause a stamp duty of sixpence in addition to the stamp duty which is otherwise chargeable on the policy.

(3.) If the risk covered by the continuation clause attaches and a new policy is not issued covering the risk, the continuation clause shall be deemed to be new and separate contract of sea insurance expressed in the policy in which it is contained, but not covered by the stamp thereon, and the policy shall be stamped in respect of that contract accordingly, but may be so stamped without penalty at any time not exceeding thirty days after the risk has so attached.

(4.) For the purposes of this section, the expression "continuation clause" means an agreement to the following or the like effect, namely, that in the event of the ship being at sea or the voyage otherwise not completed on the expiration of the policy, the subject-matter of the insurance shall be held covered until the arrival of the ship, or for a reasonable time thereafter not exceeding thirty days.[1]

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## THE REVENUE ACT, 1903.

(3 Edw. 7, c. 46.)

Stamping of policies on ships under construction, etc.

§ 8.—A policy of insurance made or purporting to be made upon, or to cover any ship or vessel, or the machinery or fittings belonging to the ship or vessel whilst under construction, or repair, or on trial, shall be sufficiently stamped for the purposes of the Stamp Act, 1891, and the Acts amending that Act, if stamped as a policy of sea insurance made for a voyage, and though made for a time exceeding twelve months shall not be deemed to be a policy of sea insurance made for time.

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[1] This section was inserted in consequence of the decisions in *Charlesworth* v. *Faber* (1900), 5 Com. Cas. 408, and *Royal Exchange* v. *Vega* (1901), 2 K. B. 567; affirmed (1902), 2 K. B. 384, C. A. In the latter case, a twelve-months-time policy contained a continuation clause to the following effect: "Should the vessel be at sea or abroad on the expiration of this policy, it is agreed to hold her covered until her arrival at the port of final destination in the United Kingdom at a *pro rata* daily premium to the within." It was held that the continuation clause must be construed as part of the original time policy, and as extending the insurance beyond the legal twelve months.

# APPENDIX II.—NOTES.

## Note A.—Definitions of Marine Insurance.

The following definitions of marine insurance may be referred to:— See § 1, *ante.*

1. "Marine insurance is a contract whereby one party, for a stipulated sum, undertakes to indemnify the other against loss arising from certain perils or sea risks to which his ship, merchandise, or other interest may be exposed during a certain voyage or a certain period of time." *Arnould*, Ed. 6, p. 16.

2. "Marine insurance is a contract whereby one party, for a specified consideration, agrees to indemnify another who is interested in property exposed to marine risks, against loss incidental thereto." *McArthur*, Ed. 2, p. 1.

3. "Marine insurance is a contract whereby for a consideration stipulated to be paid by one interested in a ship, freight, or cargo subject to marine risks, another undertakes to indemnify him against some or all of those risks during a certain period or voyage." *Phillips* on Insurance, § 1 (U.S.).

4. "Assurance maritime, c'est un contrat par lequel l'un des contractants se charge des risques et fortunes de mer que doivent courir un vaisseau, ou les marchandises qui y doivent être chargées, et promet en indemniser l'autre contractant pour une certaine somme que celui-ci lui donne pour le prix du risque dont il se charge." *Pothier*, Traité du Contrat d'Assurance, § 4.

After fancifully comparing insurance to a contract of sale in which the assured buys from the insurer an indemnity from risk, Pothier proceeds to classify the contract by describing it as (*a*) consensual, (*b*) synallagmatic, for it gives rise to reciprocal obligations, (*c*) aleatory, not commutative, and (*d*) universal, *i.e.* du droit des gens.

5. "L'assurance est un contrat par lequel on promet indemnité des choses qui sont transportées par mer, moyennant un prix convenu entre l'assuré qui fait ou fait faire le transport et l'assureur qui prend le péril sur soi et le charge de l'événement. Cette définition est

tirée du Guidon de la mer et dc la doctrine de tous nos auteurs." *Emerigon*, Ch. I.

6. "Assecuratio est conventio seu contractus quo quis in se suscipit incertum periculum cui alter est obnoxius que e contrario eo nomine illi premium retribuere tenetur." *Grotius*; cited by Lawrence, J., in *Lucena* v. *Crauford* (1806), 2 B. & P. at p. 300, H. L., and see other ancient definitions cited at p. 295.

7. "A policy of marine insurance is a contract of indemnity against all losses accruing to the subject-matter of the policy from certain perils during the adventure." *Lloyd* v. *Fleming* (1872), L. R. 7 Q. B. at p. 302, per Lord Blackburn.

Most of these definitions assume that thc premium is an essential part of the contract. Generally it is so, but there are exceptions, so that it does not necessarily enter into thc definition. In the case of mutual insurance the policy is silent as to premium, and the contributions of members are provided for by thc rules of the association. Besides, a policy may be under seal, and a contract under seal imports consideration.[1]

Comparing marine with life insurance, the former is a contract of indemnity, the latter is not.[2] Death is a certainty, the datc of its occurrence only is uncertain. Moreover, human lifc is incapable of money valuation.

Comparing marine insurancc with fire insurancc, both of them are contracts of indemnity,[3] but the measure of indcmnity is assessed on wholly different principles.[4] In a fire insurance (unless the policy otherwise provides) if goods valued at £20,000 be insured for £1000, and a loss of £1000 occurs, the insurer is liable for that amount; but with regard to marine insurancc, if goods to the value of £20,000 are insured for £1000, and a loss occurs, it is necessary to show what proportion the goods lost bear to thc whole value, for thc owner of the goods is his own insurer for £19,000. See a clear exposition of the principle per Walton, J.[5]

For a comparison between a contract of insurance and a contract of guarantee, see *Seaton* v. *Heath* (1899), 1 Q. B. at p. 792, and *Rowlatt's* Principal and Surety, p. 9.

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[1] *Roberts* v. *Security Co., Ltd.* (1897), 1 Q. B. 111, C. A.

[2] *Dalby* v. *Ind. Life Ass. Co.*, 15 C. B. 355; *Burnand* v. *Rodocanachi* (1882), 12 App. Cas. at p. 340.

[3] *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, C. A.

[4] See *Joyce* v. *Kennard* (1871), L. R. 7 Q. B. at p. 81.

[5] *Anglo-Californian Bank* v. *London and Prov. Mar. Ins. Co.* (1904), 10 Com. Cas. at pp. 8, 9 (guarantee and marine policy contrasted).

NOTE B.—DEFINITIONS OF BARRATRY.

Barratry, in the maritime sense of the term, is derived from the Italian word "barrateria," which is supposed to be of Arabic origin, and which signifies "cheating." The following definitions may be referred to:— See Sched. I., Rule 11.

1. "Barratry, in English law, may be said to comprehend not only every species of fraud and knavery covinously committed by the master with the intention of benefiting himself at the expense of his owners, but every wilful act on his part of known illegality, gross malversation, or criminal negligence, by whatever motive induced, whereby the owners or charterers of the ship (in cases where the latter are considered owners *pro tempore*) are in fact damnified." *Arnould*, Ed. 6, p. 775.

2. "Any act, with criminal intent, committed by the master or crew of a vessel, in violation of their duty to the shipowner, and without his connivance, is barratry." *McArthur*, Ed. 2, p. 130.

3. "Barratry or barratry of the master or mariners means any wilful act of spoliation, or violence to the ship or goods, or any fraudulent or consciously illegal act which exposes the ship or goods to danger of damage, destruction, or confiscation, done by the master or crew without the consent of the shipowner." *Carver's* Carriage by Sea, Ed. 3, § 99.

4. "Barratry is an unlawful, fraudulent, or dishonest act of the master mariners or other carriers, or of gross misconduct, or very gross and culpable negligence, contrary in either case to their duty to the owner, and that might be prejudicial to him or to others interested in the voyage or adventure." *Phillips* on Insurance, § 1062 (U.S.).

5. "Barratry is every species of fraud or knavery in the master of a ship by which the freighters or owners are injured; and in this light a criminal deviation is barratry, if the deviation be without their consent." *Lockyer* v. *Offley* (1786), 1 T. R. 259; 1 R. R. 197, per Willes, J.

6. "Barratry is considered as being precisely tantamount to fraud, in the particular relation which subsists between master, mariners, and owners; being such by which a loss may happen to the subject-matter insured." *Earle* v. *Rowcroft* (1806), 8 East, 134; 9 R. R. 385, 392; approved *Cory* v. *Burr* (1883), 8 App. Cas. 399. All the definitions and cases up to 1870 are reviewed in an American case, *Atkinson* v. *Great Western Ins. Co.* (1872), 1 Asp. Mar. Cas. (N. S.) 382.

7. "Les termes *baratteries du patron* comprennent toutes les espèces, tant de dol que de simple imprudence, défaut de soin et

impéritie, tant du patron que des gens de l'équipage." *Pothier*, Traité d'Assurance, § 65.

Comparing the French with the English definition, it appears that the French definition includes losses caused by unskilful and improper navigation, which in England would be attributed to losses by perils of the seas. In England the essence of barratry is a criminal or quasi-criminal breach of duty to the owners for the time being. As Lord Ellenborough says, "In order to constitute barratry, which is a crime, the captain must be proved to have acted against his better judgment." [1]

If the master commits a criminal act with the privity of his owners it is not barratry; but if the master be a part-owner his barratrous act is none the less barratry as against innocent co-owners and shippers.[2]

The general opinion is that barratry can only be committed against the owner, or a charterer who *pro hac vice* is in the position of an owner (*Arnould*, Ed. 6, p. 785); but Hannen, J., in one case ruled that if a ship was scuttled with the consent of the owners it would be barratry as regards an innocent shipper of goods.[3]

The following acts are instances of barratry:—Engaging in smuggling, deviation in order to smuggle, fraudulent sale of ship and cargo, scuttling the ship.

## Note C.—Definition of Average.

See § 64, *ante*.

Much learning and ingenuity have been spent on the endeavour to define the true meaning of the term "average." See *McArthur*, Ed. 2, p. 386; *Arnould*, Ed. 6, p. 828. The fact is that the term is used in different senses, and its meaning in each case must be sought in its context.

The word is derived from the French "avarie" or Italian "avaria," which themselves are of uncertain derivation. The final syllable follows the form of such words as "towage" and "poundage." Originally the term "average" signified a toll or duty. In ordinary shipping law it denotes an extra charge, as in the expression "primage and average as accustomed."

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[1] *Todd* v. *Ritchie* (1815), 1 Stark. 240.

[2] *Jones* v. *Nicholson* (1854), 10 Exch. 28, 37; *Westport Coal Co.* v. *McPhail* (1898), 2 Q. B. 132; *Small* v. *U. K. Mar. Assn.* (1897), 2 Q. B. 311, C. A. (innocent mortgagee).

[3] *Ionides* v. *Pender* (1872), 1 Asp. Mar. Cas. (N. S.), 432, 435.

In insurance law the use of the word "average" is very puzzling. The fact is, the law has been developed piecemeal by decisions, and no uniform theory has been worked out. A partial loss, as distinguished from a total loss, may be either a general average loss or a particular average loss, that is to say, it may be a loss which gives rise to a right of contribution, or a loss which does not do so. But here a complication comes in. The term "particular average loss" applies only to damage to the subject-matter insured. Expenses incurred for the purpose of preserving the subject-matter from peril are known as particular charges, and are recoverable under the sue and labour clause, and not under the body of the policy (see §§ 66 and 78); but the expression "general average" includes a general average expenditure as well as a general average sacrifice, and also a general average contribution. Therefore, the scope of the word "average" in the two classes of cases is different.

The expression "average unless general," as used in the memorandum to Lloyd's policy, is a good illustration of the confused use of the word. It appears to mean "a partial loss of the subject-matter insured, which is not a general average loss." See *ante*, p. 149.

But the case of a general average sacrifice gives rise to a further complication. If, for example, insured goods be jettisoned so as to constitute a general average loss, the insurer who has insured against jettison is liable under the express terms of the policy. As between insurer and assured, the loss is to this extent a particular average loss, though for other purposes the loss is a general average loss (see *ante*, pp. 98, 100). But even this rule is not carried to its logical conclusion, because it has been held that for the purpose of making up the 3 per cent. franchise a general average loss cannot be added to a particular average loss. (See *McArthur*, Ed. 2, p. 386, and *ante*, p. 113.)

According to French law, "le mot *avarie* désigne un dommage matérial et aussi une dépense extraordinaire faite pour le navire et pour les merchandises, conjointement ou separément." Code de Commerce, Art. 397. "Les avaries se divisent en deux classes. Elles sont (1) simples ou particulières; (2) grosses ou communes." *Bravard-Demangeat*, Ed. 7, p. 475.

French law, therefore, differs from English law by including expenses which, under our law, would be classed as "particular charges." See *Kidston* v. *Empire Ins. Co.* (1866), L. R. 1 C. P. at p. 550, per Willes, J. See particular charges distinguished from general average, *McArthur*, Ed. 2, p. 173.

NOTE D.—DEFINITION OF ABANDONMENT.

See §§ 63 and 79.

ABANDONMENT (from the French "abandonner," but the corresponding term in insurance is "délaissement").—In ordinary language the term "abandonment" is used as the equivalent of "relinquishment."

But in marine insurance law the term has a highly special though indefinite meaning. It is used to denote (1) the voluntary cession by the assured to the insurer of whatever remains of the subject-matter insured, in case of constructive total loss; (2) the notice by which the assured signifies to the insurer his election to abandon; and (3) the cession which takes place, by operation of law, of whatever remains of the subject-matter insured when the insurer pays for total loss.

I. In marine insurance, where there is a constructive total loss, the assured may elect either to treat the loss as a partial loss or, within a reasonable time, to cede to the insurer, as from the date of the casualty causing the loss, whatever may remain of the subject-matter insured, together with all proprietary rights and remedies incident thereto, and claim for a total loss. This cession is called abandonment.

"Abandonment is the act of cession, by which in cases where the loss or destruction of the property, though not absolute, is highly imminent, or its recovery is too expensive to be worth the attempt, the assured, on condition of receiving at once the whole amount of the insurance, relinquishes to the underwriters all his property and interest in the thing insured, as far as it is covered by the policy, with all the claims that may ensue from its ownership, and all the profits that may arise from its recovery." *Arnould*, Marine Insurance, Ed. 6, p. 953, citing in notes 2 Pardessus 400 "Le délaissement equipolle à un transport." But see *Arnould*, Ed. 7, pp. 1388, 1390, distinguishing abandonment from subrogation.

"Abandonment is a relinquishment to the underwriter, in case of loss constructively total, of all right, title, and claim to what may be saved, leaving it to him to make the most of it for his own benefit. It operates as an assignation." *Bell's* Principles of the Laws of Scotland, § 484.

"L'acte par lequel l'assuré quitte et délaisse aux assureurs les droits, noms, raisons et actions de propriété qu'il a en la chose assurée." *Emérigon*, Traité des Assurances, c. 17, citing Guidon de la Mer, Ch. 7, Art. 1. As to the modern French definition, see *Sacre*, Dictionnaire de Droit Commercial, Tit. Avarie, No. 5.

"In reference to constructive total loss, it is defined to be a cession or transfer of the ship from the owner to the underwriter, and of all

his property and interest in it, with all the claims that may arise from its ownership, and all the profits that may arise from it, including the freight then being earned. Its operation is as effectually to transfer the property in the ship to the underwriter as a sale for valuable consideration." Per Martin, B., *Rankin* v. *Potter* (1873), L. R. 6 H. L. at p. 144.

II. The notice by which the assured signifies to the insurer his election to abandon and claim for a total loss is frequently confused with the abandonment or cession itself. Thus the Draft New York Civil Code, § 1486, proposes to define abandonment as "the act by which after a constructive total loss the person insured declares to the insurer that he relinquishes to him his interest in the thing insured." "The cession or abandonment," says Blackburn, J., "is a very different thing from a notice of abandonment, though the ambiguous word 'abandonment' often leads to confounding the two." *Rankin* v. *Potter* (1873), L. R. 6 H. L. at pp. 118, 119, 156.

III. Where the insurer pays or settles for a total loss, the assured is bound to abandon or cede to the insurer, as from the date of the casualty causing the loss, whatever may remain of the subject-matter insured, together with all rights and remedies incident thereto. This cession is sometimes called abandonment, and sometimes is referred to as the "subrogation" of the insurer for the assured. See *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, C. A. Abandonment in this sense of the term is not peculiar to marine insurance, but is a necessary incident of every contract of indemnity. It is to be noted that life insurance, unlike the insurance of property, is not a contract of indemnity. *Rankin* v. *Potter* (1873), L. R. 6 H. L. at pp. 118, 119.

"On general principles of equity, not at all peculiar to marine insurance, he who recovers on a contract of indemnity must and does by taking satisfaction from the person indemnifying him, cede all his right in respect of that for which he obtains indemnity. There is no notice of abandonment in fire insurance, but the salvage is transferred on the principle of equity, expressed by Lord Hardwicke, that the person who originally sustains the loss was the owner, but, after satisfaction made to him, the insurer." Per Blackburn, J., *Rankin* v. *Potter* (1873), L. R. 6 H. L. at p. 118 (loss of freight).

"Where the owners of an insured ship have claimed or been paid as for a total loss, the property in what remains of the ship, and all rights incident to the property, are transferred to the underwriters *as from the time of the disaster in respect of which the total loss is claimed for and paid.* The right to receive payment of freight accruing due but not earned at the time of the disaster is one of those rights so incident to the property in the ship, and it therefore passes

to the underwriters, because the ship has become their property, just as it would have passed to a mortgagee of the ship who before the freight was completely earned had taken possession of the ship. This is at times very hard upon the insured owner of the ship; he can, however, avoid it by claiming only for a partial loss, keeping the property in himself, and so keeping the right to earn the accruing freight. In such a case he recovers an indemnity for the amount of the loss actually sustained, in calculating which all the benefits incident to the property retained by the shipowner must be considered.

"But the *right of the assured to recover damages from a third person is not one of those rights which are incident to the property in the ship; it does pass to the underwriters in case of payment for a total loss, but on a different principle.* And on this same principle it does pass to the underwriters, who have satisfied a claim for a partial loss, though no property in the ship passes.

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"*Mason* v. *Sainsbury* (3 Douglas' Rep. 61) and *Yates* v. *Whyte* (4 Bing. N. C. 272) were both cases of partial loss only. The right of the underwriters could not arise in those cases by relation back to the passing of the property at the time of the loss, for there was no such passing of the property. It could only arise, and did only arise, from the fact that the underwriters had paid an indemnity, and so were subrogated for the person whom they had indemnified in his personal rights from the time of the payment of the indemnity." Per Lord Blackburn, *Simpson* v. *Thomson* (1877), 3 App. Cas. at pp. 292, 293.

In a later case, Brett, L.J., proceeds to point out that abandonment is applicable to every claim for a total loss, whether actual or constructive. "If there is anything to abandon, abandonment must take place; as, for instance, when there is an actual total loss, and that which remains of a ship is what has been called a congeries of planks, there must be an abandonment of the wreck. . . . But that abandonment must take place at the time of the settlement of the claim. It need not take place before." *Kaltenbach* v. *Mackenzie* (1878), 3 C. P. D. at p. 471.

## Note E.—Definition of Piracy.

See Sched. I., Rule 8.

Piracy (from Lat. *piratica*, sea robbery).—Robbery with violence at sea is called piracy, but no precise general definition of the term can be given. There are certain acts which all civilized nations recognize as piratical, and which constitute piracy, *jure gentium*.

Then there is the common law definition of piracy, and then by the statute law of various countries certain acts are deemed to constitute piracy for the purposes to which the statute apply. Thus "the slave trade is piratical in England and the United States, and in France the crew of an armed vessel navigating in time of peace with irregular papers become pirates upon the mere fact of irregularity, without the commission of any act of violence. *Hall's* International Law, Ed. 3, p. 264. It is obvious that different legal consequences may ensue according as an act comes within one or another of these overlapping but not coincident descriptions of piracy. For instance, the master of a ship might be criminally liable for piracy on facts which would not constitute piracy within the meaning of a mercantile document, such as a charter party or marine policy. The following definitions may be cited:—

1. "Piracy is defined by the text writers to be the offence of depredating on the seas without being authorized by any sovereign state, or with commissions from different sovereigns at war with each other." *Wheaton*, International Law, Ed. 2, p. 246. As to piracy by municipal law, see at p. 247.

2. "The crime of piracy, or robbery and depredation upon the high seas, is an offence against the universal law of society, a pirate being, according to Sir Edward Coke, *hostis humani generis*. . . . The offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas which if committed upon land would have amounted to felony there. But by statute some other offences are made piracy also." *Blackstone*, Commentaries, vol. 4, pp. 71, 72, citing 2 Inst. 113. Cf. *Cicero*, off. 3, 29. *Pirata non est perduellium numero definitus, sed communis hostis omnium.*

3. "Piracy, by the law of nations, is taking a ship on the high seas, or within the jurisdiction of the Lord High Admiral, from the possession or control of those who are lawfully entitled to it, and carrying away the ship itself, or any of its goods, tackle, apparel, or furniture, under circumstances which would have amounted to robbery if the act had been done within the body of an English county. . . . It is doubtful whether persons cruising in armed vessels with intent to commit piracies are pirates or not." *Stephen's* Digest of Criminal Law, Ed. 3, Art. 104; as to piracy by statute for criminal purposes, see Arts. 106-117.

4. "Piracy is forcible robbery at sea, whether committed by marauders from outside the ship or by mariners or passengers within it. The essential element is that they 'violently dispossess the master, and afterwards carry away the ship itself or any of the goods

with felonious intent.'" *Carver's* Carriage by Sea, Ed. 3, § 94, citing *A.-G. for Hong Kong* v. *Kwok-a-Sing* (1873), L. R. 5 P. C. at p. 179.

5. "Piracy is robbery on the sea, or by descent from the sea upon the coast, committed by persons not holding a commission from or at the time pertaining to any established state. . . . Piracy, being a crime against nations, may be brought before any court, no matter what the nationality of the plaintiff or the origin of the pirate may be. The law of such state may enlarge the definition of the crime of piracy, but must confine the operation of the new definition to its own citizens and foreigners on its own vessels." *Wolsey,* International Law, § 137.

6. "The charge of Sir Charles Hedges (13 St. Tr. 454) contains a correct exposition of the law as to what constitutes piracy *jure gentium.* Piracy is only a sea term for robbery, piracy being a robbery within the jurisdiction of the Admiralty. . . . If the mariners of any ship shall violently dispossess the master and afterwards carry away the ship itself, or any of the goods, with a felonious intention, in any place where the Lord Admiral hath jurisdiction, this is robbery and piracy." *A.-G. for Hong Kong* v. *Kwok-a-Sing* (1873), L. R. 5 P. C. at p. 199. (Murder of a Frenchman on a French ship by a Chinese. Piracy justiciable in any court.)

7. "The taint of piracy does not, in the absence of conviction or condemnation, continue, like a maritime lien, to travel with the ship through her transfers to various owners." *R.* v. *McCleverty* (1871), L. R. 3 P. C. at p. 689.

8. "Piracy may be said to consist in acts of violence done upon the ocean or unappropriated lands, or within the territory of a state through descent from the sea, by a body of men acting independently of any politically organized society." *Hall's* International Law (1892), Ed. 3, p. 257.

## Note F.—History of Marine Insurance.

The origin of marine insurance is obscure. Loans on bottomry are of very ancient date. Money lent on bottomry is not repayable in case of loss, and marine insurance, the earliest form of insurance, may well have been a development of this maritime usage. There is evidence that marine insurance was known to the Lombards in the twelfth century, and some time later it was introduced into England, probably by the merchants of the Steelyard, the representatives of the Hanseatic League, whose treaty privileges in England were abolished

in 1578. Its English history is ably and exhaustively traced by Mr. F. Martin in his History of Lloyd's and Marine Insurance, published in 1876. It will be sufficient here to give the leading dates in that history.[1]

1589.—First reported case, *Anon*, 6 Coke R. 47B, tried before Wray, C.J.

1601.—First mention in the statute book. The 43 Eliz. c. 12 established a special court for the trial of marine insurance cases. The court fell into disuse by the end of the seventeenth century, but the Act was not repealed expressly till 1863. See *Martin*, p. 49.

1613.—Earliest extant English policy. It almost exactly resembles the form given in the Guidon de la Mer, published in France in 1600, and for the most part is in accord with the Lloyd's policy now in use. See *Martin*, p. 46.

1688.—First mention of Lloyd's coffee-house, resorted to by merchants and underwriters.

1720.—The "Royal Exchange Assurance Corporation" and the "London Assurance Corporation," incorporated by charter pursuant to the 6 Geo. 1, c. 18, with the privilege of being the only corporations or societies who were allowed to insure marine risks or lend money on bottomry.

1726.—Lloyd's List established. See *Martin*, p. 107.

1730.—Lloyd's Register of Shipping first published. See *Martin*, p. 325.

1745.—The Marine Insurance Act, 1745 (19 Geo. 2, c. 37), passed to prohibit wagering policies and re-insurance. See *Martin*, p. 139.

1749.—The "Memorandum" added to the common form of policy. See *McArthur*, Ed. 2, p. 274.

1756.—Lord Mansfield raised to the Bench. He sat till 1788, and settled the principles of English insurance law.

1769.—Lloyd's formed into a society with rules and regulations, and established in the Royal Exchange. See *Martin*, p. 145.

1779.—Lloyd's policy settled in its present form and printed. In 1850 a verbal alteration was made by omitting the introductory words "In the name of God, Amen," and substituting "Be it known that."

1788.—The Marine Insurance Act, 1788 (28 Geo. 3, c. 56), requires the name of the assured to be inserted in all policies.

1795.—Marine policies first required to be in writing and stamped

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[1] Mr. Marsden's Select Pleas of the Court of Admiralty, published for the Selden Society, contain some interesting antiquities of marine insurance.

by 35 Geo. 3, c. 63. See *Home Marine Ins. Co.* v. *Smith* (1898), 1 Q. B. at p. 834.

1824.—Monopoly of "Royal Exchange" and "London Assurance" Corporations abolished by 5 Geo. 4, c. 114, and companies and partnerships allowed to engage in marine insurance. See *Martin*, p. 290.

1834.—Establishment of "Lloyd's Register of British and Foreign Shipping" on modern basis. See *Martin*, p. 345. (N.B.—The society of "Lloyd's Register" is altogether apart from Lloyd's.)

1845.—The Gaming Act, 1845 (8 & 9 Vict. c. 109), makes void all contracts by way of gaming or wagering.

1862.—The Companies Act, 1862 (25 & 26 Vict. c. 89), provides for incorporation of limited companies, and prohibits associations of more than twenty persons from carrying on business unless incorporated.

1864.—Re-insurance again legalized by 27 & 28 Vict. c. 56. See *Mackenzie* v. *Whitworth*, 1 Ex. D. at p. 40.

1868.—The policies of Marine Assurance Act (31 & 32 Vict. c. 86) provides for assignment of policies and empowers assignee to sue in his own name.

1871.—Lloyd's incorporated and regulated by Lloyd's Act, 1871 (34 & 35 Vict. c. xxi.). See *Martin*, p. 356.

1891.—Stamp law consolidated by Stamp Act, 1891 (54 & 55 Vict. c. 39). Contracts of sea assurance required to be embodied in policy, specifying certain particulars, and not to be made for more than twelve months.

1894.—The Merchant Shipping Act, 1894 (56 & 57 Vict. c. 60), consolidates the laws relating to merchant shipping.

1901.—§ 11 of the Finance Act, 1901 (1 Edw. 7, c. 7), authorizes continuation clauses under certain conditions.

1906.—Marine Insurance law codified by Marine Insurance Act, 1906 (6 Edw. 7, c. 41).

The law of marine insurance developed more rapidly in France than in England. The Guidon de la Mer, published at Rouen about 1600, is a very complete exposition of the practice of that day. In 1681 the French law of marine insurance was codified by the Ordonnance de la Marine. The great works of Pothier and Emérigon appeared in the eighteenth century, and with their assistance the Ordonnance of 1681, with various improvements and additions, was re-enacted in 1808, by the existing Code de Commerce, Arts. 332 to 439.

The French code formed the basis of the other continental codes, but most of the continental nations have now re-enacted their commercial codes, and in so doing have departed more or less widely from the original model. The latest is the German Commercial Code of 1897, which came into force in 1900.

## Note G.—Rules of Practice of Association of Average Adjusters.[1]

The following Rules of Practice of the Association of Average Adjusters with regard to particular average may be cited in amplification of the notes to the text of the Act. The complete Rules, relating both to general and to particular average, are appended to the annual Reports of the Association. The following are taken from the Report for 1906.

### Particular Average on Ship

*Statement of Particular Average on Ships.*

(Proposed and accepted 1874, p. 23. Confirmed 1875, p. 19.)

That claims for particular average on ships shall not be stated unless the policies or copies of policies of insurance, for claiming on which the statement is required, be produced to the adjusters.

(Proposed and accepted 1874, p. 23. Confirmed 1875, p. 19.)

That such statements shall give the names of the underwriting firms and companies interested, and the amounts payable on the respective policies produced.

*Apportionment of Costs in Collision Cases.*

(Proposed and accepted 1889, p. 42. Confirmed 1890, p. 30. Referred to a Special Committee 1888, p. 38.)

That when a vessel sustains and does damage by collision, and litigation consequently results for the purpose of testing liability, the technicality of the vessel having been plaintiff or defendant in the litigation shall not necessarily govern the apportionment of the costs of such litigation, which shall be apportioned between claim and counterclaim in proportion to the amount which has been or would have been allowed in respect of each in the event of the claim or counterclaim being established; provided that when a claim or counterclaim is made solely for the purpose of defence, and is not allowed, the costs apportioned thereto shall be treated as costs of defence.

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[1] As to the effect to be given to these rules of practice, see *Steamship Carisbrook Co.* v. *London and Prov. Mar. Ins. Co.* (1901), 6 Com. Cas. at p. 297, per Mathew, J.

*Expenses of Removing a Vessel for Repair.*

(Proposed and accepted 1896, p. 23. Confirmed 1897, p. 24.)

Where a vessel is in need of repair at any port and is removed thence to some other port for the purpose of repairs, either because the repairs cannot be effected, or cannot be effected prudently—

(*a*) The necessary expenses incurred in moving the vessel to the port of repair shall be allowed as part of the cost of repair, and where the vessel after repairing forthwith returns to the port from which she was removed, the necessary expenses incurred in so returning shall also be allowed.

(*b*) Where by moving the vessel to the port of repair any new freight is earned, or any expenses are saved in relation to the current voyage of the vessel, such net earnings or savings shall be deducted from the expenses of moving her, and where the vessel loads a new cargo at the port of repair no expenses subsequent to the completion of repair shall be allowed.

The expenses of removal include the cost of temporary repair, ballasting, wages and provisions of crew and [or] runners, pilotage, towage, extra marine insurance, port charges, and, in case of a steamer, coal and engine-room stores.

(*c*) This rule shall not admit any ordinary expenses incurred in fulfilment of a contract of affreightment, though such expenses are increased by the removal to a port of repair.

*Coals and Stores used in Repair of Damage to the Hull.*

(Proposed and accepted 1876, p. 23. Confirmed 1877, p. 53.)

That the cost of replacing coals and engine-room stores consumed either in the repair of damage to a steamer, in working the engines or winches to assist in the repairs of damage, or in moving her to a place of repair within the limits of the port where she is lying, shall be charged to the underwriters on ship as particular average.

*Rigging Chafed* (*Custom of Lloyd's*, 1876).

Rigging injured by straining or chafing is not charged to underwriters, unless such injury is caused by blows of the sea, grounding, or contact; or by displacement, through sea peril, of the spars, channels, bulwarks, or rails.

*Sails split or blown away* (*Custom of Lloyd's*, 1876).

Sails split by the wind, or blown away while set, unless occasioned by the ship's grounding or coming into collision, or in consequence of damage to the spars to which the sails are bent, are not charged to underwriters.

*Scraping and Painting.*

(Proposed and accepted 1900, p. 26. Confirmed 1901, p. 41.)

That when in consequence of damage by a peril insured against, a vessel's bottom has to be scraped and painted, the cost of such scraping and painting shall be charged to underwriters on ship, without any deduction on account of the vessel having become due for ordinary painting at any time subsequent to the accident.

*Dry Dock Expenses.*

(Proposed and accepted July, 1891, p. 26. Confirmed 1892, p. 28.)

That where repairs on owner's account which can only be effected in dry dock are executed concurrently with other repairs, for the cost of which the underwriters are liable, and which also can only be effected in dry dock, the cost of entering and leaving the dry dock, in addition to so much of the dock dues as is common to both repairs, shall be divided equally between the shipowner and the underwriters.

This division shall apply in those cases where a vessel is due for ordinary dry docking or for repairs on owner's account necessary for procuring or retaining her class; but it shall not apply when the shipowner has only taken advantage of the vessel being in dry dock to scrape or paint or to effect any other repairs not immediately necessary, but which it may then be convenient to effect.

*Deduction of One-third* (*Custom of Lloyd's, amended* 1890–91).

(1876) The deduction for new work in place of old is fixed by custom at one-third, with the following exceptions:—

Anchors are allowed in full. Chain cables are subject to one-sixth only.

Metal sheathing is dealt with, by allowing in full the cost of a weight equal to the gross weight of metal sheathing stripped off, minus the proceeds of the old metal. Nails, felt, and labour metalling are subject to one-third.

The rule applies to iron as well as to wooden ships, and to labour as well as material. It does not apply to the

expense of straightening bent ironwork, and to the labour of taking out and replacing it.

It does not apply to graving dock expenses and removals, cartages, use of shears, stages, and graving dock materials.

It does not apply to a ship's first voyage.

(1890–91) N.B.—Articles belonging to, or repairs done to, a ship, other than an iron ship, allowed in general average, are subject to similar deductions in respect to new for old materials as are made in adjusting claims of particular average on ship.

*In lieu of note to Custom of Lloyd's*, 1876, *viz.*:—

*N.B.—Articles belonging to, or repairs done to, a ship, allowed in general average, are subject to similar deductions in respect to new for old materials as are made in adjusting claims of particular average on ship.*

### Particular Average on Goods.

*Adjustment on Bonded Prices* (*Custom of Lloyd's*, 1876).

In the following cases it is customary to adjust particular average on a comparison of bonded instead of duty paid prices:—

In claims for damage to tea, tobacco, coffee, wine, and spirits imported into this country.

*Adjustment of Average on Goods sold in Bond.*

(Proposed and accepted 1885, p. 64. Confirmed 1868, p. 24.)

That in consequence of the facilities generally offered to bond goods at their destination, on which terms they are often sold, the term "gross proceeds" shall, for the purpose of adjustment, be taken to mean the price at which the goods are sold to the consumer, after payment of freight and landing charges, but exclusive of Customs duty, in cases where it is the custom of the port to sell or deal with the goods in bond.

*Apportionment of Insured Value of Goods.*

(Proposed and accepted 1885, p. 43. Confirmed 1886, p. 23.)

That where different qualities or descriptions of cargo are valued in the policy at a lump sum, such sum shall, for the purpose of adjusting claims, be apportioned on the invoice values, where the invoice distinguishes the separate values of the said different qualities or descriptions; and over the net arrived sound values in all other cases.

*Under-insured Interest made good in General Average.*

(Proposed and accepted 1882, p. 47. Confirmed 1883, p. 48.)

That an underwriter who has paid for loss by jettison of the thing insured is entitled, in the proportion that the sum insured bears to the policy value, to whatever is recovered in general average in respect to such loss, although the amount so recovered may exceed the amount paid by him.

*Allowance for Water in Picked Cotton* (*Custom of Lloyd's*, 1876).

When bales of cotton are picked, and the pickings are sold wet, the allowance for water in the pickings (where there are no means of ascertaining it) is by custom fixed at one-third.

*Allowance for Water in Cut Tobacco* (*Custom of Lloyd's*, 1876).

When damaged tobacco is cut off, the allowance for water in the cuttings is one-fourth.

*Allowance for Water in Wool* (*Custom of Lloyd's*, 1876).

Damaged wool from Australia, New Zealand, and the Cape is subject to a deduction of 3 per cent. for wet, if the actual increase cannot be ascertained.

*Franchise Charges* (*Custom of Lloyd's*, 1876).

The expenses of protest, survey, and other proofs of loss, including the commission or other expenses of a sale by auction, are not admitted to make up the percentage of a claim; and are only paid by the underwriters in case the loss amounts to a claim without them.

*Extra Charges* (*Custom of Lloyd's*, 1876).

Extra charges payable by underwriters, when incurred at the port of destination, are recovered in full; but when charges of the same nature are incurred at an intermediate port they are subjected to the same treatment, in respect of insured and contributory values, as general average charges.

*Adjustment of Return of Premium* (*Custom of Lloyd's*, 1876).

When the words "and arrival" follow the stipulation for a return of premium on a policy on goods, the particular average, but not the special charges, is deducted from the amount insured to arrive at the amount on which the return is taken.

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