

Sansom *versus* Ball.

1806.

CASE on a policy of insurance, upon the freight of the ship *Richmond*, for a voyage, at and from *Philadelphia* to *Batavia*, and thence back again. The premium was 20 per cent. "to return five per cent. if the ship proceeds only to *Batavia* and back to *Philadelphia*, and no loss happens;" and the insurance was declared to be "on freight advanced here, and which, by agreement, is valued at 13,500 dollars." The policy, also, contained the usual clause, that there should be no average loss recovered, if less than 5 per cent. unless it was general.

On the trial of the cause, it appeared, that the *Richmond* was owned by Messrs. *Jesse* and *Robert Wain*; that the plaintiff purchased from the owners, three-eighths of the tonnage of the ship, for the voyage, at the price of 10,837 dollars 50 cents, which was paid before the ship sailed; that the *Richmond* proceeded safely to *Batavia*, but, on her return thence to *Philadelphia*, she was captured by a *French* privateer, who ordered her to *Guadaloupe*, and she was afterwards re-taken by a *British* ship of war, who carried her into *Martinique*; that upon a libel for salvage at *Martinique*, one half of the full value of the ship and cargo was decreed to the recaptors, and the claimants charged with all costs; and that by agreement between the captain and the supercargo, on the one hand, and the re-captors, on the other, one half of the cargo was specifically delivered to the latter, and 2750*l.* fixed for the salvage on the ship, which was paid by a draft on the owners at *Philadelphia*, secured by an hypothecation.

The present suit was brought to recover an average loss; and the case being submitted for the opinion of the Court, two questions were discussed: 1st. Whether the subject described in the policy was an insurable interest. 2d. Whether, under all the circumstances of the case, the insurers were liable for a general average. (1)

1st. The plaintiff's counsel, contending that the interest was insurable, urged, 1st. *That it was a lawful interest.* It is the payment of a sum of money, for the benefit of bringing home a return cargo, either as owner, or upon freight. There is no general law, no law of *America*, or of *England*, against the payment of freight in advance, whatever may be the law of *France*; 2 *Marsh.* 644. and there is scarcely a subject of property, for which

(1) Mr. *Fitzsimmons*, a merchant and underwriter of great intelligence and experience, proved, at the trial of the cause, that the interest, acquired by the plaintiff, in the tonnage of the ship, was a well known subject of insurance in *Philadelphia*. He, also, proved, that an adjustment of the average loss, on the present voyage, had been made; in which the insurance companies, and most of the private underwriters, had acquiesced. On the effect of the adjustment, the plaintiffs cited *Park.* 118. *Mars.* 244.

1806. a price is paid and received, that may not be the subject of insurance, unless where general policy forbids; as in the case of seamen's wages. *Park.* 9. (5 *Edit.*) *Ib.* 103. Nor, can this be considered as a double insurance; for it is a distinct interest; and different insurances may be effected by different persons, having different rights, in the same property. 1 *Marsh.* 282. *Park.* 103. Nor is it a loan upon bottomry; for it was not advanced on the pledge of the ship herself, but for the use of her tonnage; and it is immaterial, that the valuation in the policy, exceeds the actual cost; as the plaintiff had a right to cover the premium, charges, interest, and profit, as well as his advance. 2d. The interest insured was liable to hazard and loss; and, therefore, it was insurable. If the ship had been totally lost, the plaintiff's use of the tonnage, for which he had paid, was gone, and the owner of the ship could not be compelled to refund. 3d. The interest is well described in the policy. It is not a purchase of a share in the vessel; but of a right to convey goods in her, upon the voyage insured; and the transaction does not violate the registering act, on the point of ownership, (2 *vol.* 147. s. 14. *Swift's Edit.*) or even, on the supposition of its amounting to a sale of a part of the vessel, it only forfeits the *American* privileges; it does not affect the insurable quality of the interest acquired. But, again: when it is objected, that none but the owners of a ship can recover upon an insurance of freight; the objection obviously arises from confounding the purchase of the right of freight, paid in advance, with freight to be earned and received, at the end of the voyage. It is clear, that the owners of the ship could not insure, (and certainly they did not attempt it) as freight, the tonnage purchased by the plaintiff. And when the plaintiff proposed the insurance, the intention of the parties, according to the facts disclosed, without objection at the time, ought to govern the construction of the policy. *Park.* 439. (4 *Edit.*)

2d. On the second point, the plaintiff's counsel insisted, that whether the salvage was considered as freight, or as a charge upon goods, the interest insured was liable to a general average; and, if so, the underwriters on the present policy were bound to furnish an indemnity. Ship, freight, and cargo, contribute to general average. *Park.* 121. *Abbot* 215. (Am. *Edit.*) 1 *East*, 220. If it is essential to a general average, that the loss should be voluntarily incurred, surely the payment of salvage, upon a re-capture, is an act as voluntary, as throwing goods into the sea, upon the coercion of a tempest. Nay, it is within the express stipulation of the policy, that the assured shall labour to recover the property from any jeopardy, in which it is involved, by a risque insured against. *Park.* 140, 1. 123. *Ab.* 218. 2 *Burr.* 1213. 1 *Mag.* 245. 1 *Rob. Rep.* 86. And, if ship, freight, and goods, should all contribute to a general average, the plaintiff's interest in the use of the ship could only contribute in this way; and, contributing at all, is entitled

titled to an indemnity. 2 *Marsh.* 460. *Park.* 124, 5, 6. (4 *Edit.*) 1806.  
*Ab.* 290, 1.

1st. The defendant's counsel contending that the interest was not insurable, argued, that it was in the nature of bottomry; and, therefore, not insurable, unless specifically; and even then, there could be no recovery for an average, but only for a total loss; that the idea of freight, is inseparable from a completion of the voyage, and none but the owner of the ship can recover freight; and that there is no instance of a person, who is merely liable to pay freight, being liable to contribute to the payment of a general average; *Ab.* 179. 2 *Bos. and Pull.* 321. 2 *Marsh.* 644. 1 *Marsh.* 93. If the purchase is considered as a purchase of part of the vessel, then no legitimate contract can be founded on it, unless the vessel is registered anew. 2 *vol.* 147. s. 14. (*Laws of U. S. Swift's Edit.*)

2d. On the second point, the defendant's counsel contended, that the decree of the Court only affected the ship and cargo (not the freight) with the payment of salvage; that nothing but a general average can affect freight; and a general average calls for a voluntary sacrifice of a part, to preserve the rest, of the property; whereas the loss on the salvage was compulsory. 1 *Johns.* 406. 410. *Ab.* 220. *Park.* 122. 130.

The chief justice, after stating the general facts, delivered the unanimous opinion of the Court, in the following terms.

TILGHMAN, *Chief Justice.* In this case two questions have been made:

1st. Had the plaintiff an insurable interest?

2d. If it was insurable, was it liable to a general average?

1st. In order to determine whether the plaintiff's interest was insurable, we must first ascertain the nature of it. It seems to be a kind of interest, not much known in *Europe*, though well known in this city. The plaintiff advanced a sum of money to the owners of the ship, in consideration of which, they gave him a right to fill up three-eighths of the tonnage of the ship, for that voyage, with goods, either his own, or the property of others. It is called in the policy, "freight advanced," an expression well calculated to shew its meaning. All countries, and even all cities, have singularities of expression. All new inventions, either in commerce or the arts, give rise to new modes of speech, which, when once introduced into contracts, are recognised by Courts of justice, whose duty it is to carry into execution the intention of the contracting parties. Now, what is there in this interest, which should exclude it from the benefit of insurance? there is nothing unlawful in it. It is subject to loss; for, whether the plaintiff used the tonnage for the transportation of his own goods, or of the goods of others, he would lose his money, unless the ship performed the voyage in safety. Indeed, I think Mr. *Ingersoll*, in arguing

1806. arguing for the defendant, conceded that the plaintiff's interest might have been insured, if it had been properly described; but he conceived it to be in the nature of bottomry. This it certainly cannot be; there was no loan of money. Messrs. *Walns* were obliged to make no payment to the plaintiff, but the plaintiff was entitled to make what he could from the tonnage he had purchased. Whether it was more, or less, Messrs. *Walns* had nothing to do with it. The testimony of Mr. *Fitzsimmons* goes far towards proving, that the plaintiff's interest was well described, and was a proper object of insurance. In the case of *Gregory v. Christie*, (*Park*. 11.) my Lord *Mansfield* thus expresses himself, "I should think that the words "goods, specie, and effects," did not extend to the plaintiff's interest, if we were only to consider the words by themselves. But here is an express usage, which must govern our decision. A great many captains in the *East India* service swear, that this kind of interest is always insured in this way." Now, though there have not been a *great many* witnesses in this cause, yet there has been *one*, very much conversant in the business of insurance, who stands uncontradicted. Upon this first point, therefore, the insurability of the plaintiff's interest, whether it is considered on principle, or on usage, I have no doubt but the law is with the plaintiff.

2d. But was the plaintiff's interest liable to general average?

General average, or general contribution, is founded on principles of justice and sound policy. It arises, when a sacrifice of part has been made for the preservation of the residue, or, when money is expended; to preserve the whole. Thus, the loss occasioned by cutting away of masts, or throwing goods overboard to lighten the ship, in a storm, or money paid to redeem ship and cargo, which had been captured, are subjects of general average; ship, cargo, and freight, have been benefited, and therefore all must contribute. In the present instance, a compromise was made with the recaptors? Was it for the benefit of all persons concerned in ship, cargo, and freight? for, if it was, it falls within the rule of general average. It appears to me that it was for the benefit of all concerned. It prevented a sale of both ship and cargo, which must have injured all concerned. It would certainly have injured the plaintiff, who had goods on board to a large amount, and he had paid in advance, for the freight of these goods. Of whatever nature the plaintiff's interest was, it was liable to salvage. Sir *William Scott's* opinion (1) is, that salvage is due, for ship, cargo, and freight. But the defendant's counsel object, that general average never arises but from the voluntary act of man, and here, say they, was no voluntary act; for, salvage was decreed by the Court. This argument is rather too refined. Let us consider it. It is true, that the agency and consent of man, must intervene, to produce a general average; but this agency and consent, though in one sense voluntary, are upon the whole, involuntary. When life is at stake, the mariner willingly

(1) 3 *Rob.* 86.

lingly throws gold and diamonds into the sea. But was he willing to encounter the storm, which produced this dire necessity? General average always arises from actions produced by necessity. In the case before us, there was a capture, re-capture, and decree of salvage. The master and supercargo consented, under these circumstances, to a measure, which produced a general benefit. They surely exercised as much volition, as if they had thrown half the cargo over board in a storm. Suppose they had stood still, and suffered the ship and cargo to be sold, the underwriters would then have had to answer for the *whole freight*. It is better for them to be subject to a general contribution.

We are of opinion that the plaintiff is entitled to recover on this policy, according to his demand.

*Lewis, Rawle, and J. Sergeant*, for the plaintiff:  
*M. Kean* (Attorney-General) and *Ingersoll*, for the defendant.

*Donath et al. versus* The Insurance Company of North America.

THIS cause was argued, in *March* term last, on the following case, stated for the opinion of the Court.

Case. (1) The plaintiffs were in advance for money lent, and goods delivered, to *Don Alvarez Calderon*, according to their account stated, (including commissions and premium of insurance) to the amount of 13,750 dollars; and addressed to the defendants the orders of insurance, dated respectively the 22d of *June* and 6th of *July* 1799, in these words:

“ *Philadelphia, June 22d 1799.*

“ President and Directors of the  
“ Insurance Company of *North America.*

“ GENTLEMEN,

“ Agreeably to your answer, we request you to insure 13,750  
“ dollars, on sundry effects, shipped on board the schooner *Daphne*,  
“ captain *Ripley*, bound for *Havanna.*

“ This insurance is declared to be made by us, for and in be-  
“ half of *Don Alvarez Calderon*, king’s attorney in the island of  
“ *Cuba*, on goods, or rather effects, they not being merchandize  
“ intended for trade, but wholly his property, consisting in cloth-  
“ ing and wearing apparel, library, a vast quantity of house furni-  
“ ture, coaches, &c. amounting together to 13,733 dollars, of  
“ which we only cover the above sum of 13,750 dollars, the same  
“ being the amount of our advances, inclusive of premium,  
“ commission, &c. at and from *Philadelphia* to *Havanna*, on board

(1) The case was stated with a reference to the various documents, read in evidence; but it is necessary to incorporate the substance of them here, with the statement.

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