

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.

“ the

1806. { “ the *Daphne*, an *American* bottom and property, and the returns
 “ from *Havanna* to *Philadelphia* on board the same schooner or
 “ any other *American* vessel, but if remittance should be made to
 “ us in bills of exchange for the whole or in part of the sum so
 “ insured by us, a return premium of $7\frac{1}{2}$ per cent. shall be allow-
 “ ed us, on the amount that may be remitted in bills:
 “ We further warrant that *Don Alvarez Calderon* has all neces-
 “ sary passports and protections for himself, suite, and property,
 “ from th *British*, *Spanish* and *French* ministers, which we have
 “ caused to be registered in *Clement Biddle's* office.”

“ *Philadelphia*, *July* 6th 1799.

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

“ GENTLEMEN,

“ Please to cancel the policy of insurance effected on goods
 “ or effects, shipped by us, on board the schooner *Daphne*, for
 “ account of *Don Alvarez Calderon*, for 13,750 dollars, as the
 “ same have been re-landed and loaded on board the brig *Currier*,
 “ captain *M. Keever*, on which you will please to transport the
 “ same insurance, and on the same conditions.

“ *Jos. Donath & Co.*”

Previously to these orders, the plaintiffs had entered into an agreement with *Don Alvarez Calderon*, dated the 11th day of *June* 1799, of which the material passages were these:

“ The said *Jos. Donath & Co.* contract to furnish a suitable
 “ vessel for the passage of the said *Don Andres Alvarez Calderon*,
 “ his suite, and goods and effects, from this port of *Philadelphia*
 “ to *Havanna*. To procure insurance to be made of the goods and
 “ effects of the said *Don Andres Alvarez Calderon*, for the said voy-
 “ age, to the amount of commissions, premium and charges, and
 “ the said goods and effects inclusive, and to comprehend in like
 “ manner the sums of two thousand dollars, advanced him by *Ste-*
 “ *phen Dutilh*, such insurance to be made at and from *Philadelphia*
 “ to *Havanna*, and at and from thence back to this port of *Philadel-*
 “ *phia*, and the policies of insurance and authority to recover the
 “ same, in case of loss, to remain and be vested in the said *Jo-*
 “ *seph Donath* and company.”

“ And the said *Andres Alvarez Calderon* further covenants,
 “ promises and obliges himself to the said *Joseph Donath* and
 “ company, to pay to the said *Joseph Donath* and company, or
 “ their correspondent at *Havanna*, the full amount of said sums
 “ so to be by them advanced, and also for the freight and other
 “ sums to be by him paid as aforesaid at *Havanna*, in specie, to be
 “ loaded on board any vessel at *Havanna* that they may require,
 “ clear of duties or risque, or at the option of said *Andres*
 “ *Alvarez Calderon*, to pay the said amount in sugars, or other
 “ produce.

“ produce, in which last case, all the freight, charges, commissions 1806.
 “ at *Havanna*, and risk of the said sugars or other produce of the
 “ said island of *Cuba*, shall be at the charge of the said *Andres*
 “ *Alvarez Calderon*, so that the nett proceeds thereof, after de-
 “ ducting all charges, freight and insurance, as the same shall
 “ produce at *Philadelphia*, shall be to the credit of said *Andres*
 “ *Alvarez Calderon*, instead of the sum paid at *Havanna* in specie.
 “ And it is declared and agreed by the said parties hereunto, that
 “ in case the said vessel should be captured, taken or lost on her
 “ said voyage, that the insurance to be recovered on the goods
 “ and effects, to be shipped and insured as mentioned in the third
 “ article before mentioned, shall be applied by the said *Joseph*
 “ *Donath* and company, to the discharge of their advances, and
 “ in abatement or acquittance for so much of the bills or drafts
 “ to be drawn by the said *Don Andres Alvarez Calderon* for the
 “ said sums, so to be paid and advanced for his use by the said
 “ *Joseph Donath* and company, as aforesaid.”

On the 6th day of *July* 1799, *Joseph Ball* duly underwrote
 the policy for the defendants, and affixed their corporate seal, by
 which they insured goods on board the *Currier* outwards, and on
 board her, or any other good *American* vessel home, at and from
Philadelphia to the *Havanna* and back to *Philadelphia*, valued at
 13,750 dollars, for a premium of 20 per cent. The property out
 was warranted to belong to *Don Alvarez Calderon*; and that he
 had all necessary passports and protections for himself, suite, and
 property, from the *British*, *Spanish*, and *French*, ministers, resi-
 dent in the *United States*. It was, also, stated in the policy, that
 the property homewards was to be shipped by *Don Alvarez Cal-*
deron, or by his order, for account of the plaintiff; but if the re-
 mittance was made in bills of exchange, and not goods, there
 should be a return of $7\frac{1}{2}$ per cent. of the premium. The premium
 was duly paid; the warranty in the policy contained was complied
 with and performed; the policy has always remained in the pos-
 session of the plaintiffs; and the goods were shipped and consign-
 ed, as specified in the invoice and bill of lading, to wit, by *Jo-*
seph Donath & Co. “for *Don Alvarez* to *Peter Blain*, or his
 “ assigns,” at the *Havanna*. On the 19th *June*, and 8th *July* 1799,
 the plaintiffs wrote two letters to *Peter Blain*, the plaintiff’s agent
 named in the bill of lading, inclosing a copy of the contract with
Don Calderon, and desiring him to secure payment before the
 goods were delivered; to which letters they received answers,
 dated respectively the 18th and 31st of *October* 1799, stating the
 refusal of *Don Calderon* to pay the drafts, and his desire that the
 plaintiffs would seek redress from the underwriters. The brig *Cur-*
rier, in the policy named, sailed from *Philadelphia*, on the 10th
 of *July* 1799, on the voyage insured, with the property insured
 on board; and, while lawfully prosecuting the voyage, to wit, on
 the 31st of *July* 1799, she was captured by the *British* privateer

1806. schooner *Charlotte*, captain *Thrift*, and carried into *New-Providence*, on the 3d day of *August* ensuing, where *James M. Keiver*, master of the said brig, entered a protest. The brig and cargo were libelled in the Vice Admiralty Court, at *New-Providence*, and were both condemned, except the property in the policy insured, touching which the following proceedings were had at *New-Providence*.

On the 26th of *August* 1799, *Don Calderon* petitioned the Court of Vice-Admiralty; stating that he was possessed of passports from the *British* minister, &c., and praying restitution of his effects. On the 2d of *September*, the Judge pronounced sentence, which, so far as it relates to the present question, expressed a doubt upon the construction of the *British* minister's passport; and directed an inquiry to be made, whether it was the minister's intention to protect the effects of *Don Calderon*, to the extent claimed. (1) On the 12th of *September* 1799, all the goods were restored

(1) The opinion of the Judge of the Court of Vice-Admiralty (Judge *Kelsall*) upon the general character and operation of diplomatic passports, appears sufficiently interesting, to justify its insertion at length.

DECREE. "The only shipment in this vessel, that has occasioned me any hesitation, is that of *Don Alvarez*. This gentleman is a *Spanish* subject, but to exempt his property (of the value of eight or ten thousand dollars) from the usual consequence of capture, he has produced a paper, which has given rise to no small argument and discussion. It is a letter of licence from his majesty's ambassador with the *American* states, Mr. *Liston*, by which the commanders of vessels of war are requested to allow *Don Alvarez* to pass, with his domestics, baggage, and effects. It is said, that this paper, from its language, not being mandatory, never was designed by Mr. *Liston* to be viewed as a safe conduct; that it is merely an expression of civility, a complimentary act, intended to procure to *Don Alvarez* polite treatment, and to protect himself, servants, baggage, and the customary *viatica*, or articles necessary for his use during the voyage, and no more; but by no means, to enable him to carry furniture, carriages, and other goods, to so great an amount as the property in dispute; that the document is not in the usual and proper form; and, finally, the right of ambassadors, to protect by their licences, more than has been here conceded to them, has been contested, on this ground, that it would defeat the operation of the prize act.

"The safe conduct of ambassadors will not, I apprehend, be often the subject of consideration here; and still more rarely will it happen, that there will be any greater occasion to dispute, or deny, the privilege claimed, than there exists in the present. If, however, the right of ambassadors to grant licences, whereby enemy, or contraband goods, may be protected from capture, during their passage through the sovereign's dominions (which is the case more especially alluded to by *Blackstone*) (1) or even to the territories of the enemy, which is the case here, be admitted in its fullest extent; still it must be granted, that to insure proper respect to his act, attention should be paid to the forms prescribed or recommended by the writers on the law of nations; I mean, as *Vattel* expresses it, to enumerate, and categorically express, every thing intended to be comprehended. Here no enumeration has been made; but, instead thereof, a word has been inserted, of an import so general, that it may be construed to include any thing and every thing, of any amount and of any kind.

"I may, I trust, without derogating in the least from the respect due to his excellency, the ambassador, be permitted to doubt, whether, when he wrote

(1) 1 vol. *Com.* 259, 260.

" the

restored to *Don Calderon*, on his giving security, to abide the final decree, except a trunk of valuable articles, which had been lost after the capture; and for which the judge refused to make the captors responsible. 1806.

The property received by *Don Alvarez Calderon*, in consequence of those proceedings, was carried by him to the *Havana*, but never delivered to the said *Blain*, in the bill of lading mentioned, nor accounted for to the plaintiffs.

On the 31st day of *August* and the 1st of *October* 1799, the plaintiffs abandoned the property insured to the defendants, stating in the former letter, particularly, that "they had received orders from *Don Calderon* to do so;" and thereupon demanded payment for a total loss: which the defendants refused to pay, but offered to pay an average loss on the goods damaged and stolen. *Don Alvarez Calderon* has not paid to the plaintiffs the whole, or any part of their advances before mentioned: and no property insured on the homeward passage, has been shipped by him or his order, for account of the plaintiffs, nor hath any part of

"the passport, he really meant to give it the full purport of which it is susceptible.

"The situation of Judges of the Vice-Admiralty Courts is well known to Mr. *Liston*. If, on the one hand, they are bound to respect the right of ambassadors, there are, also, duties to fulfil, towards those who claim the benefits of the prize act. And hence I do conclude, that in extending the privileges or immunities of a passport, beyond what is commonly done, he would have adopted a term of more precise and determinate signification, than the one he has used. Besides, it is very evident that Mr. *Bond*, the consul, who, I dare say, did see this licence, and who ought, and, I presume, does, know better than any person here, what the ambassador really intended, takes no notice whatever of "effects;" but confines his consular licence, or pass, which he granted eight days subsequent to that of Mr. *Liston*, to the persons and baggage of *Don Alvarez* and his servants. *Don Alvarez* himself, too, by insuring so carefully against capture, seems to have entertained a different opinion of this safe-conduct at *Philadelphia*, from that which he holds in this place. I will not, though, take upon me to say, that it is not possible, but that Mr. *Liston* might have been aware of the purpose to which his passport was intended to be applied; and that he might have deemed this a fit occasion, for the exercise of the extraordinary powers attached to his station and character. If this prove to be the case, I shall dismiss the libel, and leave the captors, if they think themselves aggrieved, to seek redress elsewhere. My duty, therefore, in the first place, is to be satisfied of what was the ambassador's meaning. For this purpose, I decree, that an exact enumeration of the articles (exclusive of the baggage, the books, and every thing necessary for the prosecution of his voyage, which, if it has not been done, I direct may be immediately given up) that have been shipped by *Don Alvarez*, be made out, and that it be transmitted to his excellency the ambassador, with a request that he would certify to this Court, whether any, or what, things therein specified, were intended by him to be protected from capture by his licence. In making this enumeration, I trust that the greatest care will be used to prevent injury; and that the same be done in the presence of some person appointed by the claimant."(1)

(1) Upon receiving Mr. *Liston's* explanatory certificate, the whole of the property was ordered to be restored absolutely.

the

1806. the remittances in the policy mentioned, been made in bills of exchange.

The questions for the opinion of the Court are,

1st. Whether, under all the circumstances, the plaintiffs had an insurable interest in the property, mentioned in the policy, out and home, or either? 2d. Whether, if they had such interest, it is sufficiently insured by this policy, to entitle them to recover in the present action, as for a total loss? 3d. Whether, if they are not entitled to recover as for a total loss, they are entitled to recover as for a partial loss, and to what amount? 4th. Whether they are entitled to a return of premium on the return voyage, and to what amount?

It is further agreed, that the judgment of the Court shall be rendered by them, in such form and for such sum, if any, as shall be best calculated to effectuate their opinion upon the foregoing questions.

The cause was argued in *March* term 1806, by *Levy* and *Dallas*, for the plaintiffs; and by *Ingersoll* and *Hopkinson*, for the defendants.

For the plaintiffs, it was insisted: 1st. That the advance and lien, gave them an insurable interest in the effects of *Don Calderon*; *Park*, 282. 1 *Bl.* 103. 1 *Burr.* 489. *Park*, 267. 269. 8 *T. Rep.* 154. *Park*, 11. 3 *Burr.* 1410. *Park*, 270. 8 *T. Rep.* 13. 1 *Bos. & Pull.* 315. 323. 216. 6 *T. Rep.* 478. 483. 1 *Marsh.* 81. 91. 111, 112. 2 *Bos. & Pull.* 240. 75.; that the nature of their interest was fully communicated to the defendants; that they had taken every precaution to secure the lien, by retaining the possession of the effects, and consigning them to their agent at the *Havanna*, to be delivered to *Don Calderon*, only upon re-payment of the money advanced; that the capture took from the plaintiffs the possession of the property, and, with it, their lien; thereby constituting a total loss, on which they had a right to abandon; 2 *Burr.* 694. 2 *Emerig.* 188. 194, 5. 3 *Poth. B.* 3. c. 3. art. 1. s. 3. that the restitution to *Don Calderon* was not a restitution to the plaintiffs; but, on the contrary, was destructive of their possession and lien; and that although the goods were, in fact, afterwards carried to the *Havanna* by *Don Calderon*, they were never delivered at the port of destination, to the consignee of the plaintiffs, within the spirit and meaning of the policy, any more than if they had been carried thither by the captors. 2d. That the defendants have virtually acknowledged the right of the plaintiffs to recover, by offering to pay an average loss upon the property damaged and stolen. 3d. That, at all events, the policy contemplates two distinct adventures; to wit, an outward cargo, and a remittance, either in cargo, or in bills of exchange (providing, in the latter case, for an abatement of seven and a half

a half per cent. premium) and as no risque has been run of either kind, upon the return voyage, there should be a proportional return of premium. *Park*, 367. (5 edit.) 377, 8. 3 *Burr*. 1237. 2 *Marsh*. 564. 567. 569. 561 to 571. 1 *Bos.* & *Pull*. 172. 1806.

For the defendants, it was insisted, 1st. That their contract was with *Don Calderon*, through the agency of the plaintiffs; that the plaintiffs never had an insurable interest, or, if they had, they have not insured it; for, the insurance is made on the effects of *Don Calderon*, on his account and risque; and although they are consigned to *Blain*, at the *Havanna*, it is expressly "for *Don Calderon*;" 1 *Ld. Raym.* 271. 12 *Mod.* 156. that there was no idea of a lien, in the origin of the transaction, but a perfect reliance on the honour of *Don Calderon*; that although two persons may insure distinct interests in the same subject, it must be upon distinct contracts, and for distinct premiums; and that *Don Calderon*, in case of a legal loss, might have sued on the policy, though he had paid his debt to the plaintiffs; and thus if they might sue, their debt not being paid, two interests would be insured by the same contract, for a single premium. 2d. That the defendants had complied with their contract, the property being restored to, and remaining in, the possession of its owner, for whom the insurance was made, at its port of destination; and that the insurance was against the perils of the sea, and of war, but it was not an insurance against the misconduct of *Don Calderon*, in retaining the property, without paying the debt. 3d. That the voyage was entire; for an entire premium of twenty *per centum*, varying the amount of the premium, but not the entirety of the voyage, according to the manner, in which the returns should be made. *Park*. 440. 377. 2 *Marsh*. 572. *Doug.* 751.

The cause was held under advisement, until the 17th of *January* 1807, when the opinions of the Judges, who had heard the argument, were delivered.

TILGHMAN, Chief Justice. My opinion on the first point will be rendered unnecessary, by the opinion which I shall deliver on the second point; because, granting that the plaintiffs possessed an insurable interest, I am of opinion that it clearly appears from the facts stated, that they ordered no insurance, and that no insurance was made for them, in any other capacity, than as agents of *Don Alvarez Calderon*: consequently, they cannot recover for a total loss, as *Don Alvarez Calderon* has accepted that part of the property which was saved, and thereby made his election to claim only for a partial loss. The instructions of the plaintiffs for effecting the insurance, were to insure *expressly for and on behalf of Don Alvarez Calderon*. It is true, they insured only 13,750 dollars, although the whole effects of their principals amounted to 18,733 dollars;

1806. dollars; and they give the reason, that 13,750 dollars covered the amount of their advances, including premium, commissions, &c. The defendants might well suppose, that the plaintiffs were to hold this policy for their own security, in case of loss, although the insurance was made for *Don Alvarez Calderon*; and that this was the fact, appears from the agreement, dated the 11th of *June* 1799. But it is not stated, that this agreement was disclosed to the defendants: on the contrary, there is one circumstance which goes far towards convincing me that no such disclosure was made. It is this: By the agreement, the outward cargo was to be at the risk of *Don Alvarez Calderon*; but the memorandum at the foot of the policy, contains a covenant, that the inward cargo should be shipped on account of the plaintiffs. The plaintiffs contend, that they had a lien on the goods, and that it so appears by the bill of lading, and their letter to *Mr. Blain*. But, in my opinion, those papers prove directly the contrary. By the bill of lading, the goods are deliverable for *Don Alvarez Calderon*, to *P. Blain*; so that *Don Alvarez Calderon* might have compelled *Blain* to give him possession of the goods, before the expiration of the fifteen days, which were allowed for payment of the plaintiffs' demand. The plaintiffs, in their first letter to *Blain*, declare that *the respectability of Don Alvarez Calderon's character* was a sufficient guarantee, for the honourable execution of his agreement. And even in their second letter, although they began to apprehend difficulty from the capricious temper of the Don, they gave no intimation of any expectation, that their agent should hold the goods till he received payment of their demand.

Suppose *Don Alvarez Calderon* had paid the plaintiff's account; can it be contended, that he could not recover for his own use, on this policy, the amount of the loss, that he has actually sustained? And, if he could, does it not inevitably follow, that the plaintiffs cannot recover *for their own use*? If they can, one insurance effected for one premium, may be made to cover two different interests, vested in different persons. Besides, the plaintiffs attempt, most unreasonably, to make the defendants answerable for a risk, which they never meant to run; that is, for the integrity and good conduct of *Don Alvarez Calderon*. And after that gentleman has received the property, which was restored to him by the *British* Court of Admiralty, the defendants are called on to answer for it, as being lost. To render the impropriety of this demand the more complete, the plaintiffs made the abandonment, on which they found their claim, *expressly by order of Don Alvarez Calderon*. Nothing can be clearer than that the plaintiffs, throughout the whole of the transaction of this insurance acted not for themselves, but as the agents of *Don Alvarez Calderon*.

3d. On the third point there is no difficulty. Undoubtedly, the plaintiffs may recover for the partial loss, sustained by *Don Alvarez*

vez Calderon. The defendants do not deny it. I presume the parties can easily adjust this loss. Indeed, I understood so, from what fell from Mr. *Levy*, in the course of his argument. 1806.

4th. The last question in this case, is, whether the plaintiffs are entitled to a return of any part, and how much, of the premium? The general rule is, that where the voyage is *entire*, and the risk has once *commenced*, there shall be no return of premium. But when, by the course of trade, or the agreement of the parties, the voyage is divided into distinct parts; and, on one of these parts, no risk has been run, there shall be an apportionment of the premium, and part shall be returned. A voyage may be *entire*, though the ship is to go to a number of different places, and to take in different cargoes. But if, in the contract of insurance, there are certain contingencies introduced, which, at certain periods of the voyage, may operate so as to make the insurance void, it has been considered, that, in such cases, the voyage may be supposed to have been divided, in the contemplation of the parties, into distinct parts. As in the case of *Stevenson v. Snow*, which was an insurance of a ship "at and from *London* to *Halifax*, warranted to depart with convoy from *Portsmouth*." The convoy was gone, before the ship arrived at *Portsmouth*; and by the judgment of Lord *Mansfield*, and the whole Court of King's Bench, there was a return of part of the premium. In the case before us, it appears to have been in contemplation of the parties, that on the voyage from the *Havana* home, there might be contingencies, which would either avoid the policy, for that part of the voyage, or lessen the risk, so far as to require a part return of premium. The goods shipped on the *outward* voyage, are warranted to be the property of *Don Alvarez Calderon*. It was doubtful, whether any goods would be shipped on the *inward* voyage. If a remittance was made in bills of exchange, there was to be a return of seven and a half *per cent.*, part of the premium. If goods were shipped, they were warranted to be on account of the plaintiffs. It seems to be the spirit of this agreement, that the voyage may be divided; and that if no goods were shipped, there should be a return of seven and a half *per cent.*

On the whole of the case, I am of opinion, that the plaintiffs are entitled to recover for a partial loss, and a return premium of seven and a half *per cent.*, with interest from the commencement of the action. I do not think, that they should be allowed interest for a longer time, because they demanded more than they were entitled to, and have put the defendants to the expense of contesting their claim for a total loss.

YEATES, *Justice*, being indisposed sent his opinion, in writing, to the Court, and it was read by the prothonotary. He concurred in the decision, that the plaintiffs, were entitled to recover a partial loss, for the goods lost and damaged; but he considered

1806. dered the voyage as entire, and, consequently, was opposed to the claim, for a return of premium.

SMITH, and BRACKENRIDGE, *Justices*, concurred, generally, in the sentiments delivered by the Chief Justice.

And judgment was entered for the plaintiffs, accordingly; the quantum to be calculated by the parties. (1)

(1) On the question of interest, *Dallas* took the liberty of suggesting to the Court, after the opinions were delivered, that the practice had uniformly been, to allow interest on the amount actually recovered, upon the expiration of 30 days, after depositing the proofs of loss; and that, on principle, the underwriters could only discharge themselves from interest, or costs, by a tender, or payment into Court, of the sum due. But the Chief Justice answered, that the subject had been considered, and was now decided.