

32. *What goods are subject to contribution, in cases of general average?*—240-242.

The general doctrine is, that all merchandise, of whatever kind or weight, or to whomsoever belonging, contributes. The contribution is made, not on account of incumbrance to the ship, but of safety obtained, and, therefore, bullion and jewels put on board as merchandise, contribute according to their full value. Wearing apparel and things taken on board for private use do not contribute, in case of general average. The common rule, according to Magens, is, that what articles pay freight must contribute, and what pay no freight pay no average. Instruments of defense and provisions do not contribute, nor do wages of seamen contribute, except in the single instance of the ransom of the ship. Goods sold for the necessities of the ship are the subject of general average.

33. *What is the general rule for settling general average?*—242.

That the goods sacrificed, as well as the goods saved, are to be valued at the clear net price they would have yielded, after deducting freight, at the port of discharge. The value of the vessel lost is estimated according to her value at the port of departure, making a reasonable allowance for wear and tear on the voyage up to the time of the disaster.

34. *What is meant by salvage?*—245.

The compensation allowed to persons by whose assistance a ship or its cargo has been saved, in whole or in part, from impending danger, or recovered from actual loss, in cases of shipwreck, derelict, or re-capture.

35. *What amount is usually allowed for salvage?*—245, n.—246.

The courts are liberal in the allowance of salvage in meritorious cases, as a reward for the service, and as an incentive to effort; and the allowance used to fluctuate between one half, one third, and one fourth of the net proceeds of the property saved, but adequate remuneration, in view of all the circumstances, is the true rule. In general, neither the master, nor a passenger, seaman, or pilot, is entitled to compensation, in the way of salvage, for the ordinary assistance he may afford a ves-

sel in distress. Yet, if the ship has been abandoned so as to discharge a seaman from his contract, and he subsequently contributes to the preservation of the vessel, he will be entitled to salvage.

36. *What will work a dissolution of the contract of affreightment, without a performance?*—248, 249.

If the voyage becomes unlawful, or impossible to be performed, or if it be broken up, either before or after it has actually commenced, by war or interdiction of commerce with the place of destination, the contract is dissolved. But a temporary impediment of the voyage does not work a dissolution of the charter party, and an embargo has been held to be such a temporary restraint, though it be indefinite as to time.

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## LECTURE XLVIII.

### OF THE LAW OF MARINE INSURANCE.

1. *What is marine insurance?*—253, n. 1.

It is a contract whereby one party, for a stipulated premium, undertakes to indemnify the other against certain perils, or sea risks, to which his ship, freight, and cargo, or other interest, or some of them, may be exposed, during a certain voyage, or a fixed period of time.

2. *Who may be insured?*—253.

All persons whether aliens or natives, except alien enemies.

3. *Who may be insurers?*—256, 257, n. (b).

Any individuals, or companies, or partnerships, may lawfully become insurers. In New York and other States, marine insurance, or lending on *respondentia* or *bottomry*, effected within the State, is prohibited to all persons and companies residing in any foreign country, acting by agent here. Persons and associa-

tions, residing in other States, effecting such insurances in New York, are taxed ten per cent. on their premiums.

4. *What if in the terms of the contract, a ship be specified?*—257.

It becomes a part of the contract, and no other ship can be substituted without necessity; but the cargo may be shifted from one ship to another, if done from necessity, and the insurer of it will be still liable.

5. *What does an insurance on the body of a ship include?*—257.

It sweeps in, by the comprehensiveness of the expression, whatever is appurtenant to the ship, except when varied by special agreement. This doctrine is taught by all the continental writers on insurance, as well as in the English law.

6. *What if a partner insure in his own name only?*—258.

It will cover his undivided interest in the partnership, and no more. If the policy has the words, *and whomsoever it may concern*, then it will cover the whole partnership interest.

7. *To whom only will those general words, whomsoever it may concern, apply?*—258.

To the person having an interest in the subject insured, and who was in the contemplation of the contract.

8. *Will a policy on a voyage from abroad be good, if it omit to name the ship, or master, or port of discharge, or consignee, or nature of the cargo?*—259.

It may, for all these may be unknown to the insured when he applies for insurance.

9. *What if a policy be part written and part printed, and there should arise a reasonable doubt upon the meaning of the contract?*—260.

The greater effect is to be attributed to the written words. All mercantile contracts, if dubious, or made with reference to usage, may be explained by parol evidence of the usage; but with this limitation, that the usage, to be admissible, must be

consistent with the principles of law, and not go to defeat the essential provisions of the contract.

10. *What if an agent effects a policy for his principal without his knowledge?*—260, 261.

If the principal afterwards adopts the act, the insurer is bound; but if it be not adopted, the contract is not binding.

11. *Is a merchant who has effects of his foreign correspondent in his hands, or who has been in the habit of insuring for him, bound to comply with an order to insure?*—261.

He is, and the order may be implied, in some cases, from the previous course of dealing between the parties.

12. *What if the agent neglects, or imperfectly executes the order?*—261.

He is answerable as if he himself was the insurer, and is entitled to the premium.

13. *What if the subject-matter of the policy be assigned?*—261.

The policy may also be assigned, so as to give a right of action to the assignee.

14. *What is the proper subject of insurance?*—262.

Lawful property engaged in lawful trade.

15. *Is a policy on a voyage undertaken in violation of a blockade, or of an embargo, or of the provisions of a treaty, legal?*—262.

It is not, whether the policy be on the ship, freight or goods embarked in the illegal traffic. An insurance on property, intended to be exported or imported contrary to the law of the place where the policy is made, or sought to be enforced, is void.

16. *Is insurance on a smuggling voyage, prohibited only by the law of the foreign country where the ship has traded, or intends to trade, valid?*—266.

It is, if the insurer was fully informed, when he entered into the contract, of the nature of the trade. But insurance to a port does not include the risk of going into the port in viola-

tion of law, unless the peril of illicit entry at the port be also within the provision or contemplation of the policy.

17. *Is the insurance by a neutral, of goods usually denominated contraband of war, valid?*—267, 268.

It is, for it is not deemed unlawful for a neutral to be engaged in a contraband trade. Illicit voyages may be ranked in several classes :

1. When the sovereign of the country, to which the ship belongs, interdicts trade with a foreign country or port, in which case, a voyage, for the purpose of trade, would be illegal, and all insurances thereon void.

2. Where the trade in question is prohibited by the trade laws of a foreign State ; and in that case, the voyage, in such trade, may be the subject of insurance in any State in which the trade is not prohibited, for the municipal laws of one jurisdiction have no force in another.

3. When neutrals transport to belligerents goods contraband of war. The law of nations does not go to the extent of rendering the neutral shipper of goods contraband of war an offender against his own sovereign. An insurance, then, by neutrals in a neutral country is valid, whether it relates to an interloping trade in a foreign port, illicit *lege loci*, or to a trade in transporting contraband goods, which is illicit *jure belli*. But to render the insurance valid, in either case, the insurer should be informed of the nature of the trade and goods.

18. *For what reason have the Ordinances generally prohibited the insurance of seamen's wages?*—269.

From the consideration, that if the title to wages did not depend upon the earning of freight by the performance of the voyage, seamen would want one great stimulus to exertion in times of difficulty and disaster.

19. *What is the doctrine as to insuring freight?*—269, 270.

In France and Spain, freight not earned can not be insured, and for the same reason that seamen's wages are not insurable ; freight already earned may be insured. In England, and in the United States, future, or expected and contingent, and even

dead freight, is held to be an insurable interest. It is necessary, however, that the ship have actually begun to earn freight. An inchoate right to freight is an insurable interest.

20. *When does the risk generally begin?*—270.

From the time the goods, or a part of them, are put on board ; and if the ship has been let to freight under a charter party of affreightment, the right to freight commences, and is at risk, so soon as the ship breaks ground ; and if the charterer omits to put on board the expected cargo, and the ship performs the voyage in ballast, the right to freight is perfect.

21. *Are profits a proper subject of insurance?*—271.

They are ; the right to insure expected or contingent profits is settled in England, and has received repeated and elaborate confirmation. They are, likewise, in this country, held to be an insurable interest. In France insurances on profits are unlawful.

22. *What is an open policy?*—272.

It is one in which the amount of interest is not fixed by the policy, but is to be ascertained by the insured, in case a loss should happen.

23. *What is a valued policy?*—273.

It is where the value has been set on the ship or goods insured, and inserted in the policy, in the nature of liquidated damages.

24. *What is the effect of an excessive or fraudulent valuation?*—273.

A valuation, fraudulent in fact, as respects the insurer, or so excessive as to raise a necessary presumption of fraud, entirely vacates the policy.

25. *Does the valuation apply to partial losses?*—274, n. 2.

The better opinion is, that in settling all losses, total or partial, the valuation of the property in the policy is to be con-

sidered as correct in the adjustment of the loss. And it has been so decided by the House of Lords in England.

26. *What if there be certain articles comprised in the valuation, and part of them are safely landed before the ship is lost?*—275.

The valuation must be opened, and the claim of the insured reduced in the proportion which the articles actually lost bore to the valuation of the whole at the commencement of the risk.

27. *What is a wager policy?*—275.

A policy on a mere hope or expectation, without any interest in the subject-matter.

28. *What interest is sufficient to maintain a policy?*—275, 276.

If a person be directly liable to loss on the happening of any particular event, he has an insurable interest. A creditor, to whom property is assigned, as collateral security, has an insurable interest to the amount of his debt. Commissions to become due to public agents, and all reasonable expectations of profits, are insurable interests. Interest does not necessarily imply a right to, or property in the subject insured.

29. *Are wager policies lawful in this country?*—278.

They are unlawful in New York, and, it seems, in Massachusetts and Pennsylvania.

30. *What is a re-assurance?*—278-280.

It is where, after an insurance has been made, the insurer hath the entire sum re-assured to him by some other insurer; this species of insurance is prohibited in England, but allowed with us. The first insurer may re-assure to the same amount; but the better opinion is that he can not insure the premium due him for the first insurance. The insured may likewise insure the solvency of the first insurer.

31. *What is a double insurance?*—280.

It is where the insured makes two insurances on the same

risk and the same interest. But the law will not allow him to receive a double satisfaction, though he may sue on both the policies. The underwriters on both the policies are bound to contribute ratably toward the loss.

32. *What is the rule for contribution in cases of double insurance?*—281.

It was declared by the Circuit Court of the United States that the insurers pay according to the rate of their subscriptions, without regard to the order of time in which the policies were made, and if the insured recovers his whole loss from one set of underwriters, they will be entitled to their action against the other insurers, on the same interest and risk, for a ratable proportion of the loss. The French rule is, that if there exist several contracts of insurance on the same interest and risk, and the first policy covers the whole value of the subject, it bears the whole loss, and the subsequent insurers are discharged on returning all but one half per cent. premium. The ancient rule in England was according to the French ordinance.

33. *What if two policies be dated on the same day?*—281.

The policy first in point of fact must bear the loss.

34. *What is the usage of the companies in New York, in regard to partial losses?*—282.

That they are to be apportioned between the policies, without regard to dates, provided the cargo on board was large enough to have attached both policies. This is the French rule.

35. *What are the effects of a misrepresentation while effecting a policy of insurance?*—282-284.

It is an established principle that a misrepresentation to the underwriter, or the concealment of a fact material to the risk, will avoid the policy; and this, though loss arose from a cause unconnected with the misrepresentation, and even though the misrepresentation or concealment was without any fraudulent intention.

A representation to the first underwriter in favor of the risk, extends to all subsequent underwriters. This rule is strictly con-

fined to representations made to the first underwriter, and does not extend to intermediate ones. Nor does it extend to a subsequent underwriter on a different policy, though on the same vessel, and against the same risks.

33. *What is the general duty of a person seeking to effect an insurance?*—235.

To communicate every species of intelligence which he possesses which may affect the mind of the insurer, either as to the point whether he will insure at all, or as to the rate of premium.

37. *What is meant by the warranty of sea-worthiness?*—287, 288.

That the vessel is competent to resist the ordinary attacks of wind and weather, and is competently equipped and manned for the voyage, with a sufficient crew, and with sufficient means to sustain them, and with a captain of general good character and nautical skill. This warranty of sea-worthiness relates to the commencement of the risk, and the warranty is not broken if she becomes unseaworthy afterwards.

38. *What is the effect of the breach of the implied warranty of sea-worthiness in the course of the voyage?*—288.

It has no retrospective operation, and does not destroy a just claim to damages for losses occurring prior to the breach of this implied condition.

39. *How is every warranty considered?*—288.

As a part of the contract, and it is either express or implied. If it be an express warranty, it must appear on the face of the policy. Any statement or averment of a fact, or any undertaking or description on the part of the insured on the face of the policy, which relates as a matter of fact to the risk, amounts to a warranty. It differs from a representation in this respect, that it is in the nature of a condition precedent, and requires a strict and literal performance. Whether the thing warranted be material or not, and whether the loss happened by reason of a breach of the warranty, or did not, is immaterial. A breach of it avoids the contract, *ab initio*.

40. *What is the effect of a survey?*—289.

If it be made within a reasonable time after the determination of the voyage, and if the survey states that the vessel was condemned solely on account of rottenness existing at the time of the survey, it is a conclusive bar to the assured.

41. *What are the most usual express warranties?*—289.

That the ship was safe at such a time, or would sail by such a day, or would sail with convoy, or a warranty against illicit trade, or that the property insured is neutral.

42. *What are the risks usually insured against?*—291.

The general rule is, that the insurer charges himself with all the maritime perils that the thing insured can meet with on the voyage; but the enumerated list may be enlarged or abridged at the pleasure of the parties.

43. *May a person insure against a loss by reason of the acts of his own government, as an arrest, or embargo?*—291, 292.

He may, and there is no distinction on this point between a foreign and a domestic embargo; if the embargo intervenes after the commencement of the risk, it suspends, but does not dissolve the contract of insurance, and the insured may abandon as for a total loss.

44. *Is an interdiction of commerce with the port of destination, or a denial of entry by the power at the port, or by blockade, a loss within the policy?*—293, 294.

There are conflicting decisions on the point, but the doctrine best supported by authority is, that if the danger be so great as to amount to almost a certainty of capture, it becomes a restraint in contemplation of the policy.

45. *To what does a warranty against illicit trade apply?*—294.

Only to seizures for breaches of the laws of trade, and the commercial regulations of ports. It does not extend to seizures for offenses against the law of nations, nor to acts of lawless violence, though committed under a pretext of some municipal regulation; nor to arbitrary seizures under the pretense of illicit trade, when in fact no such trade existed.