

46. *What is the practice with regard to goods of a perishable nature?*—294.

It has been the practice to introduce into policies a stipulation, by way of memorandum, that upon certain enumerated (commonly called, memorandum) articles, the insurer should not be liable for any partial loss whatever, and upon others for none under a given rate per cent.

47. *What is the established rule, if the loss of memorandum articles be partial?*—294-299.

That the underwriter pays nothing; and it is partial only, when part of the cargo arrives in safety, however deteriorated in value, though another part of the cargo had been wholly destroyed by disasters on the voyage.

48. *What are the usual perils covered by the policy?*—299.

All those natural perils and operations of the elements which occur without the intervention of human agency, and which the prudence of man could not foresee, nor his strength resist.

49. *Is the destruction of the ship by worms within perils of the sea insured against?*—300.

It is not; nor the loss of an anchor by the friction of rocks, nor the wear and tear of the equipment of the ship, nor the diminution of liquids by ordinary leakage, nor hemp taking fire in a state of effervescence, nor injury done to the ship by rats.

50. *After what length of time shall a missing vessel be presumed to have perished by the perils of the sea?*—301.

There is no precise time fixed by the English law. In the French law, a vessel not heard from is presumed to have been lost, after the expiration of one year in ordinary voyages, and two in long ones. By the ordinance of Haniburg, a ship was presumed to be lost, if bound to any place in Europe, and not heard from in three months, and by the *Recopilacion des Loyes de Indias*, in Spain, if not heard from within a year and a half. In the case of missing vessels, the loss is presumed to have happened immediately after the date of the last news.

51. *If a ship be driven ashore by the wind, and in that situation is captured by an enemy, to which is her loss attributed?*—302.

To the capture; for the peril, whatever it may be, upon which the policy attaches, must be the proximate, and not the remote cause of the loss.

52. *What if a partial loss be followed by a total loss?*—302.

The former may be considered as merged in the latter.

53. *What do the enumerated perils of pirates, rovers, and thieves, include?*—303, n. (c.)

The wrongful and violent acts of individuals, whether in the open character of felons, or in the character of a mob, or as a mutinous crew, or as plunderers of shipwrecked goods on shore. In New York it has been held that an insurance against thieves, and barratry of the master and crew, covered a loss by simple theft, unaccompanied with force.

54. *To what does the stipulation of indemnity against all takings at sea, arrests, restraints, and detainments of all kings, princes, and people, refer?*—303.

Only to the acts of government for government purposes, whether right or wrong.

55. *What is the effect of an arrest in the domestic port?*—303, 304.

If made after the voyage is commenced it justifies an abandonment; but if made before the risk commenced, the contract is discharged. An arrest by admiralty process, at the instance of an individual, on a private claim, is not a case within the policy.

56. *How far is the insurer liable under the insurance against fire?*—304.

It is held, that if the ship be burnt under justifiable circumstances, to prevent capture, or from an apprehension of a contagious disease, the insurer is liable. If sails and rigging, put on shore while the vessel is repairing at a foreign port, be burnt, they are covered by the policy. It has likewise been held,

after a learned discussion, that the insurer is answerable for a loss by fire occasioned by the negligence of the master and mariners.

57. *What is barratry?*—305.

It means fraudulent conduct on the part of the master, in his character of master, or of the mariners, to the injury of the owner, and without his consent, and it includes every breach of trust committed with dishonest views.

58. *What time is included in a policy, insuring "at and from?"*—307.

All the time the ship is in port after the policy is subscribed, if the ship be at home; and if abroad, it commences, according to a decision in Pennsylvania, only from the time she has been moored twenty-four hours in safety after her arrival. But if a ship be expected to arrive at a foreign port, and be insured *at and from that place*, or *from her arrival* there, other cases say the risk attaches from her first arrival. The risk continues during quarantine, though after the twenty-four hours. The precise meaning of the words "at and from" is somewhat uncertain.

59. *What if the policy be to a country generally, as to Jamaica?*—308, 309.

The risk ends at the first port made for the purpose of unloading, after the vessel has been moored there twenty-four hours in safety. But in France, where insurances are generally made to the *French West India Islands*, the risk continues until the cargo is discharged at the last place of destination.

60. *When does the risk on the cargo commence?*—309.

Usually from the loading thereof aboard the ship; and it continues while the cargo is on board and no longer, unless the policy covers the risk upon the goods until safely landed, in which cases it continues during their passage to the shore.

61. *At what time does the risk begin in insurances on freight?*—311.

Usually from the time the goods are sent on board, and not

before. But if the ship, sailing under contract, be lost on her way to the port of lading, or at the port of lading to which she had arrived in ballast, before any goods are put on board, or when part only of the cargo is on board, and preparation making to receive passengers, the insurer on freight and passage money is liable.

62. *What is the effect of deviation?*—312.

If the vessel departs voluntarily, and without necessity, from the usual course of the voyage, the insurer is discharged; not indeed from loss occurring previous to the deviation, but from all subsequent losses.

63. *What if there be several ports of discharge mentioned in the policy, and the insured goes to more than one?*—314, 315.

He must go to them in the order in which they are named in the policy, or if they be not specifically named, he must generally go to them in the geographical order in which they occur, though there may be cases in which he is not bound to follow such order.

64. *What if the ship quits, from necessity, the course described in the policy?*—315.

She must pursue such new voyage of necessity, in the direct course, and in the shortest time, or it will amount to a deviation.

65. *What if the vessel have liberty to carry letters of marque?*—316.

She may deviate for the purpose of defense, but not for the purpose of capture. In *Haven v. Holland*,* a pretty enlarged discretion, for the purpose of capture, was confided to the captain, as to the best mode of defense, and it was held that the letter of marque might chase and capture hostile vessels in sight, in the course of the voyage. If liberty be given her to *chase and capture*, that will not enable her to convoy her prize into port, though she may do it, if she be not thereby led out of her

* 2 Mason, 230.

way ; and to cruise for six weeks, means six consecutive weeks, and not at different times.

66. *What is a total loss within the meaning of the policy ?—318.*

It may arise either by the total destruction of the thing insured, or, if it specifically remains, by such damage to it as renders it of little value. A loss is said to be total if the voyage be entirely lost or defeated, or not worth pursuing, and the projected adventure frustrated. It is a constructive total loss if the thing insured, though existing in fact, is lost for any beneficial purpose to the owner.

67. *What may the insured do in such a case ?—318.*

He may abandon all his interest in the subject insured to the insurer, and call upon him to pay as for a total loss.

68. *What is the effect of an abandonment ?—319.*

It has a retrospective effect, and does of itself, and without any deed of cession, transfer the right of property to the insurer to the extent of the insurance.

69. *Within what time, after information of the loss, must the abandonment be made, in order to charge the underwriter with a constructive total loss ?—320.*

As soon as the insured is informed of the loss, he ought (after being allowed a reasonable time to inspect the cargo, and for no other purpose) to determine promptly whether he will elect to abandon ; and he can not lie by to speculate on events. And the same principle requires an insurer, who rejects an abandonment, to act promptly.

70. *What kind or extent of loss will give a right to abandon ?—321, 322.*

The right of abandonment does not depend upon the certainty, but upon the high probability of a total loss, either of the property, or voyage, or both. If the facts present a case of extreme hazard, and of probable expense exceeding half the value of the ship, the insured may abandon, though it should happen that she was afterwards recovered at a less expense. Such are

the common cases of embargoes, captures, or detainments by princes. It exists when the ship, for all the useful purposes of the voyage, is gone from the control of the owner ; as in the cases of submersion, shipwreck or capture ; or when the risk and expense of restoring the vessel are disproportioned to the expected benefit and objects of the voyage. Each case will be governed on a reasonable view of its special circumstances.

71. *In what cases does the French Ordinance of the Marine allow of an abandonment ?—322.*

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

72. *What is shipwreck ?—323, n. (c.)*

There are two kinds : 1. When the vessel sinks or is dashed to pieces. 2. When she is stranded, that is, when she is grounded and fills with water. The latter may or may not justify an abandonment.

73. *How about abandonment of cargo ?—326, n. 1.*

There is a material difference between an insurance on ship and on cargo, and some confusion is introduced by blending the cases ; but the essential principles of abandonment, with some variation, apply to each case. "An insurance on goods," says Arnould, "is a contract to indemnify the insured for any loss he may sustain by his goods being prevented by the perils of the seas from arriving in safety at their port of destination."

74. *What is the rule for ascertaining the value of the ship, and the quantum of expense or injury ?—330, 331.*

The valuation in the policy is conclusive in case of a total loss, but in some respects it is inapplicable for the purposes of ascertaining the *quantum* of injury, in case of a partial loss of goods. The rule in that case is, to ascertain the amount of injury by the difference between the gross proceeds of the sound and damaged goods. The value of the ship at the time and

place of the accident is the true basis of calculation as to her damage.

75. *How is the master affected by a valid abandonment?*—331.

He becomes the agent of the insurer, and the insured is not bound by his subsequent acts unless he adopts them.

76. *What is the doctrine, as regards the freight of an abandoned ship?*—333, 334.

It has been a controverted question, whether an abandonment of the ship transferred the freight in whole or in part. It was finally settled in the jurisprudence of New York and of Massachusetts, and adopted as the true rule in the Circuit Court of the United States for Massachusetts, that on an accepted abandonment of the ship, the freight earned previous to the disaster was to be retained by the owner, or his representative, the insurer on the freight, and apportioned *pro rata itineris*; and that the freight subsequently earned went to the insurer on the ship.

77. *What is the rule for the adjustment of partial losses?*—335-337.

In an open policy the general rule is, that the actual or market value of the subject insured, is to be estimated at the time of the commencement of the risk. The object of inquiry is the true value of the subject put at risk, and for which an indemnity was stipulated; and the question of total or partial loss does not turn on the estimated value, in a valued policy, but upon a view of all the circumstances attending the loss.

If goods arrive damaged at the place of destination, the way to ascertain the quantity of the damage either in open or valued policies, is to compare the market price or gross amount of the damaged goods, with the market price or gross amount at which the same goods would have sold if sound. But this mode of adjustment affords no perfect indemnity to the insured, for he has to pay freight for the goods as if they were sound, and which freight he can not recover of the insurer. The true way to avoid the inconvenience is to insure the sum to be paid for the freight and charges at the port of delivery.

78. *What is the rule as to return of premium?*—341.

If the insurance be void *ab initio*, or the risk has not been commenced, the insured is entitled to a return of premium. If the insurance be made without any interest whatsoever in the thing insured, and this proceeds through mistake, or misinformation, or any other innocent cause, the premium is to be returned. If the risk has not been run, whether it be owing to the fault, or pleasure, or will of the insured, or to any other cause, the premium must be returned. If the vessel never sailed on the voyage insured, or the policy became void by failure of the warranty, and without fraud, the policy never attached; but if the risk has once commenced, though the voyage be immediately thereafter abandoned, there is to be no return or apportionment of premium. And if the premium is returned, it is the usage in every country where it is not otherwise expressly stipulated in the policy, for the insurer to retain one half per cent. by way of indemnity for his trouble and concern in the transaction. And the insurer retains the premium in all cases of actual fraud on the part of the insured or his agent. So, if the trade be in any respect illegal, the premium can not be reclaimed.

LECTURE XLIX.

OF MARITIME LOANS.

1. *What are maritime loans called?*—353.

Contracts of *bottomry* and *respondentia*. They are loans of a very high and privileged nature, and are always upheld by the admiralty with a strong hand, when entered into *bona fide* and without any suspicion of fraud.

2. *What is a bottomry bond?*—353, 354.

It is a loan of money upon the ship, or ship and accruing freight, at an extraordinary interest, upon maritime risks, to be borne by the lender, for a specific voyage, or for a definite period.