Biays *v.* Chesapeake Insurance Company. (*a*)

Marine insurance.—Memorandum articles.—Salvage.

There cannot be a technical total loss of part of a cargo, consisting of memorandum articles, of only one species, such as hides.[1]

Nor are the underwriters liable for salvage upon such articles, under the clause which authorizes the insured to labor and travel for the preservation of the cargo, unless, perhaps, in a case where the salvage may have prevented an actual total loss of the cargo.

Error to the Circuit Court for the district of Maryland, in an action of covenant, upon a policy of insurance on hides, which, by the *memorandum* in the policy, were declared to be free from average, unless general. The policy contained the usual stipulation, "that in case of loss or damage, the assured shall labor, &c., for the preservation of the property, to the expenses of which the assurers will contribute." The voyage was to Amsterdam.

The vessel arrived at a place called "Niew Diep;" where, according to the usage of the trade, the hides were put into several lighters, to be sent to Amsterdam. One of these lighters sunk, but some of the hides contained in it were afterwards fished up and saved by the people of the place, for which a salvage of $3000 was allowed and paid. The rest were totally lost. This action was brought to recover for those totally lost, and for the salvage of those which were saved.

On a case stated, the judgment of the court below was for the defendants; on which the plaintiff brought his writ of error. [*416

Harper, for plaintiff in error, contended, 1. That where an insurance is made in gross, as in this case, upon a cargo consisting of a number of separate distinct things, there may be a total loss upon some of them, though the rest are saved; and 2. That as, consequently, the loss here upon the hides fished up would have been total, but for the labor and care of the assured, they are entitled to be reimbursed the expense, by the underwriters, under the stipulation in the policy on that subject; notwithstanding the declaration in the *memorandum*, exempting hides from particular average.

1. The obvious construction and meaning of the *memorandum* is, that where the cargo is divisible, there may be a total loss of part. The average loss mentioned is loss by deterioration. If one out of many bales of cloths should be lost, it would be a total loss of that bale. But if one piece in a bale should be damaged and lost, it would be an average loss, especially, as to *memorandum* articles. If a cargo should consist of 500 casks of wine, and 499 of them should be lost, one only being saved, this would be a total loss of the 499 casks. In the absence of all authority, we must resort to general principles. Such cases must have existed often; but no case is found in the books like the present. The inference is, that it must have been considered as a total loss.

2. The second point (as to the salvage), is, perhaps, a point of more difficulty; but it depends in part upon the first. Where the object of the expense is to prevent a total loss, the underwriters are liable. Here, the

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(*a*) February 24th, 1813. Absent, Todd, Justice.

[1] The authorities on this question are by no means uniform or consistent with each other, where the line of distinction is very narrow. They are reviewed by Mr. Justice Miller, in the Great Western Ins. Co. *v.* Fogarty, 19 Wall. 640.

salvage loss prevented a total loss. If a literal construction be given to the two stipulations in the policy, one would destroy the other. The *417] *assured are to labor to prevent a total loss; not for their own benefit, for they are insured, but for the benefit of the underwriters. The loss was of part of a lighter load of hides, some were fished up and saved, and salvage paid. No expense could arise respecting these hides, unless it would come under the name of average loss. The stipulation, therefore, to labor &c., would be void as to all these articles. The construction ought to be, that we will pay all expenses incurred, to prevent a greater than an average loss.

March 6th, 1813. LIVINGSTON, J., delivered the opinion of the court, as follows:—This is an insurance on hides, "warranted by the assured free from average, unless general." The declaration is for a total loss by perils of the seas, but it came out in evidence, that 3280 hides (the whole number insured being 14,565) were put on board of a lighter, to be transported from the vessel to their place of destination; that the lighter, in her passage to the shore, was sunk, by which accident, 789 of the hides, of the value of $4000, were totally lost, and the residue, to the number of 2491 more, were fished up and saved, at the cost of $6000, which was paid by the plaintiff. The hides thus saved were delivered to the plaintiff's agent, and sold on his account. The whole sum insured on the cargo of hides, by the defendants, was $25,000.

On this state of facts, it has been contended, that this insurance, although on perishable commodities, being in gross, on a cargo consisting of a distinct number of articles, there may be a total loss as to some of them, although others be saved, and that for the part of the cargo, thus totally lost, the underwriters are liable, notwithstanding the agreement respecting what are generally called *memorandum* articles. In support of this position, it is said, that the only intention of the parties, in coming to this agreement, was to obviate disputes concerning losses arising from the perishable nature of the goods insured, but that as this loss happened in another way, and is total as to the portion of the property in question, it ought not to be considered as excluded by the *memorandum*.

*418] *Whatever may have been the motive to the introduction of this clause into policies of insurance, which was done as early as the year 1749, and, most probably, with the intention of protecting insurers against losses arising solely from a deterioration of the article, by its own perishable quality; or whatever ambiguity may once have existed from the term average being used in different senses, that is, as signifying a contribution to a general loss, and also a particular or partial injury falling on the subject insured, it is well understood, at the present day, with respect to such articles, that underwriters are free from all partial losses of every kind, which do not arise from a contribution towards a general average.

It only remains, then, to examine, and so the question has properly been treated at bar, whether the hides, which were sunk and not reclaimed, constituted a total or partial loss, within the meaning of this policy. It has been considered as total, by the counsel of the assured, but the court cannot perceive any ground for treating it in that way, inasmuch as out of many thousand hides which were on board, not quite 800 were lost, making, in

point of value, somewhat less than one-sixth part of the sum insured by this policy. If there were no *memorandum* in the way, and the plaintiff had gone on to recover, as in that case he might have done, it is perceived at once, that he must have had judgment only for a partial loss, which would have been equivalent to the injury actually sustained. But without having recourse to any reasoning on the subject, the proposition appears too self-evident not to command universal assent, that when only a part of the cargo, consisting all of the same kind of articles, is lost, in any way whatever, and the residue (which in this case amounts to much the greatest part) arrives in safety at its port of destination, the loss cannot but be partial, and that this must for ever be so, so long as a part continues to be less than the whole. This loss, then, being a particular loss only, and not resulting from a general average, the court is of opinion, that the defendants are not liable for it.

Having disposed of this point, it would seem as if much difficulty could not occur in deciding the other question, which has been made in this cause, and that is—whether the assured is not entitled to recover the *expenses which he was put to, in saving part of the hides which had [*419 sunk?

This liability is supposed to result from that clause in the policy, which authorizes the assured, "in case of any loss or damage, to sue, labor and travel for, in and about the defence, safeguard and recovery of the goods, or any part thereof, to the charges whereof the assurers will contribute, according to the amount of the sum insured." If this clause be construed with reference to what is most evidently its subject-matter, that is, a loss within the policy, and in connection with other parts of the instrument, it seems impossible to misunderstand it, or that it should receive so extensive an application as the plaintiff is desirous of giving to it. The parties certainly meant to apply it only to the case of those losses or injuries for which the insurers, if they had happened, would have been responsible. Having, in such cases only, an interest in rescuing or relieving the property, it is reasonable, that then only they should defray the charges incurred by an effort made for that purpose; but when a loss takes place, which cannot be thrown on them, it would require a much stronger and more explicit stipulation than we find in the policy, to render them liable to contribute to such expenses. If a cargo be insured for a long voyage, against sea risks only, and a capture intervene the very day after the vessel leaves port, it is very clear, that the underwriter is not only not liable for such a loss, but that he derives an advantage from it, as his risk may be terminated thereby, and the whole premium be earned, and yet, if the construction now endeavored to be put on this clause should prevail, all the expenses of claiming a property, in which he had no interest, and which, if condemned, is a matter of indifference to him, and all the costs of pursuing it through an almost endless litigation, would be thrown, whether the pursuit were successful, or otherwise, on an insurer who had taken care to restrict his liability to losses by perils of the sea only. The court cannot subscribe to such an interpretation, when a more natural, rational and obvious one, and that, without departing from the letter of the instrument, presents itself, which is, that this clause can never apply but in such cases as would, if they happen, be losses (either partial or total) within the meaning *of the [*420

policy. We are, therefore, of opinion, that the underwriters not being answerable for the principal loss in this case, they cannot be so for the subsequent expenses which were incurred in recovering the property. The judgment of the court below is affirmed, with costs.

Judgment affirmed.

Stark *v.* Chesapeake Insurance Company. (*a*)

Naturalization.

It need not appear by the record of naturalization, that all the requisites prescribed by law for the admission of aliens to the rights of citizenship, have been complied with.[1]

Semble: That the judgment of the court, admitting the alien to become a citizen, is conclusive that all the pre-requisites have been complied with; or, that parol proof may be received in aid of the record.

Error to the Circuit Court for the district of Maryland, in an action of covenant, upon a policy of assurance, in which the goods insured were warranted to be American property, "proof of which to be required in the United States only." A loss by capture having taken place, the plaintiff offered an abandonment which was refused, wherefore, he brought this action:

To prove his citizenship, and support the warranty, he produced and read at the trial, an exemplification, duly authenticated, of the record of his naturalization, in the words following, viz:

"At a court of common pleas, held at York, for the county of York, on the third Monday of May, in the year of our Lord, one thousand eight hundred and four, before John Joseph Henry, Esquire, president, and his associate judges, &c., assigned, &c. The petition of John Philip Stark, late of Wetgenstein Berleburg, in the empire of Germany, was read to the court, setting forth that your petitioner has resided in the state of Pennsylvania five years, that he is now desirous of becoming a citizen of the United States, conformably to the act of congress in such case lately provided; your
*421] petitioner therefore prays of the *honorable court, that he may be admitted to citizenship, upon his complying with the requisites of the act aforesaid, and your petitioner will pray, &c.

John Philip Stark."

"Jacob Hostler appearing in court, and being duly sworn, says, that the petitioner above named has resided within the state of Pennsylvania five years and upwards; and during that time, he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same.

"Sworn and subscribed in open court, the 21st of May 1804. Jacob Hostler."

Charles W. Hartley."

(*a*) March 8th, 1813. Absent, Washington, Todd and Duvall, Justices.

[1] See Spratt *v.* Spratt, 4 Pet. 393; Mutual Benefit Life Ins. Co. *v.* Tisdale, 91 U. S. 245, Hunt, J.