*Hughes *v.* Union Insurance Company.

Marine insurance.—Deviation.

Insurance on a vessel and freight, "at and from Teneriffe to the Havana, and at and from thence to New York, with liberty to stop at Matanzas," with a representation, that the vessel was "to stop at Matanzas, to know if there were any men of war off the Havana;" the vessel sailed on the voyaged insured, and put into Matanzas, to avoid British cruisers, who were then off the Havana, and were in the practice of capturing neutral vessels trading from one Spanish port to another; while at Matanzas, she unladed her cargo, under an order from the Spanish authorities; and afterwards, proceeded to Havana, whence she sailed on her voyage for New York, and was afterwards lost, by the perils of the seas. It was proved, that the stopping and delay at the Havana was necessary to avoid capture, that no delay was occasioned by discharging the cargo, and that the risk was not increased, but diminished:[1]

Held, that the order of the Spanish government was obtained under such circumstances as took from it the character of a *vis major* imposed upon the master, and was, therefore, no excuse for discharging the cargo; but that the stopping and delay at Matanzas were permitted by the policy, and that the unlading the cargo was not a deviation.[2]

This case distinguished from that of the Maryland Ins. Co. *v.* Le Roy, 7 Cranch 26.

Error to the Circuit Court for the district of Maryland. This was an action of *assumpsit*, brought on a policy insuring the ship Henry and her freight, "at and from Teneriffe to the Havana, and at and from thence to New York, with liberty to stop at Matanzas."

At the trial, the plaintiff gave in evidence the representation on which the policy was made, which contained this expression: "We are to stop at Matanzas, *to know if there are any men of war off the Havana." The vessel sailed from Teneriffe, on the 7th of April 1807, and on the 7th [*160 of June following, put into Matanzas, in the island of Cuba, to avoid British cruisers, who were then cruising on her way to, and off the port of, Havana, and who were then in the practice of capturing American vessels sailing from one Spanish port to another. On the 6th of July, as soon as the passage was clear, she proceeded to the Havana, whence, on the 14th of July, she sailed on her voyage to New York. On the 28th of that month, she

[1] A deviation consists in a variation of the risks insured against, without necessity or reasonable cause; if the risks be varied, the underwriter is discharged, though they be apparently diminished. Child *v.* Sun Mutual Ins. Co., 3 Sandf. 26. If a vessel lie by, at an intermediate part, to repair a defect, known at the commencement of her voyage, and be there destroyed by fire, it is a deviation, which discharges the underwriters. Audenreid *v.* Mercantile Mutual Ins. Co., 60 N. Y. 482.

[2] A delay in port will not amount to a deviation, if there be circumstances sufficient to justify it; and if justifiable, the taking in cargo will not render it a deviation. Foster *v.* Jackson Marine Ins. Co., Edm. S. C. 290. So, if the master, being delayed by adverse winds and danger, put into a place of safety, in his course, and send ashore for provisions, it is not a deviation. Thomas *v.* Royal Exchange Assurance Co., 1 Price 195. On a policy at and from London to New South Wales, and from thence to the ship's loading port or ports, in the East Indies, and elsewhere, and that she might proceed and sail to, and touch and stay at, any ports or places whatsoever and wheresoever, and for any purpose whatsoever; the ship sailed from London, with convicts, to New South Wales there; having discharged them, she proceeded in ballast to Batavia, where she took on board a quantity of corn, and discharged the same at Sourabuya, and was there loaded with a full cargo of rice, with which she proceeded to the Mauritius, where it was discovered that she had sustained an injury, and she was accordingly broken up: *held*, to be no deviation, although it was insisted, that by the terms of the policy, the ship was only to go to her loading ports, and not to trade or take in a fresh cargo. Armet *v.* Innes, 4 Moore 150. And see Company of African Merchants *v.* British and Foreign Marine Ins. Co., 8 L. R., Exch. 154.

foundered at sea, and was totally lost. The action was for the insurance on the vessel and freight from the Havana. The underwriters gave in evidence, that while at Matanzas, she unladed her cago, and insisted, that this was a deviation, by which they were discharged. To repel this evidence, the plaintiffs showed, that the stopping and delay at Matanzas were necessary to avoid capture, and therefore, allowed by the policy; that no delay was occasioned by discharging the cargo; that the risk was not increased, but diminished by it; and that an order from the Spanish government had made this act necessary.

The court instructed the jury, that unlading the cargo at Matanzas was a deviation, which discharged the underwriters, unless it was rendered necessary, by the order of the Spanish government at the Havana. That in this case, the order did not justify such unlading, and that the underwriters were, consequently, discharged. Under these directions, the jury found a verdict for the defendants. The plaintiff having excepted to the opinion of
*161] the court, the judgment *which was rendered in favor of the defendants was brought before this court on writ of error.

February 12th. *Harper*, for the plaintiff, argued, that the unlading at Matanzas was by a mandate, and not a permission, from the Spanish government, which, being a *vis major*, excused the master. That in this case, the risk was not increased, but diminished, by stopping at Matanzas. Neither party is at liberty to vary the risk; but this rule applies to cases where the change may produce some inconvenience to the insurer, not where it does actually produce it merely. Unnecessary deviation always discharges the underwriters, because it may increase the risk. But here, the policy permitted the stopping and delay at Matanzas; and the risk not only could not be increased, but was actually diminished, by discharging the cargo, and proceeding with the vessel close along the shore to the Havana. This doctrine is not impugned in the *Maryland Insurance Company* v. *Le Roy*, 7 Cranch 26. That case went on the ground of variation from the terms of the policy. The taking on board the jack-asses might have increased the risk; but whether in point of fact it did, or not, the court said was immaterial. But in the present case, there is no variation from the terms of the contract; the risk neither was, nor could be, increased, by unlading the cargo. In *Raine* v. *Bell*, 9 East 195, Marshall on Ins., app'x, No. VIII.,
*162] 834 *a*, the court of K. B. determined, that a ship may *trade at a port where she has liberty to touch and stay, provided this occasions no delay, nor any increase or alteration of the risk. It has also been held, in the courts of our own country, that selling a part of the cargo during a necessary detention, does not discharge the insurers.

Winder and *Jones*, contrà, argued, that the proceedings of the Spanish authorities were a mere permission, which the party might use or not, at his pleasure, and not an imperious mandate, which he was compelled to obey. It is an elementary principle of insurance law, that whether the deviation increase the risk or not, it discharges the underwriters. 2 Emergon, *Des Assurances*, 558; Marsh. on Ins. 185, *et seq.* The case of the *Maryland Insurance Company* v. *Le Roy*, illustrates the rule, and the jury there found that taking on board the jack-asses did not increase the risk. Dis-

charging the cargo at a place where permission is only given to touch, is a deviation. Marsh. on Ins. 208, 275, and the cases there collected. It is immaterial, whether the risk be increased, or diminished, or remain the same *in quantum*. In *Raine* v. *Bell*, the jury found, that the vessel would have otherwise been necessarily detained, while she was taking in the cargo ; and that case proves nothing more than that, while so detained, the master may take in cargo, but not break bulk. Staying to unlade, increases the risk ; but taking cargo on board, while necessarily detained, does not increase or alter the risk.

*D. B. *Ogden*, in reply, contended, that the question was whether during the necessary detention of the vessel the master had a right [*163 to land the cargo. The authority of *Kane* v. *Columbian Insurance Company* is conclusive to show that he had. If, according to *Raine* v. *Bell*, it be not a deviation, to take on board a cargo, at a port of necessity, neither is it a deviation, to land the cargo at a port of necessity. The case of the *Maryland Insurance Company* v. *Le Roy* is distinguishable. Where the master deviates, from necessity, his subsequent conduct, if *bonâ fide*, cannot discharge the insurers. But in this case, he acted in good faith for the benefit of all parties.

February 18th, 1818. MARSHALL, Ch. J., delivered the opinion of the court, and after stating the facts, proceeded as follows :—At the trial, the cause seems to have turned principally on the necessity to unlade the cargo at Matanzas, produced by the order of the Spanish government at the Havana. As this court concur with the circuit judge in the opinion, that this order was obtained under circumstances which take from it the character of a force imposed on the master, and compelling him to discharge his cargo, and is, therefore, no excuse for such discharge, it will be unnecessary further to notice that part of the case. The question to be considered is that part of the opinion, which declares, that unlading the cargo at Mantanzas, although it occasioned no delay, and did not increase, but did diminish the risk, was a deviation, which discharged the underwriters.

*In considering this question, it is to be observed, that the *termini* of the voyage were not changed. The Henry did sail from Teneriffe [*164 to the Havana, and was lost on the voyage from the Havana to Baltimore. The policy permitted her to stop at Mantazas, and the purpose of stopping was to know, if there were any men of war off the Havana. It would be idle to stop, for the purpose of making this inquiry, if it were not intended that the Henry might continue at Mantanzas, so long as the danger continued. The stopping and delay at Mantanzas is then expressly allowed by the policy.

But, admitting this, it is contended, that unlading the cargo is a deviation. And why is it a deviation ? It produced no delay, no increase of risk, and did not alter the voyage. The vessel pursued precisely the course marked out for her in the policy. In reason, nothing can be found in this transaction, which ought to discharge the underwriters. If, however, the case has been otherwise decided, especially in this court, those decisions must be respected.

In *Stitt* v. *Wardel* (1 Esp. 610), it was determined, that liberty to touch and stay at any port did not give liberty to trade at that port; and in *Sheriff* v. *Potts* (5 Esp. 96), it was decided, that liberty to touch and discharge goods, did not authorize the taking in of other goods. These cases certainly bear with considerable force on that under consideration, but they were decided at *nisi prius*, and seem to have been in a great degree overruled by the court, in the case of *Raine* v. *Bell*, reported *in 9 East. *165] In that case, under a policy to touch and stay at any place, goods were taken on board, during a necessary stay at Gibraltar. The court was of opinion, that as this occasioned no delay, nor any increase or alteration of the risk, the plaintiff was entitled to recover. Between the case of *Raine* v. *Bell*, and this case, the court can perceive no essential difference. In the supreme court of Pennsylvania (*Kingston* v. *Girard*, 4 Dall. 274), a similar question occurred, and it was there held, that unlading and selling part of her cargo, by a captured vessel, during her detention, would not avoid the policy.

But it is contended, that this point has been settled in this court, in the case of the *Maryland Insurance Company* against *Le Roy* and others. In that case, a liberty was reserved in the policy, "to touch at the Cape de Verd Islands, for the purchase of stock, such as hogs, goats and poultry, and taking in water." The vessel stopped at Fago, one of the Cape de Verd Islands, and took in four bullocks and four jack-asses, besides water and other provisions, unstowed the dry-goods, and broke open two bales, and took 40 pieces out of each, for trade. The vessel remained at the island, from the 7th to the 24th of May, although the usual delay at those islands for taking in stock and water, when the weather is good, is from two to three days. The weather was good during this delay; and the bullocks and jack-asses incumbered the deck of the vessel, more than small stock would have done. The court left it to the *jury to determine, whether *166] the risk was increased by taking the jack-asses on board, and directed them to find for the plaintiffs, unless the risk was thereby increased. The jury found for the plaintiffs; and this court reversed the judgment rendered on that verdict, because the taking in the jack-asses was not within the permission of the policy.

It is perfectly clear, that the case of the *Maryland Insurance Company* v. *Le Roy and others*, differs materially from this. In that case, articles were taken on board which incumbered the deck of the vessel, and which were not within the liberty reserved in the policy. In that case, too, the assured traded, and the delay was considerable and unnecessary; the risk, if not increased, might be, and certainly was, varied. The judge, therefore, ought not to have left it to the jury, on the single point of increase of risk by taking in the jack-asses. Although the risk might not be thereby increased, the unauthorized delay and unauthorized trading, during that delay, connected with taking on board unauthorized articles, discharged the underwriters, according to the settled principles of law; and the court does not say, in that case, that these circumstances were immaterial or without influence. The court does not feel itself constrained by the decision in the *Maryland Insurance Company* v. *Le Roy et al.*, to determine, that in this case also, which differs from that in several important circumstances, the

underwriters are discharged. *The judgment is reversed, and the cause remanded, with directions to issue a *venire facias de novo.*

Judgment reversed.(*a*)

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*Swan *v.* Union Insurance Company of Maryland. [*168

Marine insurance.—Loss.

To entitle the plaintiff to recover in an action on a policy of insurance, the loss must be occasioned by one of the perils insured against.[1] The insured cannot recover for a loss by barratry, unless the barratry produced the loss; but it is immaterial, whether the loss, so produced, occurred during the continuance of the barratry, or afterwards.

Error to the Circuit Court for the district of Maryland. This was an action on a policy of insurance upon the schooner Humming Bird, at and from New York to Port au Prince, and at and from thence back to New York.

The policy was dated on the 21st of July 1810, and the vessel sailed on the voyage insured, on the 5th of that month. About the 5th of August following, she arrived at Port au Prince, and was there stripped of her sails, and a considerable part of her rigging, by one James Gillespie, to whom she had been chartered for the voyage. This was done, with the knowledge and acquiescence of the master, either for the purpose of procuring the loss of the vessel, or of fitting up another vessel, which Gillespie wished to dis-

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(*a*) In the case of Urquhart *v.* Barnard, it was held by the English court of C. B., that if a ship has liberty to touch at a port, it is no deviation, to take in merchandise, during her allowed stay there, if she does not, by means thereof, exceed the period allowed for her remaining there. And that, if liberty be given to touch at a port, the contract not defining for what purpose, but a communication having been made to the underwriter, that the ship was to touch, for a purpose of trade, it shall be intended as a liberty to touch for that purpose. 1 Taunt. 450. Liberty to touch at a port for any purpose whatever, includes liberty to touch for the purpose of taking on board part of the goods insured. Violet *v.* Allnutt, 2 Taunt. 419. Under a liberty to touch and stay at all ports, for all purposes whatsoever, the stay must be for some purpose connected with the furtherance of the adventure. Whether the purpose is within the scope of the policy, is a question for the court. The policy not limiting the time of stay, whether a ship has stayed a reasonable time for the purpose, is purely a question for the jury. Langhorn *v.* Alnutt, 4 Taunt. 511.[2]

[1] Smith *v.* Universal Ins. Co., 6 Wheat. 176; Coles *v.* Marine Ins. Co., 3 W. C. C. 159; Boon *v.* Ætna Ins. Co., 12 Bl. C. C. 24; Mathews *v.* Howard Ins. Co., 11 N. Y. 9. If, however, the peril insured against were the proximate, though not the immediate cause of loss, the insurers are liable. Brown *v.* St. Nicholas Ins. Co., 2 J. & Sp. 231; s. c. 61 N. Y. 332; Insurance Co. *v.* Boon, 95 U. S. 130. And see Insurance Co. *v.* Tweed, 7 Wall. 44. Where different causes concur in occasioning a loss, the rule is, that the loss must be attributed to the efficient predominating peril, whether that peril were, or were not, in activity, at the time of the final consummation of the disaster. Dole *v.* New England Mut. Marine Ins. Co., 2 Cliff. 394; Howard Fire Ins. Co. *v.* Norwich and New York Transportation Co., 12 Wall. 194. And in case of the concurrence of two causes of loss, one at the risk of the assured, and the other insured against, if the damage by the perils respectively can be discriminated, each party must bear his proportion. Norwich and New York Transportation Co. *v.* Western Massachusetts Ins. Co., 6 Bl. C. C. 291; s. c. 12 Wall. 201; Howard Fire Ins. Co. *v.* Norwich and New York Transportation Co., *ut supra.*

[2] See Warre *v.* Miller, 4 B. & C. 538; Pratt *v.* Ashley, 1 Exch. 257; s. c. 16 M. & W. 471; Hunter *v.* Leathley, 10 B. & C. 858; s. c. 5 M. & P. 457.