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.

patch to the United States. On her return-voyage, she was sunk by Gillespie, but whether with or without the knowledge of the master, did not appear. The plaintiff insisted at the trial, that as barratry had been committed at Port au Prince, *the subsequent loss, however occasioned, was *169] to be ascribed to that cause, and he was entitled to recover. But the court directed the jury, that, admitting the act at Port au Prince to be barratry, the plaintiff could not recover on account of it, unless the jury should be of opinion, that it produced the loss. Under this direction, to which the plaintiff excepted, the jury found a verdict for the defendants.

February 12th. *Harper*, for the plaintiff, argued, that the loss, though not immediately consequent upon the act of barratry, was a ground of recovery; the assured ought to be protected against the incidental consequences of that act; and could not else have the benefit of his contract of indemnity. In the case of *Vallejo* v. *Wheeler*, Cowp. 143, the smuggling which was the barratrous act, was not the immediate and direct cause of the loss: yet the insured recovered, because the loss was sustained in consequence of the alteration of the voyage. Sergeant Marshall deduces from that case this corrolary, that if barratry be once committed, every subsequent loss or damage may be ascribed to that cause; and the underwriters are liable for it as for a loss by a barratry. Marsh. on Ins. 528, 531.

Winder, contrà, contended, that it did not appear that the act of the master at Port au Prince was barratrous, or anything more than gross neglect, or that he had any interest in the consequences of his supposed misconduct. The case of *Vallejo* v. *Wheeler* *does not support the inference *170] of Marshall, and his opinion is not authority, any further than it is borne out by the case. It has been doubted by the most enlightened jurists, whether barratry ought to be the subject of insurance, and certainly, it ought not to be extended beyond its direct and immediate consequences.

February 18th, 1818. Marshall, Ch. J., delivered the opinion of the court, and after stating the facts, proceeded as follows:—The general principle unquestionably is, that to entitle the plaintiff to recover, the loss must be occasioned by one of the perils in the policy; this is equally the rule of reason and the rule of law. But the plaintiff contends that the case of *Vallejo* v. *Wheeler* denies the application of this principle to a loss, in a case in which barratry has been committed. This court is not of that opinion. The case of *Vallejo* v. *Wheeler* declares it to be immaterial, whether the loss occurred during the continuance of the barratry, or afterwards, not whether the loss was produced by the barratry. In that case, the court was of opinion that the loss was produced by the barratry.

Judgment affirmed.(*a*)

(*a*) The cases on the subject of barratry are collected in Condy's edition of Marshall on Insurance, vol. 2, p. 515 *et seq*, and note 84, p. 534. To which add the following: Where the owner of a vessel chartered her to the master, for a certain period of time, *171] the master covenanting to *victual and man her at his own expense, he was held to be owner *pro hâc vice*, and no act of his would amount to barratry. And if he committed an act, which, were he invested with no other character than that of

master, could be barratrous, the insurer would not be liable, even to an innocent owner of the goods laden on board the vessel. Hallett *v.* Columbian Ins. Co., 8 Johns. 272. Barratry may be committed by the master, in respect of the cargo, although the owner of the cargo is, at the same time, owner of the ship, and although the owner is, also, supercargo, or consignee for the voyage. Cook *v.* Commercial Ins. Co., 11 Johns. 40. *Quære?* Whether information or facts, known to the assured, as to the carelessness, extravagance and want of economy in the master, be material, and ought to be disclosed to the insurer at the time of effecting the policy? Walden *v.* Firemens' Ins. Co., 12 Johns. 128, 513. A vessel was insured, among other risks, against fire; during the voyage, a seaman of the crew carelessly put up a lighted candle in the binnacle, which took fire, and communicating to some powder, the vessel was blown up and wholly lost; it was held, that the insurers were not liable for the loss. A loss occasioned by the mere negligence or carelessness of the master or mariners, does not amount to barratry, which is an act done with a fraudulent intent, or *ex maleficio*. Grim *v.* United Ins. Co., 13 Johns. 451. See 8 Mass. 308. A sentence condemning, as enemy's property, a cargo which the maater had barratrously carried into an enemy's blockaded port, although conclusive evidence that the cargo was enemy's property, at the time of capture and condemnation, does not disprove an averment that the cargo was lost by the master's barratrously carrying it to places unknown, whereby the goods became liable to confiscation, and were confiscated. Goldschmidt *v.* Whitmore, 3 Taunt. 508. Where the plaintiff declared on a policy from Jutland to Leith, and averred a loss by seizure; the master testified, that the ship was pursuing her course for Leith, when she was captured by a Swedish frigate, five German miles off the coast of Norway. The *defendant produced a Swedish sentence of condemnation, for breaking the blockade of Norway: *Held*, that this was conclusive evidence [*172 of the breach of blockade, but that it was not sufficient evidence to fix the master with barratry. That cannot be done, unless he act criminally; and to say, that he broke the blockade, in disobedience to the instructions of his owners, from some private interest of his own, was too strong an inference from the evidence as it stood. The ship might have been bound for Leith, and yet might have received instructions to touch at Norway; and for other reasons, she might have gone thither, without any imputation of barratry. But the court did not decide, whether the plaintiff could have recovered, without a count for barratry, nor whether, upon a count for barratry, the sentence for a breach of blockade would be conclusive. Everth *v.* Hannam, 2 Marsh. 72; s. c. 6 Taunt. 375. Improper treatment of the vessel by the master, will not constitute barratry, although it tend to the destruction of the vessel, unless it be shown that he acted against his own judgment. Todd *v.* Ritchie, 1 Stark. 240.[1]

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[1] If the act of the master were intended to benefit the owner, though mistaken and illegal, it cannot amount to barratry. Dederer *v.* Delaware Ins. Co., 2 W. N. C., 61. So, the negligence or carelessness of a competent master, does not amount to barratry. Sturm *v.* Atlantic Mutual Ins. Co., 63 N. Y. 77; s. c. 6 J. & Sp. 281. As the negligence of the master and crew, in failing to extinguish a fire. Patapsco Ins. Co. *v.* Coulter, 3 Pet. 222. See Burk *v.* Royal Exchange Assurance Co., 2 B. & Ald. 73; Bishop *v.* Pentland, 7 B. & C. 214; Grill *v.* General Iron Screw Collier Co., 1 L. R., C. P., 600; Atkinson *v.* Great Western Ins. Co. 65 N. Y. 531.