
Hugg et al. v. Augusta Insurance and Banking Co.

of *McDonogh v. Millaudon*, 3 How., 693, the State courts were called on to construe a perfected Spanish title, and to settle its limits by applying the local law, and having done so, this court has no authority to revise the judgment; nor can we see how the case would have been different had Forbes & Co.'s grant been an elder patent emanating from the United States directly; as in such a case a controversy concerning the incidents of alluvion would not have drawn in question an act of Congress, or a survey made according to an act of Congress.

We deem it useless to examine in detail the instructions proposed by the defendants below, and rejected by the court. The only one worthy of notice was that which rejected Weakly's survey of Forbes & Co.'s grant, made and approved in 1835. It could not change the grant, nor affect its validity in any degree, and could only be read to establish boundary as a matter of fact; and neither its admission nor rejection, when offered for such purpose, could give this court jurisdiction, no matter which side should be injured; and so this court, in effect, held in the case of *Mackay v. Dillon*, 4 How., 447. The survey was an *ex parte* proceeding for the purposes of the land-office, and immaterial to Forbes & Co.'s title.

On careful examination, we are of opinion that no one question was raised and decided in the State courts that gives this court jurisdiction to revise such decision; and that, therefore, the case must be dismissed for want of jurisdiction.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Alabama, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that this cause be and the same is hereby dismissed, for want of jurisdiction.

JACOB HUGG AND JOHN M. BANDEL, PLAINTIFFS, [*595
v. THE AUGUSTA INSURANCE AND BANKING COM-
PANY OF THE CITY OF AUGUSTA.

In an insurance upon freight, there is no total loss of a memorandum article as long as the goods have not lost their original character, but remain in

Hugg et al. v. Augusta Insurance and Banking Co.

specie, and in that condition are capable of being shipped to their destined port, no matter what may be the extent of the damage.¹

If, however, the articles are not capable of being carried, in specie, to the port of destination, arising from danger to the health of the crew or to the safety of the vessel; or the public authorities at the port of distress order the articles to be thrown overboard, from fear of disease, there would be a total loss.²

In construing the contract of insurance upon freight, the interest of the insured, or of the underwriters of the cargo, is not considered. Therefore, if the vessel is in a condition to carry on the cargo to the port of destination, or another vessel can be procured for that purpose, it is the duty of the owner of the vessel to carry it on, although it may be for the interest of the insured and insurers of the cargo to sell it at the port of distress.

If so sold, the insured cannot recover for a total loss of freight.

But although it is the duty of the owner of the vessel, either to repair his own or to procure another at the port of distress to carry on the cargo, yet, if it should be made to appear that the repairs or procurement of another vessel would necessarily produce such a retardation of the voyage as would, in all probability, occasion a destruction of the article, in specie, before it could arrive at the port of destination, or, from its damaged condition, it could not be reshipped in time, consistently with the health of the crew or safety of the vessel, or would not be in a fit condition, from pestilential effluvia or otherwise, to be carried on, it then became the duty of the master to sell the goods for the benefit of whom it might concern.

A policy of insurance upon "freight of the bark Margaret Hugg, at and from Baltimore to Rio Janeiro and back to Havana or Matanzas, or a port in the United States, to the amount of \$5,000, upon all lawful goods, &c., beginning the adventure upon the said freight from and immediately following the lading thereof aforesaid at Baltimore, and continuing the same until the said goods, wares, and merchandise shall be safely landed at the port aforesaid," upon which a greater premium was paid than was usual for the outward voyage alone, must not be construed as a policy upon the round voyage.³

The insurers were, therefore, not entitled to a deduction for the outward freight.

THIS case came up, on a certificate of division, from the Circuit Court of the United States for the District of Maryland.

¹ EXPLAINED. *Insurance Co. v. Fogarty*, 19 Wall., 643, 4. *S. P. Mercader v. Chesapeake Ins. Co.*, 8 Cranch, 39; *Moreau v. United States*, 1 Wheat., 219; s. c., 3 Wash. C. C., 256; *Humphreys v. Union Ins. Co.*, 3 Mason, 429; *Robinson v. Commonwealth Ins. Co.*, 3 Sumn., 220.

An actual total loss of freight arises only where the circumstances are such as to render the ultimate earning of freight absolutely impossible or practically hopeless. The mere loss of the vessel does not produce this result, as the master may still earn the freight by forwarding the cargo by other means of conveyance; and it is his duty to the insurer on freight so to do, if in his power. If the owner

neglect to do this, the insurer on freight is chargeable only in the same way and to the same extent as if the duty had been performed, and the loss will be partial or total according to the amount so adjusted. The question, therefore, whether the loss of freight is total, does not depend upon whether the ship is totally lost, but upon whether there is a chance of being able to earn the freight by forwarding the cargo. *Hubbell v. Great Western Ins. Co.*, 74 N. Y., 246; reversing s. c., 10 Hun, 167.

² CITED. *Williams v. Hartford Ins. Co.*, 54 Cal., 451.

³ FOLLOWED. *Insurance Co. v. Mordecai*, 22 How., 118.

Hugg et al v. Augusta Insurance and Banking Co.

The Reporter finds the following statement prefixed to the opinion of the court, as delivered by Mr. Justice Nelson.

This is an action upon a policy of insurance on the freight of the bark Margaret Hugg, at and from Baltimore to Rio Janeiro, and back to Havana or Matanzas, with liberty to touch and stay at any intermediate port in case of stress of weather, or for the purpose of transacting business. The amount \$5,000; premium, \$158.25.

The policy contained the usual memorandum, enumerating various articles warranted free from average, and all others that were perishable in their own nature.

About four hundred tons of jerked beef were shipped on board the vessel at Montevideo, which were to be delivered in good order at the port of Matanzas or Havana to the *consignees, they paying freight. The bill of lading [*596 was signed the 25th of April, 1842.

The vessel sailed from Montevideo on the 29th of April, and, after being out some forty-seven days, encountered a storm, and was driven on Gingerbread Ground, where she received considerable damage; the rudder was broken and unshipped, and as the extent of the damage could not be ascertained, it was deemed prudent, on consultation with the captain of a wrecking vessel and Bahama pilot, to go into Nassau for the purpose of a survey and repairs. The wind was fair for that port, but strong ahead in the direction of Matanzas. The vessel was taken in charge of one of the wreckers, and arrived at Nassau on the second day, about the 20th of June, and grounded on the bar while entering the harbour, and under the charge of the king's pilot, and sustained a good deal additional damage.

A part of the beef had been thrown overboard to lighten the vessel while on the Gingerbread Ground; and a much larger quantity while on the bar at Nassau. She had leaked while on the ground in the former place, so that it was necessary to work the pumps every half hour; and at the latter, there was seven or eight feet of water in the hold, with some fourteen men at the pumps.

The beef was so much damaged by the sea-water that the board of health at Nassau refused to allow but about one hundred and fifty tons to be landed. The rest was ordered to be carried outside the bar, and thrown into the sea, for fear of disease; it was wet and very much heated, some of it so changed as to become green, and all emitting an offensive stench. The portion allowed to be landed was wet and heated, and not in a fit condition to be shipped; and the

Hugg et al. v. Augusta Insurance and Banking Co.

board of health recommended to the authorities, that it should be removed as soon as conveniently could be.

The vessel was surveyed after the cargo was discharged, and it was found that the rudder was entirely broken off, the forefoot gone, and the keel greatly shattered and damaged; and it appears to be conceded that she could not have been repaired at that port so as to have carried on the cargo, and that, if she could, it would have cost more than half her value. She was repaired sufficiently to bring her home in ballast. It also appears that there was no vessel in port that could be procured to forward on the remaining cargo, even if it had been in a condition to be shipped.

The salvors libelled the vessel and cargo for salvage services in the Vice-Admiralty Court of the Bahamas on the 30th of June, 1842, to which the master put in an answer on *597] the 7th *of July, insisting that the libellants were entitled to compensation for pilotage only, and not for salvage.

The court, on the 18th of July, decreed \$2,100 salvage to the libellants, for services rendered to the vessel and cargo. Appraisers of the vessel and cargo taken on shore had been previously appointed; and, on an examination of the cargo, it was found to be so much damaged, and in such a condition, that they advised an immediate sale, as it was deteriorating in value daily.

The master assented to a sale, accordingly, which was ordered by the court on his application on the 1st of July. The nett proceeds amounted to \$2,664.92. The time occupied in an ordinary voyage from Nassau to Matanzas is three days, and to Baltimore, ten.

It was proved by several masters of vessels, that the navigation at the place where the Margaret Hugg first grounded, and was visited by the pilots, was very hazardous, and that, under similar circumstances, they would have considered it their duty to have carried their vessel into the harbour at Nassau.

The regular premium for insurance of freight of the cargo covered by the policy for the outward voyage was about one and one eighth per cent.

Upon this state of facts appearing at the trial, the following questions were raised, and presented to the court, viz.:—

1. It being admitted that the loss is to be adjusted according to the terms of the Baltimore Insurance Company, if the jury find that jerked beef was a perishable article within the meaning of the policy, are the defendants liable as for a total loss of freight, unless the entire cargo was so totally de-

stroyed that no part of it could have been carried to the port of destination even in a deteriorated and valueless condition?

2. If the jury find that, from the condition of that portion of the cargo sold at Nassau (occasioned by the disasters stated in the testimony), it was for the interest of the insured and insurers upon the cargo that it should be so sold, and not transported to Matanzas, is the plaintiff entitled to recover for a total loss of freight, provided his own vessel could have been repaired in a reasonable time, so as to perform the voyage in safety, or he could have procured another vessel, and have transmitted to the port of destination, in its deteriorated state, the portion sold at Nassau? And

3. Assuming that the plaintiff is entitled to recover, is the policy on the amount mentioned for one entire voyage round, from Baltimore out and home again? and are the defendants entitled to deduct from the amount insured the freight earned in the voyage from Baltimore to Rio upon the outward cargo?

*The cause was argued by *Mr. Mayer* and *Mr. Nelson*, [*598 for the plaintiffs, and *Mr. David Stewart* and *Mr. John-son*, for the defendants. The following is a very brief sketch of the respective arguments.

Mr. Mayer, for the plaintiffs.

The premium was double what would have been demanded for half the voyage. Some of the beef was thrown out as spoiled, the rest landed, somewhat injured. Then came a libel for salvage, and a decree for it. No funds existing to pay it or make the necessary repairs with, a sale was ordered. We abandoned, and now claim for a total loss. The policy is a blank cargo policy, filled up with an insurance on freight. Does the claim arise where the articles are not entirely lost? In England the courts of Common Pleas and King's Bench have decided differently. 3 Bos. & P., 474; Marshall on Ins., 227, 565; 2 Mau. & Sel., 247;—that the articles, though not lost, might be deemed extinct. 32 Com. Law Rep., 115; 1 Wheat., 219, 225,—case of memorandum articles; 2 Philips on Insurance, 485,—all the decisions cited; 6 Cow. (N. Y.), 270.

The law was settled in England by the case of *Roux v. Salvador*, 3 Bing. (N. C.), 266; s. c., 1 Bing., 526; and there is nothing contradictory in the decisions of this court. The case in 1 Wheaton depended on particular circumstances. If the beef had to be thrown overboard for the sake of health, it could not be considered any longer as beef for all commercial purposes. If the voyage is broken up, there is an end to

Hugg et al. v. Augusta Insurance and Banking Co.

freight; and it was broken up here by the perils insured against. There is no difference between memorandum and other articles, when a total loss ensues. Marshall on Ins., 585; 12 East, 304; 15 East, 565; 6 Mass., 119, 318, where the cases are cited; 1 Wheat., 219.

The *vis major* of the claim for salvage broke up the voyage and destroyed the property. The beef was in a fermenting state. The condition of the vessel was hopeless. As to the effect of *vis major*, 7 Com. Law Rep., 202.

Second question certified.

This involves the discretion of the captain. The owner of the vessel is bound by his contract to carry the goods. If the perils of the sea require a transshipment, it is his privilege and duty to make it. But if there be a difficulty in obtaining a vessel, the master is not bound to pay an excessive freight. 7 East, 44; 7 Com. Law Rep., 364, same as 3 Brod. & B., 97; 36 Com. Law Rep., 156, same as 9 Ad. & El., 314; 4 Johns. (N. Y.) Ch., 225; 7 Cow. (N. Y.), 584; 4 Wend. (N. Y.), 54; 12 Johns. (N. Y.), 107; Abbott on Shipp., 369, 461.

*599] But if the court should think that it was the duty of the master to transship, then I say that, if there was ground of abandonment from *vis major*, the captain became the agent of the insurers, and they must be responsible for his errors. 9 Johns. (N. Y.), 28. If half the property is lost, it is not the duty of the master to transship.

The captain is the agent of the adventure, and if the jury justify him as to the vessel or cargo, his acts bind all parties. 5 Pet., 604; 1 Johns. (N. Y.), 406. The exigency would have justified a prudent man in acting as he did, if there had been no insurance. He is to act for the general good, mindful of the owners and insurers. 3 Moo., 133, quoted in 2 Phill., 268. Was not this a judicial sale? The judge ordered it, not upon the petition of the master, but as an order of the court. The opposite party appeared, and did not object to it. 1 Wash. C. C., 530.

The third question relates to the *quantum* of recovery. The outward cargo belonged to the owners of the vessel, and thus, in fact, no freight was earned. But we are charged with a constructive freight. Suppose the owner could earn freight from himself, this is an open policy, and value must be proved. There is no evidence to show that the value of the outward freight was just half of the whole sum insured. It could not be a round voyage, because the owners sent out an adventure, and only intended to earn freight on the return. In an open policy, we have only to show that we had that amount of interest when the loss occurred. We paid a pre-

Hugg et al. v. Augusta Insurance and Banking Co.

mium, double of what we would have been charged for the outward voyage alone. It could not, therefore, have been intended as a round voyage. 3 Cai. (N. Y.), 16; 7 Gill & J. (Md.), 293; 12 Wheat., 383; 3 Wend. (N. Y.), 283; 2 Wash. C. C., 89; 1 Rawle (Pa.), 97; 33 Com. Law Rep., 124, or 3 Barn. & Ad., 198; 4 Peck, 429; 3 Com. Law Rep., 480; 2 Stark., 573.

Mr. Stewart, for the defendants.

It is proper that some omissions of the opposite counsel should be supplied. In the first place, the captain knew that he was insured; the answer to the libel says so. In the next place, he could have prosecuted his voyage. The answer to the libel says, that "without any assistance from Demeritt and his party, he could have got the bark clear of the Gingerbread Ground, and could, without any other than the ordinary dangers of the sea, have proceeded in the prosecution of their voyage." In the third place, the condition of the cargo was not so bad. The report of the board of health, made on the 29th of June, 1842, says, that "the quantity of beef *which is housed in the store appears to the board to be in a sound condition, and fit for the purpose for [*600 which it was cured." This was made on the 29th. On the 30th, the captain petitioned for a sale, which took place on the 1st of July. In the affidavit to support the motion for a sale, the captain says "he had intended, previous to the commencement of the action, that the sale of such beef should take place in the early part of the present week." What became of the cargo? In fact, it went to the very port of destination. The captain says, in his deposition, that Adderly "bought the beef with the intention of shipping it to Matanzas." Strobel, the supercargo, says, "The vessel had no means of her own to make the repairs with, but Mr. Starr, the agent of the underwriters, offered to advance money for repairs upon bottomry." The libel for salvage was contested, and limited to pilotage, and yet a sale took place.

As to the first question certified. The object of the policy is to protect underwriters by excluding small losses. Partial losses, therefore, are not recoverable, as long as part of the cargo remains not liable at all. 3 Bos. & P., 478, does not impugn this doctrine, because the articles were thrown overboard from necessity.

In *Roux v. Salvador* there was a special verdict, in which the jury found that the hides would have lost their character from putrefaction. The court relied upon this. Of course

Hugg et al. v. Augusta Insurance and Banking Co.

there was a total loss. The counsel then referred to the following cases. Park, 191, 185; 2 Mau. & Sel., 371; 2 Com. Law Rep., 55, or 7 Taunt., 154; 4 Mart. (La.), n. s., 640; 16 East, 214; 1 Cain. (N. Y.), 196; 3 Id., 108; 4 Johns. (N. Y.), 139; 4 Wend. (N. Y.), 33; 7 Cranch, 415; 8 Cranch, 39; 3 Wash. C. C., 356; 1 Wheat., 59; 3 Mason, 429. From the time of 1 Wheaton to 3 Mason, the question was not mooted, and when it was, it was only upon the authority of 15 East. 5 Mees. & W. explains 15 East to have been an insurance upon each parcel. But here a part of the beef was good, and sold for fifty per cent. of its cost. From this loss our contract exempts us. The assured warrant that they will not charge, except for general average. The vessel was within three days' sail of Matanzas, and if the jury find that beef was a perishable article, we cannot be liable.

The second question assumes that the vessel could have been repaired, or that another vessel might have been obtained. Could the act of the captain give the plaintiffs a right to recover in this action? The opposite counsel wish to make the cargo a test of the rule respecting freight; but the cargo is nothing to us. The agency of the captain binds *601] all parties *who are within the contract of indemnity, but not those who are beyond it. There was no necessity for a sale, if another vessel could have been had. 1 Johns. (N. Y.), 205; 3 Id., 321; 9 Id., 21; 2 Pick. (Mass.), 104; 23 Id., 405; 10 Com. Law Rep., 366. These cases show that, if the captain could transship, it was his duty to carry on the cargo. The expense is nothing to us. It might have cost half the freight. 4 Wend. (N. Y.), 54.

On the third question, *Mr. Stewart* cited and commented upon 20 Com. Law Rep., 342; 36 Com. Law Rep., 216.

Mr. Johnson, on the same side.

As to the first question. Certain articles are inserted in the memorandum, to guard against frauds upon the underwriters, because no one could tell whether or not the losses arose from the perils insured against. For example, it is impossible to say how far the injury to the beef proceeded from the perils of the sea, or whether or not it would have been putrid, if there had been no storms. Therefore we only insured against a total loss. The question assumes that the master could have carried on the beef in his own or some other vessel,—in a valueless condition, it is true. But does this make us liable? We may lay down these two propositions:—

1st. The case cited from Wheaton establishes, that, if a

Hugg et al. v. Augusta Insurance and Banking Co.

vessel arrives at her port, the underwriters are not responsible, unless in case of general average.

2d. Where the vessel could go on, the same rule must be applied as if she had actually gone on. Otherwise, it is in the power of the captain to convert no loss into a total loss. The underwriters are placed completely in his power. In this case, if the vessel had pursued her voyage, the underwriters would not have been responsible. Originally, the doctrine was more extensive upon our side than now, because it was held that, if any article existed at all, the insurers were discharged. The case in 3 Bingham only corrects this in its vicious extent; it only makes the underwriters free, if the cargo arrives consisting of the same articles which composed it before,—that is, if flour is still flour, hides are still hides, &c. The question of value is left out of view altogether. The question before us is, not whether the jury must find that the beef had ceased to be beef or not, but only speaks of its value. 1 Wheat., 219, decides this. It says that the consideration of quantity or value is of no consequence. If, therefore, ever so small a quantity of the article arrives, or ever so much injured, the underwriters are not responsible. The master's duty was to go on. The case of *Roux v. Salvador* does not *justify [602 the sale at Nassau. The hides in that case would have lost their character as hides.

And as to the second question. This assumes that the master could have repaired his vessel. The question of cost is not involved. Was it not his duty to send on the cargo? If the other side are right, it is always in the power of the assured to bind us by stopping short, when we would not have been responsible if the cargo had been carried on. The agency of the master only begins when the liability of the underwriters is absolutely fixed. The law is settled in England, New York, Louisiana, and in this court. If the cargo remains, specifically, the underwriters cannot be held responsible for a total loss upon memorandum articles. 3 Cai. (N. Y.), 108; 1 Johns. (N. Y.), 305; 3 Id., 328; 14 Id., 139, 143, 144, 145; 23 Pick. (Mass.), 405-409, 412, 414-416; 4 Barn. & C., 366; 3 Kent's Com., 210, 212, 213; 36 Com. Law Rep., 157, or 9 Ad. & El., 314, cites the above from Kent, with approbation; 3 Mason, 429, 440; 16 East, 214, overrules 5 East.

The owner of the cargo is bound to pay freight if the cargo arrives, no matter how much injured it may be. On memorandum articles, the underwriters are not responsible for any thing but a total loss. The policy contains such a

Hugg et al. v. Augusta Insurance and Banking Co.

clause, and no one has a right to strike it out. But the question supposes a discretion to exist in the master, to act for the benefit of all parties. But how can he do so when their interests are contradictory? If he could have gone on, then a loss of freight has occurred, not from the perils of the sea, but from the conduct of the master. If he has acted for the benefit of the owners of the cargo, that is nothing to us. We only insured that freight should be earned, not that it should be actually received. It might have been for the interest of the owner of the ship and the owner of the cargo to terminate the voyage at Nassau. But it was not for our interest, and we cannot be bound by the act.

Third question. Was it a round voyage? We rely on 2 Stark., 573; 3 Com. Law Rep., 408.

Mr. Nelson, for the plaintiffs, in reply and conclusion.

I admit that, if the loss was not total, we cannot recover. But the proposition is a surprising one, which asserts that an article can be totally valueless in point of fact, and yet not be a total loss in point of law. The object of all contracts of insurance is to preserve property, and here its value is admitted to be entirely destroyed. There is no adjudged case which sanctions such a doctrine. I speak not of the language used by courts, but of points decided. It has *603] never been before *this court. We do not assert that a loss of a part can be considered a total loss. In 7 Johns. (N. Y.) Ch., 415, the loss of a part of the hides was held to be a partial loss. This is settled law in the United States. Massachusetts has followed it. But it is not our question. In 8 Cranch, 47, it is said that nothing short of physical extinction or extinction in value will justify an abandonment of memorandum articles; but it is not settled whether extinction in value will be sufficient. 1 Wheat., 219, is not like our case. The vessel there did not put into any port of distress, but arrived at her destination.

In the New York cases, the language of the judges is strong, but the cases themselves are distinguishable from ours. (*Mr. Nelson* here remarked upon the case of *Griswold v. New York Ins. Co.*, in 1 Johnson, and again reported in 3 Johnson, and also upon the case in 14 Johnson.)

These New York cases rest upon a dictum of Lord Mansfield, which has been overruled again and again. (*Mr. Nelson* then examined all the cases in chronological order, viz.:—*Park on Ins.*, 253; same book, 247; *Cocking v. Fraser*, 4 Doug., 295; 7 T. R., 218,—where the first doubt of *Cocking*

Hugg et al. v. Augusta Insurance and Banking Co.

v. *Fraser* was expressed by Lord Kenyon, Park on Ins., 252; *Dyson v. Rowcroft*, 3 Bos. & P., 474,—where it is said that *Cocking v. Fraser* is much shaken; 15 East; 16 East, 214; 17 Com. Law Rep., 408, 409, or 9 Barn. & C., 411; and the case of *Roux v. Salvador*, which came up twice, 27 Com. Law Rep., 481, or 1 Bing. (N. C.), 526, and 32 Com. Law Rep., 115; 5 Mau. & Sel., 447.)

The English authorities appear to settle the point, that, if the value of an article is destroyed, it is a total loss. This opinion is fortified by Stevens and Benecke on Average, p. 435.

The New York cases rely upon *Cocking v. Fraser*. There is a learned argument on the subject in 14 Conn., 47.

As to the second question. It is, that, assuming a power to transship when the articles were damaged, whether an insurance upon freight can be recovered, it being granted that the cargo was insured and that it was for the interest of all parties to sell. The opposite counsel says that 23 Pickering closes this case. But I think not. (*Mr. Nelson* commented on the authority.) The question to be settled is, What ought the master to do? The authorities read by *Mr. Mayer* have not been answered. They show that where the master is in the double situation of protector of the ship and cargo, he must act with a sound discretion. Another point open upon the record is, that the vessel was in the hands of the law. The vessel entered the port on the 22d of June, and was sold on the 1st of July. The goods were taken from the control of the master and placed in *custody of the law. The [*604 sale was a judicial one, and the captain only did what his duty required.

As to the third question. This very point is decided in 12 Wheat., 383.

Mr. Justice NELSON delivered the opinion of the court, after reading the statement prefixed to this report.

The first point certified, upon the assumptions stated, involves the question, whether the underwriter of a policy upon freight of goods warranted free from average is liable, as for a total loss, unless the goods be actually destroyed by one of the perils insured against, so as to be incapable of shipment to the port of destination; or whether a total loss may result at the port of distress from the goods having been so much damaged, that, if sent on, they would become of no value at the time they reached the port of destination; and hence, instead of being sent on, may be sold for the benefit of whom it may concern.

Hugg et al. v. Augusta Insurance and Banking Co.

The contract of insurance upon freight is, that the goods shall arrive at the port of delivery notwithstanding the perils insured against; and that, if they fail thus to arrive, and the owner is thereby unable to earn his freight, the underwriter will make it good.

It does not undertake that the goods shall be delivered in a sound or merchantable state, or that the vessel in which they are shipped shall be safe against the dangers of the sea, but that it shall be in the power of the insured to earn his freight; that is, that the perils insured against shall not prevent the ship from earning full freight for the assured in that voyage. If the ship and cargo remain, notwithstanding the disasters, in a condition to continue the voyage, it is in his power to earn freight, and he is bound to proceed; but if damage happens to either, and the voyage is broken up, so that no freight can be earned, the owner is entitled to recover, as for a total or partial loss, according as he may or may not have earned freight *pro ratâ itineris*.

If the damage happens to the vessel, and that can be repaired at the port of distress in a reasonable time, and at a reasonable expense, it is the duty of the owner to make the repairs, and to continue the voyage and earn his freight; and, on the other hand, if the damage happens to the goods, and the ship be in a capacity to proceed, or, if disabled, another can be procured upon reasonable terms, the owner of the ship will still be entitled to perform the voyage and recover his freight, unless the goods have been totally destroyed. In every case, before he can recover of the underwriter, he must *605] show that he *was prevented by one of the perils insured against from completing the voyage, and, for that reason, had failed to entitle himself to freight from the shippers.

The first point certified to us assumes that the ship was capable of carrying on the cargo to the port of delivery notwithstanding the injuries received; and the only question is, whether the cargo was so much damaged, and in such a condition, as to have dispensed with that duty.

In the case of memorandum articles, the exception of particular average excludes a constructive total loss; and, of course, the principle which allows an abandonment where the loss exceeds half the value does not apply. There must be an actual total loss of the goods. The object of the clause is to protect the underwriter from any partial loss on articles of a perishable nature, which are liable to inherent decay and damage, independently of the damage occasioned by the perils insured against, and where it would be difficult, if not

Hugg et al. v. Augusta Insurance and Banking Co.

impossible, to distinguish between them. In case of a total loss, consequent upon the happening of one of the perils, the whole damage is presumed to have arisen from that cause, and thus all dispute is avoided as to the origin or nature of the loss.

What constitutes a total loss of a memorandum article has been the subject of frequent discussion, both in the courts of England and this country, and in the former of some diversity of opinion; but, in most of the cases, the decisions have been uniform, and the principle governing the question regarded as settled; and that is, so long as the goods have not lost their original character, but remain in specie, and in that condition are capable of being shipped to the destined port, there cannot be a total loss of the article, whatever may be the extent of the damage, so as to subject the underwriter. The loss is but partial. The cases are numerous on the subject, and will be found collected in Park on Marine Ins., ch. 6, subd. 13, p. 247; 2 Phillips on Ins., ch. 18, p. 483; and 3 Kent, Com., 295, 296. It would be useless to refer more particularly to them.

The only doubt that has been expressed in respect to the soundness of this rule is, whether a destruction in value for all the purposes of the adventure, so that the objects of the voyage were no longer worth pursuing, should not be regarded as a total loss within the memorandum clause, as well as a destruction in specie. But although this has been suggested in several cases in England as a proper qualification, and as coming within the obligation of the underwriter, there is no case to be found in which the suggestion has received the sanction of judicial authority.

In this country the rule has been uniform, that there must *be a destruction of the article in specie, as will be seen by a reference to the following authorities. *Mag- [606* *grath v. Church*, 1 Cai. (N. Y.), 196; *Neilson v. Col. Ins. Co.*, 3 Id., 108; *Le Roy v. Gouverneur*, 1 Johns. (N. Y.) Cas., 226; *Griswold v. New York Ins. Co.*, 1 Johns. (N. Y.), 205, Livingston, J.; s. c., 3 Id., 321; *Saltus v. Ocean Ins. Co.*, 14 Id., 138; *Whitney v. N. Y. Firemen Ins. Co.*, 18 Id., 208; *Brooke v. Louis. State Ins. Co.*, 4 Mart. (La.), N. s., 640; s. c., 5 Id., 530; *Morean v. U. S. Ins. Co.*, 1 Wheat., 219; *McGaw v. Ocean Ins. Co.*, 23 Pick. (Mass.), 405; 3 Sumn., 544; 1 Story, 342.

Whether the test of liability is made to depend upon the destruction in specie, or in value, would, we are inclined to think, as a general rule, make practically very little, if any, difference; for while the goods remain in specie, and are

Hugg et al. v. Augusta Insurance and Banking Co.

capable of being carried on in that condition to the destined port, it will rarely happen that on their arrival they will be of no value to the owner or consignee. The proposition assumes a complete destruction in value, otherwise the uncertainty attending it would be an insuperable objection; and, in that view, it may be a question even if the degree of deterioration would not be greater to constitute a total loss than is required under the present rule.

The rule as settled seems preferable, for its certainty and simplicity, and as affording the best security to the underwriter against the strong temptation that may frequently exist, on the part of the master and shipper, to convert a partial into a total loss.

Mr. Park, in speaking of the case of *Cocking v. Fraser* (4 Doug., 295), a leading one in the establishment of the rule, observes that the wisdom of the decision is apparent; for, otherwise, it would be a constant temptation to the assured, whenever a cargo of this description was likely to reach the port of destination in an unsound state, to throw the loss upon the underwriters, by voluntarily giving up the further prosecution of the voyage, to which they were not liable by the terms of the memorandum. (1 Park, 249.)

The rule, it will be observed, as we have stated it, contemplates the arrival of the goods, or some part of them, in specie, at the port of delivery; or that they were capable of being shipped to that port in specie. And hence, if the commodity be damaged so that it would not be allowed to remain on board consistently with the health of the crew or safety of the vessel, or if permission be refused to land the same by the public authorities at the port of distress for fear of disease, and, for these and like causes, should, from necessity, be destroyed by being thrown overboard, notwithstanding the article existed *in specie, and might have been carried *607] on in that condition, there would still be a total loss within the meaning of the policy. In the cases supposed, it is as effectually destroyed by a peril insured against, as if it had gone to the bottom of the sea from the wreck of the ship. The same result follows, also, if the goods be so much damaged as to be incapable of reaching the port of destination in their original character.

These principles are either stated in, or are fairly deducible from, several cases, but especially from the cases of *Dyson v. Rowcroft*, 3 Bos. & P., 474, and *Roux v. Salvador*, 3 Bing. (N. C.), and s. c., 1 Bing. (N. C.), 526.

In *Roux v. Salvador*, in the Exchequer, it was observed that the argument rested upon the position, that, if, at the

termination of the risk, the goods remained in specie, however damaged, there was not a total loss; and it was admitted that the position might be just, if, by the termination of the risk, was meant the arrival of the goods at their place of destination; but that there was a fallacy in applying those words to the termination of the adventure before that period by a peril of the sea, as the object of the policy is to obtain an indemnity for any loss that the assured might sustain by the goods being prevented by the perils of the sea from arriving in safety at the port of destination.

It was also remarked, that, if the goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, were, by reason of that damage, in such a state, though the species be not utterly destroyed, that they could not with safety be reshipped into the same or any other vessel,—or if it was certain that before the termination of the original voyage the species itself would disappear,—in any of these cases, the circumstance of their existence in specie at the forced termination of the risk was of no importance.

The jury had found in that case, that the hides were so far damaged by a peril of the sea, that they never could have arrived at the port of destination in the form of hides; and as the destruction was not complete when they were taken out of the vessel at the port of distress, they became, in their then condition, a salvage for the benefit of the party who was to sustain the loss.

In respect to the first point, therefore, the court direct that it be certified to the Circuit Court, that, if the jury find that the jerked beef was a perishable article within the meaning of the policy, the defendant is not liable as for a total loss of the freight, unless it appears that there was a destruction in specie of the entire cargo, so that it had lost its original character at Nassau, the port of distress, or that a total destruction would *have been inevitable from the damage [*608 received, if it had been reshipped before it could have arrived at Matanzas, the port of destination.¹

The second point certified assumes that the vessel, notwithstanding the disaster, was in a condition to carry on the cargo, or that another could be procured, and the question is, whether the plaintiff is entitled to recover, as for a total loss of freight, if it appeared that it was for the interest of the insured and insurer of the cargo, on account of the damaged condition of the portion sold, that it should have been sold, and not carried on to Matanzas, the port of delivery.

¹ APPROVED. *Insurance Co. v. Fogarty*, 19 Wall., 643.

Hugg et al. v. Augusta Insurance and Banking Co.

Many of the considerations stated in our examination of the first point certified have a direct application to this one ; as it there appears that the interest of the insured, or of the underwriter of the cargo, is not taken into the account, nor in any way regarded in determining whether or not a total loss of the freight has happened from any of the perils insured against, but whether there has been a destruction of the entire cargo in specie, or such damage received as would inevitably prevent the arrival of any portion of it in specie at the destined port.

The interest of the owner of the cargo may frequently be adverse to that of the owner of the ship ; for although the goods remain in specie, and in that condition capable of being carried on, it may be for the interest of the owner, or of the insurer of the cargo, to have it sold in its then damaged state at the intermediate port, instead of taking the risk of further deterioration. But, in that case, the owner, or those representing him, must act upon their own responsibility ; for, if he elects to receive the goods voluntarily at a place short of the port of destination, he is responsible for the freight. The loss cannot be total or partial at his will, or as his interest may dictate.

It was said in *Griswold v. New York Ins. Co.* (which was an action on a policy on freight), that whether it would have been wise or foolish in the shipper to have sent on the flour in the condition it was in was a question not to be put to the plaintiffs. It was none of their concern. The risk of the value of the cargo at the port of delivery lay with the owners of the cargo. All that the plaintiffs had to do by their contract was to provide the means to take on the cargo, by repairing their ship or procuring another.

Other considerations may arise as between the owner and insurer of the cargo, but it is not important now to go into them.

On looking into the facts in this case, it will be seen that the portion of the beef landed at Nassau, and sold, was wet and heated ; and that the board of health had recommended *609] to the *authorities, that it should be removed as soon as it conveniently could be without too great a sacrifice of the property. It is obvious, therefore, that the perishable condition of the article must be taken into consideration in deciding upon the obligation of the master, in the emergency, to repair his vessel, or to procure another, for the purpose of sending it on to the port of delivery. If it should be made to appear that the repairs or procurement of another vessel would necessarily produce such a retardation of the

Hugg et al. v. Augusta Insurance and Banking Co.

voyage as would, in all probability, occasion a destruction of the article in specie before it could arrive at the port of destination, or from its damaged condition could not be reshipped in time consistently with the health of the crew or safety of the vessel, or would not be in a fit condition from pestilential effluvia, or otherwise, to be carried on, it then was the duty of the master to sell the goods for the benefit of whom it might concern.

The cargo being in a perishable condition, the extent of the repairs, or difficulty of procuring another vessel, and consequent delay attending the same, are material considerations influencing his judgment in deciding upon the necessity of a sale; for it would be unreasonable to require him to subject his owner to this expense, when, at the same time, a strong probability existed that the cargo would not be in a condition to be reshipped. 18 Johns. (N. Y.), 208; 6 Cow. (N. Y.), 270; 1 Bing. (N. C.), 526; 3 Id., 266; 3 Brod. & B., 97; s. c., 6 Moo., 288; 6 Taunt., 383; 1 Holt, 48; 3 Kent, Com., 212, 213; 2 Phillips, 331 *et seq.*

The quantity and value of the portion saved are also material circumstances to be considered in exercising a sound discretion in respect to the extent of the repairs required to be made, or of expense in the procurement of another vessel, with a view to the earning of salvage for the benefit of the underwriter on freight. The owner of the cargo is liable for any increased freight arising from the hire of another vessel; and unless it can be procured at an expense not exceeding the amount of the freight to be earned by completing the voyage, the underwriter on freight has no right to insist upon this duty of the master. Beyond this, it becomes a question between him and the owner or underwriter of the cargo. 3 Kent, Com., 212; *Shipton v. Thornton*, 9 Ad. & El., 314; *Searle v. Scovel*, 4 Johns. (N. Y.) Ch., 218; *American Ins. Co. v. Center*, 4 Wend. (N. Y.), 45; 2 Phillips, 216.

In respect to the second question, therefore, we direct it to be certified to the Circuit Court, if the jury find that, from the condition of that portion of the cargo sold at Nassau, it was for the interest of the insured and insurers of the cargo that it *should have been so sold, and not transported [*610 to Matanzas, still, the plaintiffs are not entitled to recover as for a total loss of freight, provided their own vessel could have been repaired in a reasonable time, and at a reasonable expense, so as to perform the voyage, or they could have procured another at Nassau, the port of distress, and have transhipped the portion sold in specie to the port of destination.

Hugg et al. v. Augusta Insurance and Banking Co.

The third question is, assuming that the plaintiffs are entitled to recover, is the policy on the amount mentioned for one entire voyage round from Baltimore out, and home again; and are the defendants entitled to deduct from the amount insured the freight earned in the voyage from Baltimore to Rio upon the outward cargo.

The policy provides, that the defendants, in consideration of \$156.25, agree to insure the plaintiffs, &c., on freight of the bark Margaret Hugg, at and from Baltimore to Rio Janeiro and back to Havana or Matanzas, or a port in the United States, &c., to the amount of \$5,000 upon all kinds of lawful goods, &c., beginning the adventure upon the said freight from and immediately following the lading thereof aforesaid at Baltimore, and continuing the same until the said goods, wares, and merchandise shall be safely landed at the port aforesaid.

It is insisted, on the part of the defendants, that the voyage insured is one entire voyage from Baltimore out to Rio Janeiro, and then to Matanzas, or home; and that they are entitled to a deduction of the freight earned on the outward cargo from Baltimore to Rio.

The court are of the opinion, that, upon a true construction of the policy, the insurance was upon every successive cargo that was taken on board in the course of the voyage out and home, and is to be applied to the freight at risk at any time, whether on the outward or homeward passage. This was the construction given to these terms in a freight policy in *Davy v. Hallett*, 3 Cai. (N. Y.), 16, and *The Columbian Ins. Co. v. Catlet*, 12 Wheat., 383. The insurance was regarded as, in effect, covering freight upon separate voyages out and home, to the amount of the valuation; and in the former case the payment of double premium was deemed a pretty sure index to the intent of the parties that the policy should attach on the outward or homeward freight according to events, and was to be valid and operative as long as there was aliment to keep it alive. All the considerations urged in favor of this construction in the cases referred to apply with equal force to the policy in question.

The court direct, therefore, that it be certified to the Circuit *Court, that, assuming the plaintiffs are entitled *611] to recover, the defendants are not entitled to deduct from the insured the freight earned on the voyage from Baltimore to Rio upon the outward cargo, as the policy is not for one entire voyage round from Baltimore out, and home.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court,—1st. That, if the jury find that the jerked beef was a perishable article within the meaning of the policy, the defendants are not liable as for a total loss of the freight, unless it appears that there was a destruction in specie of the entire cargo, so that it had lost its original character at Nassau, the port of distress; or that a total destruction would have been inevitable from the damage received, if it had been reshipped before it could have arrived at Matanzas, the port of destination. 2d. If the jury find, that, from the condition of that portion of the cargo sold at Nassau, it was for the interest of the insured and insurers of the cargo, that it should have been so sold, and not transported to Matanzas, still, that the plaintiffs are not entitled to recover as for a total loss of freight, provided their own vessel could have been repaired in a reasonable time, and at a reasonable expense, so as to perform the voyage, or they could have procured another at Nassau, the port of distress, and have transshipped the portion sold in specie to the port of destination. And 3d. That, assuming the plaintiffs are entitled to recover, the defendants are not entitled to deduct from the insured the freight earned on the voyage from Baltimore to Rio upon the outward cargo, as the policy is not for one entire voyage round from Baltimore out, and home. Whereupon, it is now here ordered and adjudged, that it be so certified to the said Circuit Court.