13FED.CAS.—70

Case No. 7,524.

JORDAN ET AL. V. WARREN INS. CO.

[1 Story, 342;[1] 4 Law Rep. 12.]

Circuit Court, D. Massachusetts. Oct. Term, 1840.

MARINE INSURANCE—UNCOMPLETED VOYAGE—NEW FREIGHT EARNED—PARTIAL LOSS—MASTER'S ACTS.

1. Insurance on freight, on a voyage at and from New Orleans to Havre: The vessel was compelled to put back to New Orleans in consequence of an accident. The cargo, consisting principally of cotton, was so much damaged, that it would require several months to repack it in a condition to be reshipped, and it was sold by consent of the masters and shippers; and the vessel, having taken another cargo on board, proceeded on a different voyage. *Held,* that the underwriters were not liable.

[Cited in Hugg v. Augusta Insurance & Banking Co., 7 How. (48 U. S.) 606.]

2. Underwriters cannot avail themselves of a freight earned in a new voyage, which they have not insured, by way of recompense for losses on another voyage, which they have insured, and which has already terminated. Thus, where freight was insured at and from New Orleans to Havre, and the ship, meeting with an accident, put back, and another voyage to England was substituted, on which freight was earned; It was *held,* that the underwriters were not entitled to the freight of the substituted voyage, as in the nature of a salvage freight.

[Cited in Weston v. Minot, Case No. 17,453; Bradstreet v. Heron, Id. 1,792.]

[Cited in Lord v. Neptune Ins. Co., 10 Gray, 124; Parsons v. Manuf'g Ins. Co., 16 Gray, 468.]

3. Underwriters take no risk, with regard to the length, retardation, or interruption of a voyage, if it be subsequently resumed or be capable of being resumed.

[Cited in Murray v. Aetna Ins. Co., Case No. 9,955.]

[Cited in Willard v. Millers' & Manufacturers' Ins. Co., 24 Mo. 567; Able v. Union Ins. Co., 26 Mo. 58; Cox v. Foscue, 37 Ala. 509.]

4. In cases of necessity, or calamity, during the voyage, the master is by law created agent for the benefit of all concerned; and his acts, done under such circumstances, in the exercise of a sound discretion, are binding upon all the parties in interest in the voyage.

[Cited in Soule v. Rodocanachi, Case No. 13,178; Copeland v. Phoenix Ins. Co., Id. 3,210.]

[Cited in Richardson v. Young, 38 Pa. St. 172; Thompson v. Hermann, 47 Wis. 608, 3 N. W. 579; Allen v. Mercantile Mut. Ins. Co., 44 N. Y. 442; Pierce v. Columbia Ins. Co., 14 Allen, 323.]

5. Where a cargo is so much injured, that it will endanger the safety of the ship and cargo, or it will become utterly worthless, it is the duty of the master to land and sell the cargo at the place, where the necessity arises, even although it might have been carried to the port of destination, and there landed.

[Cited in The Ann D. Richardson, Case No. 410; Moore v. Hill, 38 Fed. 334; The Eliza Lines, 61 Fed. 314.]

[Cited in Indianapolis Ins. Co. v. Mason, 11 Ind. 192.]

6. The shipper has no right to demand the cargo at an intermediate port, without paying full freight, whether it be damaged, or not.

{Cited in The Ann D. Richardson, Case No. 410.}

{Cited in Rogers v. West, 9 Ind. 406; Bailey v. Damon, 3 Gray, 94.}

Assumpsit on a policy of insurance. The policy was underwritten on the 30th of May, 1838, by the Warren Insurance Company; and thereby they caused Oliver Jordan, for whom it concerns, to be insured, lost or not lost, seven thousand dollars on the freight of the ship Franklin, at and from New Orleans to Havre, at a premium of 1¼ per cent. The declaration alleged, that the ship sailed on the voyage on the 6th of June, with a cargo on board, and was, during the voyage, driven by the violence of the waves and currents, upon a bank in the river Mississippi, where the vessel remained hard and fast in the mud, and while lying upon the said bank, was violently struck by a steamboat, called the Tyger, by which disasters the vessel was so injured and broken, that the cargo of the vessel was destroyed, and the vessel prevented from performing her voyage, and the freight was totally lost Plea, the general issue. The facts, as they were agreed by the parties, or proved in the case, were, that the plaintiffs were the owners of the ship. That she took on board a cargo at New Orleans, on freight, for Havre, consisting of cotton, worth about $60,000; tobacco, worth $10,500; and woods and wax, about $500; in the whole, worth about $71,000. The freight bill was about $9,916. While the ship was proceeding down the river Mississippi, on the voyage, on the 7th of June, 1838, being in tow of the steamboat Tyger, towards the bar, the current of the river running with great rapidity, caused the ship to sheer and surge so violently on the tow line, that the steamboat lost her steerageway, and before she could recover her position, the ship took ground, and remained hard and fast. The eddy current then taking the steamboat, she swung round, and driving stern foremost, struck the ship with great violence on the larboard side, and thereby did considerable damage to her. The ship was then found to have considerable water in her hold, increasing from six feet to thirteen feet. The cargo was thereupon taken out to lighten the ship, and save the cargo; and it was carried back in steamboats, &c. to New Orleans. The ship, being lightened by taking out her cargo, was also carried back to New Orleans;

and was repaired and fitted again for sea before the 21st of July following. After the cargo arrived at New Orleans it was surveyed by experts; and being found wet and damaged, a large portion of it was, by their advice, sold at public auction. The damaged part of the cargo sold for about $19,774.22. The residue, amounting in value to about $2,210, being in a sound state, was shipped for Havre in another vessel.

It further appeared in the case, that the cotton, if shipped again in the ship, in its wetted and damaged state, would have been very liable to spontaneous ignition; but it could, by a process of drying, sorting, and repacking, be put in a state for reshipment, for commercial purposes; and that there were conveniences for the purpose. But the process was slow, and would occupy a considerable length of time to be perfected, as long, as some of the witnesses thought, as six months. But it did not appear, that the cotton might not have been dried, so as to be safe for transportation, against ignition, in a shorter period. After the Franklin was repaired, she took another cargo on board, for England, the freight of which was worth $10,000, and sailed therewith on the 21st of July, and safely landed that cargo, and earned the freight.

At the trial, one of the principal questions argued to the jury, (the questions of law arising on the case being reserved by consent, for the consideration of the court,) was, whether the master acted according to his duty, in allowing the cargo to be given up, and sold on account of its damaged state. The jury, after finding a verdict for the plaintiff for $7,000, further found; "That it was the absolute duty of the master to the owners of the cargo, not to undertake to carry forward the cargo; but that he acted properly in suffering it to be taken out of the ship, and disposed of."

Daniel Webster and J. P. Healey, for plaintiffs.

Theophilus Parsons and Theo. P. Chandler, for defendants.

The argument for the plaintiffs was, in substance, as follows:

There is no decision of authority here, which would impose upon the owners of the vessel the duty of carrying forward the damaged cargo, under these circumstances. The cases cited for the defendants, from the New York Reports, do not reach this question, even though the doctrines, there laid down, should be admitted. In all those cases the ship-owners endeavoured to excuse themselves for not proceeding on their respective voyages, either because the vessel had been slightly injured, or because the cargo had been so damaged, as to render its reshipment merely inexpedient. In every instance, the performance of the voyage was practicable, and would have been attended with no danger to life or health.

But the principle, which seems to have been adopted in New York, that it is the duty of ship-owners to carry forward every cargo, when its carriage is possible, in order to protect the underwriters on freight, even though they should thereby sacrifice the interests of the shippers to any amount, is unjust. It finds no support in reason, and can never

receive the sanction of an enlightened commercial community. There are parties, having interests at stake, which are usually much larger, than those of the underwriters on freight, and which are equally with theirs deserving of protection. It is the duty of ship-owners, in all cases, to act as a prudent man would act, who should be the owner of both vessel and cargo, without insurance on either; that is to say, it should be their object to save the greatest possible amount of property, without stopping to inquire to whose benefit it would enure. Green v. Royal Exch. Assur. Co., 6 Taunt. 68. The case of Mordy v. Jones, 4 Barn. & C. 394, which, so far as it is entitled to weight, goes against the plaintiffs in this action, is happily answered by Mr. Phillips in his Treatise on Insurance (volume 2, p. 190). The case of Whitney v. New York F. Ins. Co., 18 Johns. 208, is precisely in point. All the circumstances in that case are similar to those in the case now before the court; and if the decisions of New York were to govern here, this one would be decisive of the question in issue. The damage or loss of cargo, whereby the ship is prevented from earning freight, is a loss of freight. 1 Phil. Ins. 290; McGaw v. Ocean Ins. Co., 2 Law Rep. 363. But it is unnecessary to cite authorities further on this part of the case. We consider, that the question, as to the duty of the ship-owners to have carried forward the cargo, or to have attempted to carry it forward, was disposed of by the finding of the jury.

(2d.) The authorities cited, for the defendants under this head, are not applicable to this case. A policy on freight does not attach to a cargo, which there is merely an intention to ship, but which is never taken on board. The risk cannot commence, until something is put at hazard. But when a cargo is once received, and the voyage commenced, the policy attaches to that specific cargo, and does not shift to another cargo for the same voyage; much less to another cargo for another and a different voyage. 6 Taunt. 68; Everth v. Smith, 2 Maule & S. 278.

(3d.) There are cases in which underwriters on freight, who have become liable to pay a loss under their policy, may avail themselves of the subsequent earnings of the ship, by way of salvage. But there are some limits to this right. The right remains with the underwriters, only so long as the ship continues under the protection of their policy. They cannot claim the earnings of the ship, when they would disclaim all responsibility for any losses or accidents, that might happen to her. In the present case we contend, that if the ship, when she was ready for sea, had taken another cargo at New Orleans for Havre, it would have been an entirely new undertaking, and an entirely

new voyage, which would not have been protected by this policy. The policy surely did not cover the risks incurred by the voyage, which the ship did perform.

The cases cited for the defendants are not analogous to the present one. If a ship, having received no injury, loses a part of her cargo, and procures other in its stead, and completes her voyage, the freight earned with the new cargo, is taken to be salvage on that, which was lost by the old one. But there is not a case on record, where the earnings of a ship on one voyage are treated as salvage on another and a different voyage. In the case of Green v. Royal Exch. Assur. Co., 6 Taunt 68, the jury found a verdict for the plaintiffs; and the only ground, upon which the court ordered a new trial, was, that the jury might inquire, whether the master had acted in good faith, as a prudent man would act, under like circumstances, who had no insurance. That question settled in the affirmative, the case would be with the plaintiffs. The broad and equitable principle, that the master should act prudently, without reference to the parties, that are to be affected by his action, is recognized in all the cases. This is a principle so just and reasonable, that all parties should be willing to abide by its operation; and it a principle, which, if admitted, settles this case in favor of the plaintiffs.

On behalf of the defendants it was argued as follows:

It was the duty of the owners to repair the vessel and carry forward the cargo, whether damaged or not. To this position the following authorities were cited. Herbert v. Hallett, 3 Johns. Cas. 93; Griswold v. New York Ins. Co., 1 Johns. 204, 3 Johns. 321; Saltus v. Ocean Ins. Co., 14 Johns. 138; Mordy v. Jones, 4 Bam. & C. 394; McGaw v. Ocean Ins. Co. [40 Mass. 405]. The decisions in New York were made after the most thorough examination and argument by the ablest counsel, and they have never been overruled or questioned. In Saltus v. Ocean Ins. Co., in 12 Johns. 107, it was intimated by Yates, J., that when it is impracticable to reship, the cargo may be sold. But the same judge, in giving the opinion of the court, in Saltus v. Ocean Ins. Co., 14 Johns. 144, says, the remarks in the former case, were not called for, and were unnecessary, and they afforded no ground to infer, that the court meant to decide, that a damaged cargo would at any time authorize an abandonment of the voyage, so as to entitle a recovery on the freight policy, when an opportunity to earn freight had existed. Whitney v. New York F. Ins. Co., 18 Johns. 208, was decided on entirely different grounds. The judge, who gave the opinion of the court, recognized and approved the foregoing cases. He says (page 210): "The rule is now perfectly established, that a policy on freight does not insure the soundness of the goods, but merely their safe carriage to the port of destination. It is immaterial to the insurers, whether the cargo arrive in a good or bad condition, provided the goods specifically remain." The remarks made in regard to the impracticability of procuring another ship to take on the cargo, have no bearing on this case. This decision was made after Chief Justice Kent left the court Mordy v. Jones is similar to the present case, and it clearly shows,

that the plaintiffs could not prevail in the English courts. The same doctrine is laid down in 2 Phil. Ins. (2d Ed.) p. 211.

(2d.) When the earning of one freight is prevented, and other is obtained, the insurers on freight are not liable. Everth v. Smith, 2 Maule & S. 278; McCarthy v. Abel, 5 East, 388.

(3d.) If a loss has arisen under this policy, for which the defendants are liable, they are entitled to the freight earned on the second cargo, as salvage. 1 Phil. Ins. (1st Ed.) 427; 2 Phil. Ins. (2d. Ed.) 356, 357; Green v. Royal Exch. Assur. Co., 6 Taunt. 68. In Brocklebank v. Sugrue, 1 Moody & R. 102, Lord Tenterden held, that when a ship carried freight, though not that intended for her, the owners cannot recover for the delay and expense as a partial loss.

STORY, Circuit Justice. Two questions of law have been presented for the consideration of the court, by the counsel for the defendants. (1.) That, under the circumstances of the present case, there has been no loss of the freight for the voyage, for which the underwriters are liable under the policy. (2.) If there has been, then the underwriters are entitled to the freight of the substituted voyage to England, as in the nature of a salvage of freight. The latter ground is maintained upon the footing of the authority of the case of Everth v. Smith, 2 Maule & S. 278, and that of McCarthy v. Abel, 5 East, 388. In both of those cases, the voyage insured was actually performed, and freight was earned. In the case in 5 East, 388, the very freight insured was earned; but the owner of the ship had abandoned it to the underwriters on freight, while the vessel was held under a hostile embargo in a foreign port, from which she was afterwards released, and earned her freight; and the court held, that the loss of freight, if any, was by the abandonment, and not by any peril insured against. In the case in 2 Maule & S. 278, freight was earned on the very voyage insured (at and from Riga, and any other ports in the Baltic, to any ports in the United Kingdom); but it was not the very freight stipulated in the charter party, under which the ship sailed on the original outward voyage; but a freight from Riga to London, obtained from other persons; and thus a substituted freight was earned, which was properly treated by the court, as a salvage freight. The court said, that this was an, insurance on freight generally,

and not on any specific freight. The underwriters did not insure, that any particular freight should be brought home; but if any freight is brought home, a loss has not happened, for which he undertook to indemnify the assured. There seems no reason to doubt the authority or correctness of either of these decisions. But they are founded altogether upon a consideration, which has no existence in the present case. There, the voyage on which freight was earned was the very voyage insured, and which had not then terminated. Here, the voyage was entirely new, to a new port. The terminus of the old voyage was Havre; of the new voyage, was England. The old voyage to Havre was terminated; and the new voyage had not the slightest connexion with it. I know of no principle or authority, upon which the court can say, that the underwriters have a right to avail themselves of a freight earned in a new voyage, which they have not insured, by way of recompense for losses on another voyage, which they have insured, and which has already terminated.

The real question, then, and the only one before the court, is that first stated. The question is not, whether the freight insured has been lost, (although the circumstances of the case are so imperfectly stated, that there is great obscurity, as to the manner of settling the controversy between the owners and the freighters,) but whether it has been lost by any peril insured against, so as to make the underwriters liable therefor. The ship was duly refitted for the voyage, and capable of resuming it within a reasonable time; and if the condition of the cargo had been then such, that it could have been reshipped for the voyage, the master had a right to require it to be shipped, and was bound to proceed with it on the voyage; or, if he did not, the freight, if lost, would be lost by his default, and not by any peril insured against. It has been suggested, that the time of the detention of the ship to refit was longer than the actual voyage to Havre; and, therefore that the master might reasonably refuse to proceed on the voyage. But the underwriters take upon themselves no risk whatsoever, as to the length or duration of the voyage insured. What they undertake is, that, notwithstanding any of the perils insured against, the ship shall be capable of performing the voyage, so as to earn the freight insured; not that the voyage shall be performed in a longer or a shorter period. The owner takes upon himself the chances of a short, or of a protracted passage. This doctrine was fully recognized in Anderson v. Wallis, 2 Maule & S. 240, and applied to the very case of an insurance on freight in Everth v. Smith, 2 Maule & S. 278. In the latter case, the court held, that the underwriter had nothing to do with the temporary retardation, or protraction, or interruption of the voyage, if it was ultimately resumed, or capable of being resumed and performed. And upon that occasion, Lord Ellenborough alluded to the doctrine in the former case, and repeated the question: "What case has ever yet decided, that such a temporary retardation (not going, as he added afterwards, to a destruction of the contemplated adventure) is a good cause of abandonment, so as to amount to a total loss? Disappointment of arrival is a new head of abandonment in insurance law."

The jury have, indeed, found, that the master in delivering up the cargo, and allowing the sale thereof at New Orleans, performed his absolute duty to the owners of the cargo, and ought not to have undertaken to carry it forward to its destination in its then damaged state. And I think, that the jury were well warranted in this finding; for when a cargo on freight is so much injured, that, though capable of being carried to the port of destination and there landed, yet, from its present state, it will endanger the safety, as well of the ship, as of the cargo, or it will become utterly worthless on arrival at the port of destination, it is the duty of the master, exercising a sound discretion for the benefit of all concerned, and especially of the shippers of the cargo, to land and sell the same at the place, where the necessity arises, whether it be the original port of the shipment to which the ship returns, or any intermediate port, at which the ship arrives in the course of the voyage. It would be contrary to common sense and common justice for him to sacrifice the cargo for the benefit of another party in interest; or to elect the party, upon whom the ruin, caused by a common calamity, should fall. In a case of necessity, or of unexpected and pressing calamity, emergent in the course of the voyage, the master is by law created an agent from necessity for the benefit of all concerned; and what he fairly and reasonably does, under such circumstances, in the exercise of a sound discretion, binds all the parties in interest in the voyage, whether owners, or shippers, or underwriters. But, then, the question still remains, upon whom is any given loss to fall? And it by no means follows, because a sale of the goods has taken place at a port, short of the port of destination, by reason of a damage sustained by the cargo, the cargo specifically remaining, and capable of being carried to its destination, that there is no freight due thereon by the shippers; but that the whole loss is to be borne by the underwriters on freight. That is assuming the very point in controversy.

Let us see, then, how upon principle the case stands, as between the shippers of the cargo and the owners of the ship. We must take it, in the present case, that the sale was with the entire consent and approbation of the shippers, as well as the master, and for the benefit of the former. Now, nothing is better founded in the law on this subject, than that the shippers are bound to pay the full freight for the voyage, if the cargo is

carried to the port of destination, and specifically remains, notwithstanding at its arrival it is, by reason of sea damage, utterly ruined and worthless. This doctrine, although formerly a matter of some doubt, is now firmly established, and, indeed, must be manifestly correct upon principle.[2] It is as clear, that after the shipment of the cargo on the voyage, the shippers have no right to demand it at any intermediate port, short of the port of destination, without payment of the full freight for the voyage, whether the cargo arrive there in a damaged, or in an undamaged state. The reason is obvious. The master has a right to carry on the cargo to the port of destination; and if his ship be capable, either then, or within a reasonable time, of carrying the cargo to the port of destination, there is no ground to say, that he is not entitled to earn a full freight; and the shippers of the cargo cannot insist upon changing the original contract in invitum, and cut him off from all freight, or dismiss him with a pro rata freight. The contract of the ship-owner is to carry the cargo to the port of destination; but he by no means warrants the state, in which it shall arrive, as it may be affected by the perils of the seas, or other perils, against which his contract does not bind him. It is no answer to say, that if the cargo is carried on in a damaged state, it will be ruined. The true reply is, that the ship-owner has nothing to do with that; and that the shippers have no right to throw the loss of freight upon him, because the cargo is in danger of ruin by a calamity against which he did not warrant them. Stev. & B. Av. (by W. Phillips) 286, note 1; Id. (Ed. 1833) pp. 357–360; 3 Kent, Comm. (4th Ed.) 1. 47, p. 225.

How, then, do these principles apply to the circumstances of the present case? The ship was repaired and capable again of taking on board the cargo, at New Orleans, within a reasonable time. The master had a right to require, that it should be so taken on board and carried on the voyage, as soon as it should be in a condition to be safely reshipped. He had a right to wait until the cargo could be dried, sorted, repacked, and prepared for reshipment. The delay, arising thereby, would be a mere retardation or temporary interruption or suspension of the voyage, and not an utter prostration or destruction of it. If, then, the freight has been lost it has been lost by his own voluntary act, and not by the necessary operation of any of the perils insured against. The whole evidence shows, that the cargo could have been dried, sorted and repacked safely for the voyage, and at the farthest within six months. Mere delay in the voyage, or disappointment as to the time of arrival, constitutes, as we have seen, no ground for an abandonment of the voyage. So that, here, the loss of freight has been by a voluntary abandonment of the voyage by the master; and not from necessity, superinduced by any perils insured against.

Then, how stands the case, as to the shippers of the cargo? They could not require the cargo to be redelivered to them without the payment of freight for the voyage; and if they did not choose to pay the freight, the master had a right to retain the cargo for the payment thereof, or to prepare it again for reshipment, as soon as it could be safely done,

unless the owners refused to allow it to be again shipped on the voyage. If they did so refuse, then the contract for full freight would have been complete on the part of the ship-owner, from the default on the other side. But we must take the case here to be, what in reality it was, a mutual voluntary agreement on the part of the master and the shippers, that the damaged cargo should be sold. The sale must, therefore, be treated as a sale, reserving all the rights of the respective parties. And, in my judgment, the ship-owner was, for the reasons already stated, upon principle, entitled, under all the circumstances, to a full freight for the voyage, upon all the goods so sold, or relinquished. He has, therefore, not lost his freight for the voyage, from any perils insured against; but it is a clear right now existing against the shippers of the cargo, or, if lost, it has been lost by the voluntary relinquishment of the master and owner, by their own act or default. So far, I think, the principles of law would conduct us, in my judgment, upon general reasoning, independent of authority.

But let us see, how the case stands upon the footing of authority. And, in this case, in my judgment there is not only no authority adverse to the doctrine already stated; but there are authorities positively in its favor, and which, in effect if admitted to prevail, decide the very case before this court. The case of Herbert v. Hallett, 3 Johns. Cas. 93, very nearly approaches the present. There, the insurance was upon freight on a voyage from New York to Havana. The ship was stranded on the voyage, in a gale of wind at Sandy Hook, the cargo was unladen, being undoubtedly damaged, and was brought back to New York, and delivered back to the shippers. The ship was repaired in a fortnight, and was soon afterwards sent on a different voyage. The court held, that the underwriters on freight were not liable on the policy; that the ship-owner ought to have insisted on carrying on the cargo, after the ship was repaired; and that he had, by his negligence or folly, and not by any peril insured against, lost the freight. The court said, that if the ship be injured by the perils of the sea, but is repaired within a reasonable time, and the goods are damaged, the owner will be entitled to his freight if he offers to carry on the goods, although damaged, on the voyage,

and the shippers refuse. Nothing but a physical destruction thereof, will exempt the shipper from payment of freight in such a case. It did not appear in this case, that the cargo was incapable of being reshipped. The case of Griswold v. New York Ins. Co., 1 Johns. 204, was an insurance on freight, at and from New York to Barcelona, with liberty to touch at Gibraltar. In proceeding on the voyage, the ship was stranded on Long Island, and the cargo (flour) was, with a small exception, damaged. The cargo was taken out, and the ship got off, and repaired in six days. The cargo was received by the shippers, and sold at auction, at a loss of 27 per cent. The ship-owner abandoned to the underwriters on freight; and brought an action on the policy for the loss. The court affirmed the doctrine of the former case, holding that the ship-owner ought to have insisted on carrying on the cargo to the port of destination, so as to entitle himself to a full freight; and that there was no ground for the abandonment. Here the cargo was perishable; and upon the new trial, ordered by the court, it appeared, that if it had been carried to the port of destination, it would not have been worth the freight. But notwithstanding this fact, the court adhered to their former opinion, that the ship-owner was not entitled to recover. Griswold v. New York Ins. Co., 3 Johns. 321. In Saltus v. Ocean Ins. Co., 14 Johns. 138, there was an insurance on the ship, freight, and cargo (rye, flour, and corn); and the vessel, in the course of the voyage, was obliged to to put into a port of necessity to repair; and, there, the cargo was found to be greatly deteriorated, and in a state not fit to be reshipped; and it was accordingly sold. The vessel was repaired, so as to be able to resume the voyage. The court held, that the ship-owner could not recover on the policy on freight, as the cargo though damaged, still remained in specie; and the authority of Griswold v. New York Ins. Co. was fully recognized. The case of Whitney v. New York F. Ins. Co., 18 Johns. 208, is supposed to trench upon the principles of the former cases. It strikes me, that it is entirely consistent with those principles; and that the decision turned upon peculiar circumstances. It was a policy on freight. The cargo was hemp, which was wetted, and the master could neither dry the hemp, nor ship it on board another vessel for the voyage, in the wet and perishing condition, in which it was, there being great danger of ignition. His own ship was disabled, and could not be repaired for half her value; nor could the hemp be reshipped in another vessel to the port of destination for one half of the value of the freight, as valued in the policy. The master, therefore, broke up the voyage. The court held, that the voyage was rightfully broken up, and the ship-owner having abandoned on the policy, was entitled to recover for a total loss of the freight. The case of McGaw v. Ocean Ins. Co., 2 Law Rep. 363, manifestly proceeded upon similar principles. Thus far, the American authorities have gone; and they uniformly sustain the same doctrine.

The question has also arisen in England; and has there received a similar determination. In Mordy v. Jones, 4 Barn. & C. 394, there was a policy on freight of the ship at and from Kingston, in Jamaica, to Liverpool. The vessel sailed on the voyage with

a cargo of cotton, coffee, sugar, hides, and other goods, belonging to various shippers. The ship having started a plank was obliged to put back to Kingston to repair, and was there repaired. The cargo was landed, and was found so wetted by the sea water, that it could not be reshipped without danger from ignition to the rest of the ship and cargo, unless it underwent a process of drying, which would detain the ship six weeks, and this would have been attended with an expense equal to the freight. Under these circumstances the shippers refusing to interfere, but approving of a sale by the master, the master sold the damaged goods, and sailed with the proceeds thereof to Liverpool, and safely arrived there. The master's proceedings at Kingston were found to be such, as a prudent man uninsured would have adopted. The master, at Liverpool, paid over the proceeds of the goods to the parties interested, without any deduction of freight. The question was, whether, under these circumstances, there was such a loss of the freight of the goods so sold, as entitled the ship-owner to recover under the policy. The court held, that he was not. The reasoning of the court is certainly not very full, or satisfactory. But it is plainly in coincidence with what has been already stated, as the just result of the principles of law on the subject of the earning of freight. It may be added, that the same doctrine may be fairly deducible (although the very case is not put) from the reasoning of Pothier, on the point where full freight is due (Pothier Traite de la Charte-Partie, notes 70–77; Id. note 121); and it is not unimportant to remark, that Mr. Stevens and Mr. Benecke, both of them gentlemen of great practical experience in this branch of the law, assert the same doctrine, as one well established (Stev. Av., Ed. 1817, 81, note 6; Id., Phillips' Ed. 1833, p. 286, note 1; Benecke, Ins., Ed. 1824, 447–449; Id., Phillips' Ed. 1833, pp. 357–367).

Upon the whole, my opinion upon a deliberate survey of the whole matter is, that the plaintiffs are not entitled to recover, in the present case, for a total loss of the freight insured. But that their claim is limited to the general average, and the loss of the freight of such of the goods, as were physically lost and destroyed by the perils of the seas.

[2] See Abb. Shipp. pt. 3, c. 7, §§ 7–9, and notes to American edition of 1829; Griswold v. New York Ins. Co., 3 Johns. 321.

[1] {Reported by William W. Story, Esq.}