

## KINSMAN v. CHINA MUT. INS. CO.

(District Court, D. Massachusetts. December 7, 1891.)

## MARINE INSURANCE—INSURABLE INTEREST—TOTAL LOSS.

Where it appeared that libelant had an insurable interest in a vessel by reason of advances exceeding the amount of the policy sued on, and that the vessel had sustained damage from perils of the sea, and could not be made seaworthy except at an expense exceeding her value when repaired, thus constituting a total loss, within the meaning of the policy, *held*, that libelant was entitled to recover against the insurance company the amount of the policy.

In Admiralty. Libel to recover on policy of marine insurance.

*Eugene P. Carver*, for libelant.

*John D. Bryant*, for respondent.

NELSON, District Judge. The libelant, as managing owner, had, at the date of the policy of insurance, an insurable interest in the barque *Eliza White*, by reason of his advances made on account of the vessel. The protest of the master and mate and the surveyor's certificates are competent evidence in the case, and, with the testimony of *Darling*, are sufficient to prove that the injury suffered by the *Eliza White* from perils of the sea, previous to her arrival at *Nassau*, a port of distress, were so great that she could not be repaired so as to make her a seaworthy vessel, except at an expense exceeding her value when repaired, and this constituted a case of actual total loss, within the meaning of the policy of insurance. The testimony of the libelant is sufficient to prove that his advances exceeded \$1,000, the amount insured by the policy, and that the defendant had notice of the loss in September, 1883, and waived all further proof of the loss. Decree for the libelant for \$1,000, and interest from December 1, 1883, and costs.

## THE FROGNER.

## GULLICKSEN v. CHICORA FERTILIZER Co. et al.

(District Court, D. South Carolina. February 23, 1892.)

## FREIGHT—CARGO "INTAKEN"—AMOUNT—INTENT OF PARTIES.

Where a charter-party provides for a certain rate of freight on "about 1,500 tons" of iron ore "intaken,"—the original word "delivered," in the charter-party, being stricken out, and the word "intaken" written in,—and the master, at the port of loading, being without opportunity of weighing, demanded 1,575 tons, which amount was promised him, and a bill of lading made out therefor, and assurance given the master that he had that amount, and the ship, after a safe voyage without incident, delivered only 1,500 tons, no question of short delivery being raised, but only the question whether freight should be paid on 1,575 tons or on the amount delivered, *held*, that the parties had agreed at the port of loading as to the number of tons on which freight should be paid, viz., 1,575 tons.

In Admiralty. Libel to recover balance of freight.

*Bryan & Bryan*, for libellant.  
*J. N. Nathans*, for respondents.

SIMONTON, District Judge. Respondents are the purchaser from H. G. Mayer & Co. of a cargo of pyrites, and the agent of Mayer & Co., who also is guarantor of the freight. Mayer & Co. entered into a charter-party with the owners of the steam-ship *Frogner*, under which she took in at Pomaron, on the coast of Portugal, the cargo of sulphur ore, or pyrites, sold to the Chicora Company. The charter-party provided for a cargo of about 1,500 tons of pyrites, not exceeding what she can reasonably stow and carry, to be discharged on Ashley river, Charleston, S. C., on being paid freight at the rate "per ton of 20 cwt. intaken 16 (sixteen) shillings." The original charter-party had the word "delivered" in print. It was stricken out, and the word "intaken" written in its stead. The freight is payable on unloading and right delivery of cargo. The master could sign bills of lading, if required, at any rate of freight, but without prejudice to charter-party. The steam-ship loaded partly in port, and finished loading at sea. The ore was weighed only at the mines, some 40 miles away, was carried by rail, and dumped into the ship, a part from the quay and a part from lighters. The master demanded a cargo of 1,575 tons. This was promised to him. Before cargo was all delivered, a bill of lading for 1,575 tons was prepared by charterer, and presented to the master for his signature, and he signed it. Afterwards the agent of the charterer at Villareal stated to the master that he had shipped 1,575 tons. After a safe voyage without incident the steam-ship reached this port, and delivered cargo. Its delivery weight was 1,500 938-2240 tons. No question of short delivery is made. The only controversy is, shall freight be paid on 1,575 tons, or on the number of tons delivered? Is the freight to be paid upon the number of tons attributed to her at the port of lading, or are we bound to conclude that, as only 1,500 938-2240 tons have been delivered, and there is no question of short delivery, this was the amount "intaken," and not 1,575 tons? If the number of tons delivered is conclusive evidence of the number of tons intaken, the careful erasure from the charter-party of the printed word "delivered," and the insertion of the written word "intaken," was an idle ceremony. This would assume and give to respondents the full benefit of the assumption that the weight of the cargo is fixed by a definite, certain, inflexible, and unchangeable standard; that there can be no error or fluctuation, loss of quantity, or diminution in weight; and that the exact number of tons which went in at Pomaron would come out here. The evidence discloses the fact that the weight of the intaken cargo and the output at the port of delivery seldom, if ever, agree. The contract of sale produced in this case provides for 20 per cent. of smalls; that is, the fine powder by abrasion of the particles of ore. This shows that lumps of pyrites disintegrate, and that the amount of disintegration may reach 20 per cent. A part of the evidence was a bottle of sample ore sent with cargo, and kept sealed. The bottom of this bottle is filled

with a fine powder,—*debris* of the ore. The adoption of the rule suggested by respondent prevents the vessel from asserting this. The master demanded 1,575 tons. He was assured that he had this number, both at the place of loading and at Villareal de San Antonio, a port of call provided in the charter-party. The bill of lading prepared by the agent of the charterer called for 1,575 tons. It is manifest, therefore, that this is the amount attributed to cargo by both parties at the port of lading. The freight was to be regulated by the number of tons intaken, and to be fixed at the port of lading. In effect, it fixed the amount of freight which the one party agreed to pay, and which the other party expected to receive, as the compliance with and the result of his demand. The manner in which the ship was loaded from a train of cars, partly at the quay and by lighters at sea, precluded the master from weighing it himself. The charterer was the purchaser of this cargo, and expected to sell it again. The ship could reasonably trust that he would not overstate the cargo he was getting from the mines. When he made his demand, the master calculated upon 1,575 tons, at 16 shillings per ton. By their assurances the agents of the charterer prevented him from securing his expectations. In my opinion, both parties agreed to assume that 1,575 tons was the weight of the cargo intaken, and adopted that as the number on which freight should be estimated. See *Spaight v. Farnworth*, 5 Q. B. Div. 119. Let a decree be entered in accordance with this opinion.

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### THE SANTA ANNA MARIA.

FORACE *v.* SALINAS.

(District Court, D. South Carolina. February 27, 1892.)

**GENERAL AVERAGE—JETTISON—EVIDENCE OF EXAGGERATION—STRICT PROOF.**

An Italian bark, through collision, sprung a leak and thereafter jettisoned some of her spare furniture, as well as part of the cargo. On an adjustment in general average a certain sum was charged against the cargo, and the owners thereof objected that the jettison was unnecessary. This suit was brought to recover the amount charged against the cargo in the adjustment. The evidence indicated that there was great exaggeration, both in the alleged condition of the bark after the accident, and in the number and value of the articles jettisoned. *Held*, that libellant must make out his case by a preponderance of credible evidence, and, in view of the impression of exaggeration given by the evidence, such articles as were not clearly proved to have been jettisoned should be excluded from the general average adjustment, the others being allowed.

In Admiralty. Suit to enforce adjustment of general average.

*J. N. Nathan*, for libellant.

*J. P. K. Bryan* and *D. B. Gilliland*, for respondent.

SIMONTON, District Judge. The *Santa Anna Maria*, an Italian bark, was on her voyage from Girgenti to the port of Charleston. She had a