The Marine Insurance Company of St. Louis vs. Salisbury, Hiram; Rhodehamell, William W; Smith, Joseph 1855 St. Louis 364/4

581/13

insurance claim
Ryland
$ insured $1970 of merchandise on policy of McMechan, John
Steambt Georgia
chimneys broke up - return to St. Joe for repairs (2 days)
transferred cargo to Stbt Kansas - Kansas sank
rw + rem
delay did not justify transhipment -> marine ins. not liable

State of Missouri }
County of St. Louis } Be it remembered that heretofore, to wit, on the twenty fourth

13 day of July A.D. 1854 there was filed in the Office of the Clerk of the St. Louis Court of Common Pleas within and for the County aforesaid a certain petition which is in the words and figures following to wit;

Petition

Hiram Salisbury
William H. Rhodehamell
& Joseph Smith plaintiffs
vs
The Mississippi Insurance Company of St. Louis

} In the St. Louis Court of Common Pleas September Term 1854 County of St. Louis }

The plaintiffs state that on the first day of January A.D. 1853 the defendant issued & delivered to one John W. Wechan a certain policy of insurance of that date signed by the president & Secretary of said defendant whereby said defendant, caused ~~plaintiffs~~ said John Wechan to be insured lost or not lost from that date to the 31st of December 1853 on all consignments of Western produce, shipped on good steamboats from landings on the Western Waters to the address of the assured the defendants being notified thereof, & upon all shipments from St. Louis when reported to & the risk accepted by defendant & also upon any other shipment when specially applied for & accepted by endorsement on said policy, the adventure upon said property beginning from and immediately following the loading thereof on board of the boat or vessel on which the same was shipped & to continue and endure until the arrival of said boat or vessel

25

at its port of destination; which said insurance was against loss or ~~damage~~ damage by reason of the dangers of the seas river fires pirates overpowering thieves jettisons & all other perils losses & misfortunes that should come to the injury detriment or damage of said property or any part thereof by reason of the dangers aforesaid.

Said policy of insurance was numbered 2484 Plaintiffs cannot file the same because it is lost or distroyed but plaintiffs file herewith a copy thereof.

The plaintiffs further state that on or about the 31st day of March A D 1853 the said John McWechan who was their agent & factor for that purpose made a shipment of Merchandise belonging to plaintiffs who were then copartners under the style of E Salisbury & Co upon a good steamboat viz the Steamboat Georgia at the said Port of St Louis to be thence conveyed & transported to Council Bluffs on the Wisconsin River; that at the time when said shipment was made said John McWechan notified said defendant thereof & specially applied for insurance thereon for the benefit of plaintiffs. That said defendant accepted the risk thereupon by endorsement on the policy Book being part of said Policy of said John McWechan & agreed in consideration of $49.25 premium paid by plaintiffs to defendant to insure said merchandise in the name of said McWechan for the benefit of plaintiffs against the perils aforesaid under said policy for the trip aforesaid; ~~that the value of said merchandise so shipped was $1970.00/100 & that defendant agreed for the consideration aforesaid to insure said merchandise under said policy and as afore~~

38 ~~[illegible]~~, that the value of said Merchandise so shipped was $1970 00/100; & that defendant agreed for the consideration aforesaid to insure said merchandise under said policy & as aforesaid at that valuation.

The plaintiffs further state that on or about the first day of April 1853 the said Steamboat Georgia, which was then fully manned, officered & equipped & in every respect tho' worthy & fit for her contemplated voyage, commenced her said voyage to Council Bluffs; that she proceeded on her said voyage with safety until she reached a point on the Missouri river about seven miles above St. Joseph on said River when by reason of a storm of Wind & rain being one of the perils insured against said Steamboat Georgia was disabled rendered unfit & unable to prosecute his said voyage & by reason of said accident her said voyage was wholly broken up and determined; that thereupon said Steamboat Georgia returned to the port of St. Joseph in said disabled condition. That at that place the repairs necessary in order to enable her to proceed on her voyage could not be made, nor could they be made at any port on the Missouri River nor at any place nearer than St. Louis, the port of her departure; that when this fact was ascertained, the Officers in charge of said boat as was their duty, to do caused said merchandize immediately & without delay to be transhipped upon the Steamboat Kansas then at St. Joseph to be by her transported without delay to said Council Bluffs, that the said Steamboat Kansas at the time said merchandize was laden upon her was a good Steamboat, well found manned

4 3

& equipped & in every respect sea-worthy & fit for the said voyage, that she forthwith commenced her said voyage; to Council Bluffs, that while on her said voyage she struck a snag & sank & that she & all said merchandize excepting a few pieces of wagons of the value of $360 00/100 were totally lost & destroyed by reason of said accident which was one of the perils insured against. The plaintiffs further state that immediately upon learning the occurrance of said loss they notified said defendant of said loss & as soon thereafter as the preliminary proofs thereof could be made out to wit; on the 9th day of May 1853 plaintiffs caused the same to be presented to defendant; but defendant declined to receive the same & refused to pay the amount of said loss or any part thereof, on the ground that under the facts aforesaid & because the defendant did not insure any goods on the Kansas defendant was not liable therefor. Plaintiffs further state that they have demanded payment of said loss & that defendant has refused & wholly failed & neglected to pay the same or any part thereof. Wherefore plaintiffs ask judgment for the amount of said loss viz; the sum of $1610 00/100 with interest thereon. Krum & Harding attys for Plffs.

Chester Harding Jr being duly sworn upon his oath says that he is agent of plffs & that he believes the foregoing petition & the matters therein stated to be true.

Sworn to & Subscribed } Chester Harding
before me this 20th July 1854 C W Hicks clk

5 Z Thereupon issued the following Summons;

County of St. Louis ss

The State of Missouri

Summons. To the Sheriff of St. Louis County Greeting

We command you to summon The Marine Insurance Company of St. Louis to appear before the judge of our St. Louis Court of Common Pleas on the first day of the next term thereof to be held in the City of St. Louis within and for the County of St. Louis on the third Monday of September next then and there to answer the complaint of Hiram Salisbury William W Rodehamell & Joseph Smith as set forth in the annexed petition, and have you then and there this writ

Seal Witness Charles W Hicks Clerk of our said Court with the seal thereof hereto affixed at Office in the City of St. Louis this 21st day of July in the year of our Lord eighteen hundred and fifty four C W Hicks clk

Shffs Return. Thereupon the Sheriff made the following Return Executed on the 14th day of August 1854 by delivering to John Tilden President of the Marine Insurance Company a copy of the writ and petition as furnished by the Clerk in St. Louis County.

John W Winier Sheriff

By Geo A Stevens, Deputy.

And afterwards, the following Answer was filed by leave of Court Oct 4th 1854.

Hiram Salisbury et al plff } In the St. Louis Court of Common Pleas St. Louis County ss

Answer. Vs Marine Insurance Co Deft

The defendant for answer states: They admit the making & delivery of the policy in question

and the insurance of the property as alleged; and its shipment on said S.t. boat Georgia
But they deny that she was disabled by a storm of wind & rain as alleged & rendered unfit & unable to prosecute her said voyage, and that by reason of the alleged accident her voyage was wholly broken up & determined: they deny that repairs sufficient to enable her to prosecute the voyage to Council Bluffs, could not be made at St. Joseph, or at some point on the Missouri River nearer than St. Louis
Defendants believe that said cargo was transhipped to the S.t. boat Kansas, and allege that by reason of said transhipment their liability on said Policy was discharged as they did not insure on said last mentioned boat; and that said transhipment was not necessary, nor was it the duty of the Georgia to make it, and did not bind the defendant under their Policy.
They allege that said S.t. boat Kansas was by no means a first class S.t. boat; but whether or not she was a good steamboat well found manned & equipped & in every respect seaworthy & fit for the voyage the defendant has not knowledge sufficient to be the foundation of a belief; nor how much of said merchandize was lost, nor the value of that which was saved as alleged;
Whether or not the plaintiffs were or are the real party in interest and the said merchandize belonged to them, and said insurance was made for their account the defendant has not sufficient knowledge to be the foundation of a belief; nor whether the plaintiffs constituted the firm of H. Salisbury

73 &c as alleged. Defendants admits that certain papers presented to them as preliminary proofs were refused to be received by them, but what said papers contained they have no knowledge. They refused to pay on the general grounds that they were not liable for the loss in question nor for the amount claimed. They deny that they are liable to pay as alleged in the ~~plaintiffs~~ petition to the amount named or to any amount and ask judgment for defendant. By Kasson their atty.

State of Wisconsin
St. Louis County } p John Tilden President of said Company Deft make oath that he believes the foregoing answer and matters therein as stated are true.
Subscribed & Sworn to this 4th day of Oct 1854 before me } John Tilden
Seal } Witness my hand & seal of Office
Henry Hitchcock Notary Public.

And afterwards the following further proceedings were had in this cause to wit; February Term 1855

Saturday April 28th 1855

Trial by Court & Judgt. for Pltff. "Now at this day come the parties by their respective attorneys, and waiving a jury this cause is all and singular by them submitted to the Court, but the Court not being fully advised of and concerning the premises takes time to consider thereof"

Saturday May 5th 1855

"Now again come the parties as aforesaid, and the Court being more fully advised of and concerning the premises, doth find the issue herein joined in favor of the plaintiffs, and doth assess their damages sustained by reason of the premises in their petition

8 Z

"mentioned, at the sum of Seventeen hundred and "twelve dollars and sixty two cents; therefore it "is considered by the Court that the plaintiffs "recover of the defendant the damages aforesaid in "form aforesaid as assessed, and also their costs "and charges herein expended, and have thereof "execution". Decision of the Court filed.

Which Decision is in the words and figures following to wit;

Salisbury & Co
vs
The Marine Ins Co

Trial by the Court

Decision of the Court

The Court finds the facts to be as follows;

Facts to be copied in the opinion leave out policy Ryland

On the 31st day of March 1853 the plaintiffs were possessed of 12 wagons & a lot of other merchandize all valued in the Policy hereinafter named at $1970, and the plaintiffs caused them at that date to be insured at that valuation in the open Policy of John Mc Wechan issued by defendant & so the defendant accepted the risk in consideration of a premium of $49.25 paid to the company therefor, John Mc Wechan being insured therein for the benefit of plaintiffs;

The insurance was upon merchandise on the St Boat Georgia, from St Louis to Council Bluffs. The Policy was as follows;

Agreement about the Policy.

It is agreed that the Original Policy, sued on, or a copy, may be used by either party in the Supreme Court, without being incorporated in the transcript (signed)

Kasson for Deft
Krum & Harding for Pltff

And said insurance was taken by endorsement in Policy Book as customary & was above stated & for plaintiffs benefit

Said St. Boat Georgia departed on said voyage with the merchandize aforesaid on board & proceeded in safety to a point on the Wisconsin River some distance above St. Joseph, when in endeavoring to round a point she was caught by an eddy, which she was laying to avoid & forced toward the river bank where her cabin was broken and her chimneys were caught in a tree and broken off so that one was lost in the river & the other hung by attachment to the boat. This chimney was saved & afterwards cut in two and employed as to supply temporary chimneys, by the hands of the boat after her return to St. Joseph, but only serving as half chimneys, The water was rising and she could not make steam enough to go up with her cargo; she returned to St. Joseph. This was a safe port to lie in, and there was ample room and warehouses for storage of her cargo or the boat could have remained there in security with all her cargo unmoved in safety on board, until she could have sent an order to St. Louis for New flues & received them at St. Joseph where she could have readily put them up and proceeded on her voyage. St. Louis, was the nearest port where the necessary chimneys and repairs could have been procured. It would have taken twelve days to have made the trip to St. Louis put on the necessary repairs and returned to St. Joseph, or to have sent to St. Louis for chimneys & put them up.

10 ℥ The only obstruction to her proceedings on the voyage with her cargo was her want of sufficient draft from loss of chimneys to keep up sufficiently hot fires to make steam enough for up navigation. It also appears that some boats can sometimes construct temporary flues out of Common boards & sacking for the purpose of increasing the draft & have so sometimes proceeded up stream for hundred of Miles with cargo on board but that the "Georgia" was not so constructed as to be able to do so. As it was in this case the Georgia at Council Bluffs made a contract with the "Kansas" Steamboat by which the Kansas paid her a large proportion of her freight to accrue & the whole cargo including the merchandize in question, was transhipped to the "Kansas" with which the Kansas left that port & proceeded towards Council Bluffs, and on her way about the 20th of April 1854 was by a peril of the river sunk. Part of said merchandise insured was lost & part being nine wagons saved in a damaged condition. This property saved was worth $560. The whole amount insured was $1970. The salvage was therefore 18 1/3 % of the valuation in the policy. Applying this percentage to the actual invoice value (which was $1910.50) as required by the terms of the policy in case of partial loss the actual damage to the plaintiffs was $1541.13 on July 1st 1853 Due Preliminary proof was offered but waived by the Company's refusal to pay upon other facts in the case. If the Company became liable to pay that liability was mature on 1st July 1854 Both St. Boats were seaworthy at the time of their respective

11 3

shipment of said Cargo. The Court find also
1st That said loss of Chimney was the only
hindrance to the Georgia's proceeding on her
voyage; and that without other repairs than
above mentioned as made by cutting one chimney
into two she returned in safety to St. Louis her
point of departure & thence proceeded down the
Mississippi without further repairs; but that with-
out further repairs she could not make suffici-
ent steam to proceed from St. Jo to Council
Bluffs with her Cargo.
2d That all needful repairs could have been
made at moderate costs in 48 hours at St. Louis
whereupon she could have resumed & completed
her voyage to Council Bluffs; that but one
new chimney was required from St. Louis; the
other chimney which had been cut in two could
have been joined together & put up at St. Jo and
also at St. Louis That the Georgia would have
required but twelve days to have returned to
St. Louis & repaired, and returned again to St. Jo-
seph & started on her voyage up, with said cargo
which could in the meantime have been stored
safely at St. Joseph.
3d That the Georgia could have remained safely
at St. Joseph, without change of Cargo ordered &
obtained at reasonable costs a new chimney from
St. Louis, put up both chimneys at St. Jo and
after 12 days delay thus from her arrival, which
would have been all the detention necessary, could
have proceeded on & accomplished the voyage insured
in two or three days from that time.
4th That this merchandize was intended to proceed
on the route to California with its owners the

12 3 plaintiffs in that season; which commenced (for the departure of trains from various points from Council Bluffs down below St. Joseph; so far as Weston & Independence) from the 1st April to the middle of May; and the Georgia left St. Jo, on her return to St. Louis on the 18th of April 1854. The interest on damages from July 1st 1853 to the present time is $171.49

Replaced

Whereupon the Court declares that the plaintiffs are entitled to recover the sum of ($1712.62) seventeen hundred and twelve 62/100 Dollars

And afterwards the following further proceedings were had in this cause to wit; Thursday May 10th 1855.

Motion for review filed & Overruled & Bill of Exc. filed.

"On Motion of the defendant by its attorney leave is given to file a motion for a review herein and the same is accordingly filed and submitted to the Court, and the Court being fully advised of and concerning the premises, it is ordered that said motion be overruled, thereupon said defendant files a bill of Exceptions herein".

Which Bill of Exceptions is in the words and figures following to wit;

Salisbury vs Marine Ins Co } In Court of Common Pleas St. Louis County Pa

Bill of Exceptions.

Be it remembered that upon the trial of this cause, it was submitted for trial to the Court, a jury being waived & the Court found the facts & decision as follows (See page No. 8) to which decision & judgment the party objected at the time & in due time filed his motion for review as follows

Salisbury vs Marine Ins Co } In the Court of Common

13 3 Pleas St Louis County ss

Motion for Review. Now by leave of Court comes the defendant & moves the Court to review its decision & judgment & the law applied to the facts found by the Court in said Cause & to set aside said decision & judgment & render judgment for the defendant

Because the decision & judgment were for the wrong party. Because upon the facts found judgment should have been for defendant.

And thereof they ask judgment

Gasson atty

Which motion the Court overruled to which the defendant at the time excepted & now prays that this his bill of Exceptions may be signed sealed enrolled & made a part of the record which is done

Samuel Treat Judge Seal

And afterwards the following further proceedings were had in this cause, to wit; Tuesday May 15th 1855

Appeal Granted "On motion of the defendant by attorney an appeal is allowed it to the Supreme Court from the judgment herein, thereupon said defendant files a bond with John Tilden as principal and Wyllys King as security, which bond is acknowledged by the obligors and approved by the Court."

Said Bond is in the words and figures following to wit;

Know all men by these Presents; that we

Appeal Bond. John Tilden as principal, and Wyllys King as surety are held and firmly bound unto Hiram Salisbury Wm W Rodenhamell & Joseph Smith in the sum of Two thousand two hundred dollars, for the payment of which well and truly to be made we bind ourselves our heirs executors and administrators jointly and severally firmly by these presents, sealed with

14 3 our seals and dated at St. Louis this 14 day of May A D 1855, The Condition of the above obligation is such that whereas The Marine Insurance Company of St. Louis has appealed from the judgment rendered against it and in favor of said Satisbury & Co in the St. Louis Court of Common Pleas, for the sum of Seventeen hundred and twelve dollars and 62 cents together with costs

Now if the said appellant will pay all costs and damages that may be awarded against it occasioned by such appeal and shall prosecute its appeal and shall perform such judgment as shall be given by the Supreme Court, and such as the Supreme Court may direct the St. Louis Court of Common Pleas to give, and if the judgment or any part thereof be affirmed, that it will comply with and perform the same so far as it may be affirmed, and will pay all damages and costs which may be awarded against it by the Supreme Court then this obligation to be void otherwise to remain in full force and effect.

John Tilden Seal
Wyllys King Seal

Acknowledged & approved May 15 1855
Attest C. W. Hicks clk

State of Missouri
County of St. Louis } ss. I Charles W. Hicks Clerk of the St. Louis Court of Common Pleas within and for the County aforesaid certify that the above and foregoing is a full true and complete transcript of the record and proceedings in the above entitled cause as fully

as the same remain of Record in my Office
In Testimony Whereof I have
set my hand and affix the seal
of said Court at Office in the
City of St Louis this Eleventh
day of August A D 1855

C. H. Hickock

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94 ~~[illegible]~~

(13)

March. T. 1856

Hiram Salisbury & Co
respondents

vs Transcript

The Marine Insurance
Company of St. Louis
appellant

Transcript of Record.

Filed 4th October 1855
Wm. S. Glanville
Ck.

for Kapon atty

Exd

Krum & Hackinger app

$5.00 Clks fee paid
by atty Kapon

94 ~~[illegible]~~

cpts 70 trans/do $1.20

Salisbury et al
vs
Marine Ins. Co.

In Supreme Court

Now comes the Deft. & moves the Court to set aside the judgment of the Court of Common Pleas & to enter judgment for Defts in said cause, & states that manifest error hath intervened in the record & proceedings in said suit to the great prejudice of the Defendant: In this:

That Judgment was manifestly entered for the wrong party:

That Judgment should have been entered for Defendant, whereas the same was entered for the Plaintiffs erroneously:

Kasson for Deft.

The respondent joins in error
Krum & Harding
for respt

135

Assignment of Errors

Salisbury et al
vs
Marine Ins. Co.

Sup. Ct. Oct. 7. 1855

Kasson for Dft.

Filed 23d October 1855.
W. S. Glanville
Ck

# CARGO POLICY NO. 24821

# BY THE MARINE INSURANCE COMPANY OF ST. LOUIS.

THIS POLICY OF INSURANCE WITNESSETH, That the **MARINE INSURANCE COMPANY OF ST. LOUIS,** do by these presents, cause Mr John McMeechan to be INSURED, lost or not lost, to the thirty-first day of December, one thousand eight hundred and fifty-three

[B.] ON ALL CONSIGNMENTS OF WESTERN PRODUCE, shipped on good Steamboats from landings on the western waters, to the address of the assured, on which insurance may be required of the assured, either by letter per mail, previously written, with reference to the particular shipment, or by endorsement on bill of lading by the shipper at the time of shipment; THE ASSURED TO NOTIFY THIS COMPANY of every such shipment as soon as advised thereof, fixing a valuation on the same, which shall not exceed the St. Louis market price, and in the absence of instructions, shall be governed thereby.

No shipment from St. Louis will be covered by this Policy, until reported to and accepted by this Company.

Each package shall be subject to its own average.
No privilege of lighting, towing or reshipping, except on good keel boats and barges on the Ohio and Illinois rivers, and on the Mississippi, above St. Louis.
This Policy will cover any other shipment, only when specially applied for and accepted by endorsement hereon.

BEGINNING THE ADVENTURE UPON SAID PROPERTY from and immediately following the loading thereof on board the said boat or vessel, and so shall continue and endure until the arrival of the said boat or vessel at the port of destination, and with reasonable time allowed to discharge the same; and when landed, or any part thereof, this Company's liability ceases on such portion so landed. And it shall be lawful for the said boat or vessel, during the voyage, to proceed to and touch at any intermediate places, if thereunto obliged by stress of weather, or other unavoidable accident, or for the transaction of any lawful business connected with the voyage, without prejudice to this insurance. And in case of any loss or damage resulting from any peril insured against, it shall be the duty of the party insured, and the factors, agents, servants and assigns of the insured, to sue, labor and travel for, in and about the defence, safeguard and recovery of said property, and to use all proper means for the security, preservation, relief and recovery thereof, without prejudice to this insurance; to the charges whereof the said INSURANCE COMPANY will contribute in proportion as the sum hereby insured bears to the whole sum at risk; having been paid the consideration for this insurance at and after the rate Signed

TOUCHING THE LIABILITIES AND PERILS which the said INSURANCE COMPANY hereby assumes and takes upon itself in the premises, they are of the SEAS, RIVERS, FIRES, PIRATES, OVERPOWERING THIEVES, (but no other thieves) JETTISONS, and all other perils, losses and misfortunes that have or shall come to the injury, detriment or damage of the said property, or any part thereof, by reason of the dangers aforesaid. And in case of loss or damage happening on board any Steamboat on the Western waters, which boat may have deviated to assist any other boat or vessel in distress, the assured shall be paid by this Company the amount of such loss or damage, as though no such deviation had occurred, upon the assured assigning to this Company all claims he or they may have against the owner or owners of such Steamboat, in consequence of such deviation, and authorizing this Company to use his or their name or names to enforce such claims against the said owner or owners, for the sole benefit and use of this Company.

AND IN CASE OF TOTAL LOSS, The adjustment of the same shall be made upon the valuation specified in the Policy, if any; and in the absence of a valuation, then upon the invoice price without reference to the market value of the article insured. But in case of partial loss or damage, reference must be had to the market value of the article insured, to fix the per centum of damage, which shall be the difference between the sound cash market value and the article in its damaged state; which per centum of loss or damage must be applied to the value fixed in the Policy; and, in the absence of such valuation, then upon the invoice price, to determine the sum for which this Company shall be liable. And the assured shall be paid the amount of such loss or damage in sixty days after the proof of loss, and proof of interest in said shipment—the amount of premium note, if unpaid, and all other debts, dues and demands of said Company, against the said insured being first deducted.

AND IT IS MUTUALLY AGREED, That the acts of either party, or their agents, in securing, preserving, or recovering the property insured, shall not be considered or held to be either a waiver or acceptance of an abandonment.

AND IT IS ALSO AGREED, That the insurer shall not be liable for any partial loss on Leaf Tobacco, in hogsheads or bales, bulk Pork, Sheet Iron, Corn or Grain of all kinds, Beans, Flax or Hemp, not baled and covered with bagging entirely, Bale Rope, Bagging, Green Fruit and Vegetables, household and cabinet Furniture, pleasure Carriages, Books and Stationery, Tin Plate and Cutlery, unless it amounts to twenty per cent, exclusive, in all cases, of all charges and expenses incurred for the purpose of ascertaining and proving the loss; and no partial loss or particular average shall, in any case, be paid, unless amounting to ten per cent; but the assured shall recover on a general average.

AND IT IS ALSO AGREED, That the insurers shall not be liable for damage to goods by wet or dampness, or by being spotted, discolored, mouldy or rusty, unless the same be caused by some disaster to the vessel, and proof thereof be furnished; and also, that Money and Bullion are not covered by this Policy, unless specified.

AND IT IS FURTHER AGREED, That the said Company is not liable for leakage on Molasses or other liquids, and that the assured are not to abandon, on account of the grounding or detention of said boat or vessel.

AND IT IS ALSO AGREED, That if the assured shall have made any other assurance upon the premises aforesaid, prior in date to this Policy, then the said INSURANCE COMPANY shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the premises hereby insured; and the said INSURANCE COMPANY shall return the premium upon so much of the sum insured as they shall be by such prior assurance exonerated from. And in case of any insurance upon the said premises subsequent in date to this Policy, the said INSURANCE COMPANY shall, nevertheless, be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers; and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made; PROVIDED, that the said INSURANCE COMPANY shall contribute towards any loss in the premises, only in proportion as the sum hereby insured bears to the whole sum at risk belonging to the assured.

IT IS ALSO AGREED, That the insurers shall not be answerable for any charge, damage or loss, which may arise in consequence of the assured engaging, or having been engaged, in illicit or prohibited trade at any time whatsoever.

IT IS ALSO AGREED by the parties to this Policy, that no premium shall be abated or returned on account of any deviation that shall be made by the owners, or their agents; and if the voyage aforesaid shall have been begun, and shall have terminated before the date of this Policy, there shall be no return of premium on account of such termination of the voyage.

That in all cases not otherwise stipulated, the first shipment or shipments made, or to be made, within the period embraced by these presents, answering to the description of the subject herein assured, shall apply to this Policy.

**In Witness Whereof,** The MARINE INSURANCE COMPANY OF ST. LOUIS have caused these presents to be signed by their President, and attested by their Secretary, at their Office, in the City of St. Louis, on the first day of January one thousand eight hundred and fifty three

John Filder **President.**

ATTESTED: D. Hough **Secretary.**

## MEMORANDUM OF RISKS TAKEN ON ACCOUNT OF THE FOREGOING POLICY.

| DATE SHIPMENT. | CONVEYANCE. | FROM. | TO. | PROPERTY. | AM'T INSURED. | RATE. | PREMIUM. | REMARKS. |
|---|---|---|---|---|---|---|---|---|
| 1853 | | | | | | | | |
| Mch 31 | Georgia | St Louis | Council Bluff | Mdse | 1970 | 2½ | 49 25 | |

Correct
D Hough
Sec

## MEMORANDUM OF RISKS TAKEN ON ACCOUNT OF THE FOREGOING POLICY.

| DATE SHIPMENT. | CONVEYANCE. | FROM. | TO. | PROPERTY. | AM'T INSURED, | RATE. | PREMIUM. | | REMARKS. |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | |

MARINE INSURANCE COMPANY
OF ST. LOUIS.
POLICY.

# POLICY,

No.

## MARINE INSURANCE COMPANY

### OF ST. LOUIS.

*St. Louis,* ..... *185*

8 The Court finds the facts to be as follows.

On the 31st of March 1853 the plaintiffs were possessed of 12 wagons & a lot of other merchandize, all valued in the policy hereinafter named at $1970 & the plaintiffs caused them at that date to be insured at that valuation in the open policy of John McMechan issued by defendant & as the defendant accepted the risk in consideration of a premium of $49.25 paid to the company therefor, John McMechan being insured therein for the benefit of plaintiffs.

The insurance was upon merchandize on the Steam Boat Georgia, from St Louis to Council Bluffs.

It is agreed by the parties that the original policy sued on or a copy, may be used in the Supreme Court by either party, without being incorporated in the transcript.

9. And said insurance was taken by endorsement in Policy Book as customary & as above stated & for plaintiffs benefit.

Said Steam Boat Georgia departed on said voyage with the merchandize aforesaid on board & proceeded in safety to a point on the Missouri River some distance above St. Joseph, where in endeavoring to round a point she was caught by an eddy, which she was trying to avoid & forced toward the river bank where her cabin was broken and her chimneys were caught in a tree & broken off so that one was lost in the river and the other hung by attachment to the boat, This Chimney was saved & afterwards cut in ~~two~~ two & so put up to supply temporary chimneys by the hands of the boat after her return to St. Joseph, but only serving as half chimneys, the water was rising & she could not make steam enough to go up with her cargo; she returned to St. Joseph. This was a safe port to lie in, and there was ample room and warehouses for storage of her cargo or the boat could have remained there in security with all her cargo unmoved in safety on board, ~~unless~~ until she could

9 have sent an order to St. Louis for new flues & received them at St. Joseph where she could have readily put them up & proceeded on her voyage. St Louis was the nearest ~~place~~ port where ~~she could~~ the necessary chimneys & repairs could have been procured. It would have taken 12 days to have made the trip to St. Louis put on the necessary repairs & returned to St Joseph, or to have sent to St Louis for chim-
10 neys & put them up.

The only obstruction to her proceeding on the voyage with her cargo was her want of sufficient draft from top of chimneys to keep up sufficiently hot fire to make steam enough for up navigation. It also appears that some boats can sometimes construct temporary flues out of common boards & sacking for the purpose of increasing the draft & have so sometimes proceeded up stream for hundreds of miles with cargo on board but that the "Georgia" was not so constructed as to be able to do so. As it was in this case the Georgia at Council Bluffs made a contract with the Kansas Steamboat by which the Kansas paid her a large proportion of her freight to accrue and her whole cargo including the merchandize in question, was transhipped to the "Kansas" with which the Kansas left that port & proceeded ~~forwards~~ towards Council Bluffs, & on her way about the 20th of April 1854 was by a peril of the river sunk. Part of said merchandize insured was lost & part being 9 wagons saved in a damaged condition. This property saved was worth $360. The whole amount insured was $1970. The Salvage was therefore 18 1/3 % of the valuation in the policy. Applying this percentage to the actual invoice value (which was $1910.50) as required by the terms of the policy in case of partial loss the actual damage to the plaintiffs was $1541.13 on July 1st 1853. Due preliminary proof was offered but waived by the company's refusal to pay upon

other facts in the case. If the company became liable to pay that liability was matured on 1st July 1854. Both
11 St. Boats were seaworthy at the time of their respective shipments of said cargo. The Court find also

1st That said lap of chimneys was the only hindrance to the Georgia's proceeding on her voyage; & that without other repairs than above mentioned as made by cutting one chimney in two she returned in safety to St Louis her point of departure & thence proceeded down the Mississippi without further repairs; but that without repairs she could not make sufficient steam to proceed from St. Jo to Council Bluffs with her cargo.

2d That all needful repairs could have been made at moderate costs in 48 hours at St Louis whereupon she could have resumed & completed her voyage to Council Bluffs;
X that but one new chimney was ~~received~~ needed from St. Louis; the other chimney which had been cut in two, could have been riveted together & put up at St. Jo. and also at St. Louis, That the Georgia would have ~~received~~ required but 12 days to have returned to St. Louis & repaired & returned again to St. Joseph & started on her voyage up with said cargo which could in the mean time have been stored safely at St. Joseph.

3. That the Georgia could have remained safely at St. Joseph without charge of cargo ordered & obtained at reasonable costs a new chimney from St. Louis, put up both chimneys at St. Jo. & after 12 days delay there from her arrival, which would have been all the detention necessary, could have proceeded on & accomplished the voyage insured in two or three days from that time.

4. That the merchandize was intended to proceed on the route to California with its owners the plaintiffs in that season; which commenced (for the departure of trains from various points from Council Bluffs down below St. Joseph so far as Weston & Independence) from the 1st April to the

middle of May; & the Georgia left St. Jo. on the return to St Louis on the 11th of April 1854. The interest on damages from July 1st 1853 to the present time is $171.49.

Whereupon the Court declares that the plaintiffs are entitled to recover the sum of ($1712.62).

[A copy of the Policy is hereto annexed, as agreed K.]

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Salisbury
v
Marine Ins. Co.

Copy of Court's finding

filed as
Statement of the Case

Kapan for Deft.

Filed 31 March 1856
W S Glanville Ck

Hiram Salisbury et. al
~~ap~~ respondents
vs:
The Marine Insurance
Company, ~~defend~~ applt

In the Supreme Court
March Term 1856

Brief of respondents.

1st The policy sued on, in this case, is in the same form as that which the Court have had under consideration in the case of Wise, assignee of Eubank vs: the same Insurance Company, argued at the present term of this court. - The policy causes "John McMechan" to be insured" &c, & does not contain the name of the respondents or the words "or whom it may concern."

The allegations in the petitions, in both cases, touching the insurance being applied for & taken for the benefit of the plaintiffs & the making the contract with the assured for plaintiffs are the same. Yet, nevertheless, the question which was presented in the case of Wise, assignee, does not arise in this case. - The answer expressly admits plaintiffs' construction of the clauses of the policy which describe the risks ~~taken~~ covered by the policy, to be correct - &, also, that the plaintiffs, under that policy, have the right to sue.

The only question, presented by this case, is as to the effect ~~of~~ which the transhipment of the cargo has upon the liability of the appellant.

The respondents ~~therefore~~ contend,

2d That in cases of necessity or calamity, during the voyage, the master is by law created agent for the benefit of all concerned, including the underwriters

on Cargo; and his acts, done under such circumstances, in the exercise of a sound discretion, are binding upon all the ~~the~~ parties in interest in the voyage -

Jordan vs: Warren Ins Co. 1 Story C.C. 342 -

Et infra -

3d If, by perils of the navigation, the voyage be broken up, or if the necessary repairs would require an unreasonable delay, the master is not only justified in trans-shipping his Cargo, but, if he can do so, is bound to forward it by another vessel -

2d Phil on Ins (3d Edition) §§ 1602. 1624. 1632, 1635 -

Angell on Com Carriers § 402 §. 187

Abbott on Shipping ~~§~~ p 366-367 (side paging & notes)

9. John R. 17 & 21

4. J. Ch. R. 220

12 J. R. 107.

1. Arnould on Ins p 179. - p 185 §83 & 186-7-8

4th In this case, therefore, the appellant is liable unless the trans-shipment was unjustifiable & not an act which a prudent man, acting in good faith for the benefit of all the parties in interest, could do, or unless the appellant is discharged by the operation of the clause in the policy "No privilege of lighting, towing or reshipping, except on good Keel boats and barges on the Ohio and Illinois rivers & on the Mississippi, above St Louis"

And, hereunder, the ~~ap~~ respondents contend

1st that the facts, as found, ~~not only bring this case~~ establish the good faith of the master. (Which, however, is not denied).

2d They ~~establish~~ show the trans-shipment to have been made under circumstances which, considering the nature of the trade, viz; carrying goods destined for California by the overland route from Council Bluffs and considering the peculiarities of the navigation, not only justified the forwarding by the Kansas, but made it the duty of the master, acting with prudence, to trans-ship his Cargo -

Field vs Citizens Ins Co 11. Mo 58 at p 56

Before the Georgia could have gone to St Louis & returned, the season for commencing the trip to California would be near its close. The same time would have elapsed before the master could have sent to St Louis for a new chimney & have repaired so as to be able to proceed with his voyage. In doing either, the perils of navigation of the Missouri river could not be over-looked by the master in making up his mind what he, as a prudent man, acting for the best interests of all concerned, ought to do. Another accident, serious or trivial, would or might cause such further delay as to entirely frustrate the objects which the owners of the Cargo had in shipping their goods to Council Bluffs - viz; the conveyance of their property to California that season -

3d The clause "No privilege of lighting" &c, in the policy cannot be construed to apply to

this case -

The trans-shipment was not the exercise of a "privilege" of the assured, it was the performance of a duty by the master, acting as agent for the appellants, as well as for other parties interested, which duty was imposed upon him by the occurrence of an unavoidable peril - By one of the subsequent clauses the assured, his agents &c are bound "to use all proper means for the security, preservation, relief & recovery" of the property insured, in the event of any loss or damage to it by reason of the perils insured against -

It would be as unreasonable to stretch that clause over a trans-shipment of necessity, or, one made in the exercise of his duty as agent for all parties, as to make it apply to the conveyance of the cargo, from boat to shore, on "good Keel boats & barges" in the Missouri river, in case such lighting or reshipping became necessary to save the cargo, as, for instance, if the boat had sunk. —

The clause means nothing but that "lighting", "towing" & "reshipping" are forbidden (with the exceptions mentioned) as the ordinary means of transportation -

Krum & Harding
for respts.

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Sup Court.

H. Salisbury et. al.
respts

vs:

The Manu Ins Co
applt.

Brief of respondents

Krum & Harding
attys —

Filed 7 April 1856
W S Garvey
Clk

Salisbury et al., Resp^ts.
vs
The Marine Ins. Co., App^t.

In Sup: Court
March T. 1856.

John A. Kasson, for Appellant:

Suit on a Policy of Insurance. The question arises upon these facts. The insurance was on the goods per Stboat "Georgia", from St: Louis to Council Bluffs: The voyage was duly prosecuted to a point above St: Joseph, when by a peril of the river, the Boat's chimneys were carried away, and one of them lost. Thereupon she returned to St: Joseph. Here was ample accommodation for storing cargo, perfect security for the Boat. Without one new chimney she could not pro=ceed. This chimney could not be procured nearer than St: Louis. She could have stored her cargo at St: Jo., & returned there, after a trip to St: Louis & repairing, in 12. days all told: or, at her option, she could have lain safely at St: Jo: and received the requisite chimney, upon order, from St: Louis, in 12. days. Her detention would not in either case have exceeded that limit. It could have been put up at St: Jo:, & no moving of cargo required, & the Georgia then could proceed on her voyage.

Under these circumstances, without any effort to repair, or procure the chimney from St: Louis, she made a contract with the "Kansas" to take all her cargo, for a stip=ulated portion of the freight=money paid on the spot to the Georgia, & transport it to Council Bluffs. The Georgia thereupon, without repairs

put her head down stream to St: Louis, & without making any repairs proceeded ~~from hence~~ hence again down the Mississippi to parts unknown.

The Kansas proceeded with her increased Cargo up stream, & on the voyage was sunk by the peril of the River. The ~~damage~~ loss for which suit is brought, & judgment recovered, thus accrued upon the Kansas.

Question: Can the Defendant be held liable for a loss of ~~the transhipped~~ cargo on the Kansas, the risk being taken on the Georgia, after a tranship= =ment which was necessary only in order to avoid a detention of 12. days?

I will proceed to give my reasons & authorities for a negative answer.

The case is of the first impression (so far as I know) in this state. It is brought here for the purpose of raising the question and establishing a principle, the Defen= =dant waiving all other defences. As it is likely to be a leading case in our state, we desire a full examination of the bearings of either decision upon the commercial interests involved.

It has been long settled as an elementary principle of insurance law, that the risk cannot be transferred from one bottom to another, without the consent of both parties. This has also always been subject to the modification that if such transfer is made, not for the interest of the carrier, but of the cargo, - its safety, - that then all parties are bound by it. Otherwise not. Especially not, merely to hasten the voyage.

1. Phil. Ins. §1102.

It is also well settled that a mere retardation, or delay, in the voyage, does not justify an abandonment. Nothing less than a necessary breaking up of the voyage. In the words of Lord Ellenborough C.J., (in Anderson v. Wallis, 2. M. & S. 247#) "Disappoint=
=ment of arrival is a new head of abandon=
=ment in insurance law"!

Judge Story (in Jordan v. Ins. Co. 3. Story's R. 351) says:- "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. × × The owner takes upon himself the chances of a short, or of a protracted passage".

And the Judge seems to hold with the case of Everth v. Smith that "the under=
=writer 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 & performed." (see page 352) "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".

And the Court decided in that case that the abandonment by the master of that voyage was voluntary, and no loss fee upon the underwriters. That he is entitled to any delay necessary to prosecute his voyage after repairs. That if the owner of cargo desires earlier possession of his goods, he may obtain it, but upon paying freight for the whole voyage.

The same principles are settled in Hubert vs Ballett 3. John. C. 93.
Griswold's case 3. J.R. 321.
Saltus vs — 14. " 138.

An underwriter upon the cargo is entitled to the original bottom as long as it is safe, or can be made safe by the reasonable exertions of the Master. This rule is entirely reasonable & just. If he (the master) chooses for the promotion of his own interest to tranship, without leave, he himself & his owners become the underwriters thereafter until delivery. This was held by this court in a case where the Bill Lading covered the whole route, but with leave to tranship, and

the second vessel deviated & was lost. It was a suit between the shipper and the carrier.

Little & Tompkins vs. Semple 8. Mc. 99.
S.P. Story on Bail. §509.

It is not an enhancement of the risk merely, but a <u>change</u> of the risk which discharges the underwriters.

1. Phil. Ins. (ch. XII. sec. 1.) §979. 3d. Ed.

The same author declares it to be "the "doctrine of all the cases, that the insurers "are discharged by an unauthorized change "of the risk." <u>ibid, (n.) 4.</u>

See also <u>ibid</u>, §989.
Millar's Ins. 394.

It is a deviation, and operates throughout the remainder of the voy=age. It was for the benefit of the Georgia, to save her time & money, that her Master chose to shorten her voyage, divide freight money with the Kansas, and return for another trip. All this was the carrier's, not the underwriter's, risk. Apply the test question:- was it done for the security & advantage of the cargo, was that the motive, or was it the convenience & profit of the carrier?

see Jolly's Ex'rs vs. Ohio Ins. Co., Wright's (O.) R. 541.

The result of the authorities is this:- If the Master, after damage to the vessel, has it in his power to procure repairs to be made at a moderate cost with reference to the vessel's value, & so proceed on his voyage, it is his duty to do so. It is especially his duty to do so, where the damage is slight, & the cargo entirely uninjured. If he cannot procure repairs to be made except at an expense disproportionate to the value of the vessel, or if it is uncertain whether they can be made at all until after a serious damage to the cargo by deterioration, then it is his duty to procure another vessel & forward the cargo to its distination, if one can be obtained at reasonable cost & with reasonable effort. But the chances of an earlier later market do not enter into the decision of the question. If it did, it would constitute a policy on cargo, a policy on profits, & a guaranty of a market.

It is submitted, that the foregoing rule is stated with the utmost liberality allowed by the books. I have purposely avoided fixing the proportion of damage at 50% of the value of the vessel, doubting the universal propriety of that standard, which has sometimes been fixed.

It is also submitted that the reasonableness & justice of the rule, toward both parties, is apparent.

The very fact that the master & boatmen are the agents of the insured, appears from the fact that the result of their carelessness & neglect, or mismanagement (left than barratry), is never thrown on the Underwriters, but falls on the Shipper. ~~They~~ They are the agents of the insured in respect to the transportation of the property.

Lodwicks v. of Ohio. Ins. Co. 5. O. R. 436.

They become the agents of the under=writer, only when the thing insured by the underwriter is under the operation of the perils against which the Underwriter insured it.

For example: In the given case before us, the cargo was in no peril at the time of transhipment. It was as safe as it was at any period of the voyage. Only the Shipper and the carrier were concerned in the hastening of the arrival of the cargo at its destination. The Insurer was only interested in its safety. The reshipment concerned only the former interest, & was designed to promote it, - not the latter. The Underwriter's interest was left out entirely; and the other parties, having abandoned it, cannot, after damage, restore it. Such a resumption would be totally without consideration, & unreasonable.

The question is not how an underwriter on the vessel, or the freight money, would be affected. It is the case of insurance on a cargo perfectly secure, & remaining so until the practicable

completion of the necessary & slight repairs.

It is the first & only instance that has come to my knowledge, in the course of a pretty large practice in the depart= =ment of insurance, where a Boat has ever claimed the right to transship her cargo, when she could without moving from a safe position procure the needful repairs, and without shifting cargo. Cases have presented themselves frequently in office practice, for opinion, when the vessel had grounded, the water was falling, no prospect of a rise, and the boat & cargo in danger, or the delay extremely indifinite & other relief very distant in point of time.

But as already shown, those cases, though open to serious inves= =tigation, range themselves, prox= =imately, under the principle of detention by indefinite embargo, blockade, &c. as before shown.

This case presents no such indefinite elements. Every fact is fixed. And as no privilege of reshipping was given, but in fact excluded, by the Policy, only a case of <u>necessity</u> could justify it.

It was contended on the part of Plaintiffs that though the underwriter would be discharged by the rules applicable to Sea insurance, yet these are not applicable to River insurance.

This very general proposition is so diffuse that argument can hardly touch it. If it is sought to apply it to one case in particular, it might be correct. To another, it would have no more application than the law of gravitation to a code of morals. It has been applied to discriminate between the presumptive negligence of running on a known rock, charted, at sea; and running on an old snag in the variable channel of the Mississippi River. Also in the presumed unseaworthiness of a vessel that springs a leak a day or two out at sea, in fair weather; and the like ~~circumstance~~ incident in respect to a steamer moving on the shallow waters of a river, whose bottom is covered with the hidden obstructions which often produce a fatal effect, with less disturbance than that made by the action of her machinery.

But it might as well be said that the general principles of commercial law, ~~that~~ recognized on the sea shore, did not apply on the bank of a River; or that the general principles ~~protecting~~ of insurance did not apply to both.

For example: Take the rule contended for, — that a master has no right to bind an insurance company to a change of bottom, merely to hasten the time of arrival, or to promote the convenience or advantage of his boat, or to avoid a slight extra expense. Is there not a reason in that that applies everywhere, that is, in fact, universal?

Just so with the 50% rule, constituting a technical total loss: with the effect of an abandonment, to transfer salvage: with the doctrine of averages: even with the rule of 1/3d new for old, of more doubtful propriety, which has been fully established here: and in fact with nearly every rule of insurance. For the exceptions from the system are rare.

In the case at bar it seems totally unreasonable to contend for the abolition of the general rule established in Insurance law, which requires the Master to repair, where it is practicable at a cost moderate in proportion to the value of the vessel, & especially where the cargo is not in process of decay, or ~~deterioration~~ damage.

Hardly a case will ever present itself in which the master, homesick or eager for gain, may not throw up his voyage, take earned freight by contract with another boat, & throw all risk of freight & cargo on the other boat, & on the underwriters, provided he breaks his tiller chain, at a woodyard, or his pump needs a new valve, or any small piece of machinery gives way.

The case shows the Georgia had one chimney, which she could have put up at St. Jo. That without the other she could not make steam enough to go up stream; but amply enough to go down stream, & to leave on another trip without any of these so important repairs! The trouble then was, & only trouble went of draft to make steam enough.

Suppose she had got out of wood. She would not then have had fuel enough to make steam. Suppose she could not get it without some delay, or waiting for a wood boat to come up. Could she abandon the voyage, tranship the freight,

throw a new risk on the underwriter, & come home? The two cases are identical in principle. Each presents only the question of retardation for a temporary cause, which it is in the power of the ~~Cap:~~ ~~tain~~ Master to remove in a reasonable time.

The case also finds that this cause of retardation could have been removed in 12. days at the outside. It also shows that the cargo insured was wagons; and therefore liable to no decay or deterioration during the necessary & brief detention. No interest of the cargo, affected by any of the insured perils, could be affected in that time. A few days more or less in a voyage clearly is not a matter covered by insurance. It is already shown that such an element is no part of the insurance contract.

It is inserted in the finding, strangely enough, that the insured intended to send these wagons to California that season, & that the season closed by the middle of May.

But the answer to this is threefold:

First: The intent is not made known to the Underwriters, & therefore does not concern them:

Second: If it was made known to them, it in no way enters into the Policy; for no Policy was ever yet effected that guaranteed to the insured party the use of his goods according to his intent: And

Third: He could have taken his wagons from St: Jo: overland; or, in fact, would have arrived

at Council Bluffs before the middle of May, had he been delayed the 12. days for the arrival of the chimney.

But the allegation has no proper place, either in the argument, or the decision.

It is not safe to leave the old land= = marks of insurance law. If we desert the principle that retardation does not justify an abandonment of the voyage, where it is in the nature of the case a limited delay, voluntary, & for the purpose of partial repair, the whole field of a wide litigation is thrown open, as to the time, - a day more or less; - as to the particular repair to be made, or supply to be procured; as to the proportion of the voyage to be accomplished, & the profit or loss of its continuance, the amount of freight to be procured above, or accumulated below, as an inducement to proceed or return.

The very fact shown, - that this boat on her return to St. Louis makes no repairs, but proceeds on another voyage without them, throws suspicion around her whole conduct, & indicates the dangers to be encountered by overthrowing the wholesome rule, already established elsewhere, & contended for here.

~~I submit, that judgment~~

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Salisbury vs. Marine Ins. Co.

Argument & Brief
for App'ts

Sup. Ct. March 7. 1856

Kasson for App'ts

Filed 8 April 1856
W. S. Glanville
Ck

Salisbury vs Marine Ins. Com. of St. Louis

This was a suit upon a policy of insurance — The facts were found by the Court, and judgment rendered thereon for the plaintiff — The only question here is, whether upon the facts found the carrier was authorized to tranship the property insured so, as to subject the underwriters to a loss, that subsequently occurred to the goods in the New bottom, occasioned by a peril insured against.

The facts found are as follows, (here copy finding by the Court marked on the record) —

From these facts, the main question arises; will a detention for 12 days on a voyage up the Missouri from St Louis to the Council Bluffs, warrant the Boat originally undertaking to transport the goods, in transshipping them on an other boat, so as to continue the policy on the goods in the new bottom? — The Georgia was disabled, by the loss of one chimney; and by her cutting the other into two halves, in order to come down to St. Joseph, from the me

diately, prosecuting her voyage up the Missouri - She returned to St. Joe - and there had a safe port. The goods were on board unimpaired; there were good and sufficient warehouses to store away the goods - and it would have taken about 12 days for the Georgia to have come down to St Louis and refitted and repaired and returned to St Joseph, ready to proceed on her voyage - Or she might have remained in the port of St. Joseph in safety with her cargo unimpaired, until the owners have sent to St Louis, and have procured the necessary repairs, ~~[illegible]~~ and been ready for the trip again in 12 days - So the detention of 12 days is all that she has to justify her in making this transhipment -

This detention does not in our opinion break up this voyage, so as to make it the Master's duty to tranship, or give him the privilege to tranship. Here the Boat by running into an eddy had her Chimneys carried away - One was entirely lost overboard, the other was lodged and retained; was cut into two parts and put up so as to enable the Boat

to descend the River to the Port of St Joseph, but these chimneys (chimnies) thus cut and shortened, were not of sufficient length to make draft sufficient to make steam enough to propell the Boat up stream — There was no place to procure a chimney, nearer than St Louis — The Boat came to a safe and sufficient harbor, and teams have come on down to St Louis and procured a new Chimney, have the other again put together, ~~making~~ by rivets & bands making a sufficiently good chimney, and have returned to St Joseph in twelve days — It might have had all necessary repairs ordered from St Louis and in 12 days been ready to commence again ascending the river from the Port of St Joseph — Was it the duty of the Master to make this transhipment? The goods were Waggons — perishable not easily deteriorated by delay in delivery — Now suppose the Georgia had been run on a sand bar in the night, with a falling river, and had been detained in making efforts to extricate herself from the bar for 12 days, in vain, would this have been a sufficient cause to justify transhipment

in a lighter vessel so as to continue the policy on the goods in the new bottom? Surely not. The insurers did not estimate the rapidity with which the voyage was to be or could be made. The safety of the goods on the voyage long or short was their object. We are of opinion that the facts found here by the Court did not amount to a breaking up of the voyage, or to such a disaster to the Boat as would justify her in sending on the goods by a new bottom. That this transshipment was at the Master's risk, and not at the insurers; it was for his interest, and not for the joint benefit of all. The Insurers guaranty only the safe arrival of the goods: they do not guaranty the speedy arrival; nor do they incur any loss on account of the mere delay in the voyage, unless the delay be produced by a peril insured against and the cargo in consequence of damage occasioned by such peril, or of its perishable quality be subject to deterioration by mere lapse of time: Nor do the insurers guaranty by

their general undertaking, that the Cargo shall arrive in time for an advantageous market; they have nothing to do with the fluctuations of the market — If the vessel be only partially injured and might be repaired in a reasonable time and at reasonable costs, it is the duty of the Master to do it and to forward the goods in his own vessel. Shultz et als. vs The Ohio Ins. Company 1. Ben. Monroe 336 — The detention of 12 days in this case is not an unreasonable delay; the Master should have waited and made the repairs and then proceeded on his voyage — It is transshipment in this case can not be said to be for the general interest of all parties — No doubt, that a Master may transship when his vessel has been so injured, that repairs would be unreasonable or the time required to make them so long as to ruin the goods by delay.

"By the contract, the Ship owner, and the Master as his agent is bound to carry the goods to their destination in his own ship, if not prevented from

doing so, by some event which he has not occasioned and over which he has no control." Shipton v Thornton 9 Adol & El. 314 –

"If by reason of the damage done to his ship or through want of necessary materials, she can not be repaired at all or not without very great loss of time, the master is at liberty to procure another ship to transport the cargo to the place of destination. But if his own ship can be repaired, he is not bound to send the cargo by another, but may detain it till the repairs are made" – Abbott on Shipping 448 – 9 – The general doctrine, however, is clearly is, that, if by reason of stranding or some other unexpected cause, it becomes impossible to convey the cargo safely to its destination in his own vessel, the master is to do what a prudent man would think most for the benefit of all concerned. Transhipment to the place of destination if it be practicable is the first object, because that is the furtherance of the original object.

Angel on Carriers § 187. It is recognized as an undoubted doctrine of insurance law, that if the original ship be disabled, and the master acting with a wise ~~prudence~~ discretion, as the agent both of the merchant and the shipowners, forwards the cargo in an other ship, such necessity and justifiable change of ship will not discharge the underwriters on goods from liability for any loss which may take place on the goods subsequently to such transshipment — but if the transshipment be without necessity or without the underwriter's consent, he will be discharged. If in the course of the voyage the ship becomes so disabled as to be incapable, by any means at the Master's disposal, of being repaired at all, so as to take on the cargo, the Master, as agent for all concerned may procure another ship in which to forward the cargo to its port of destination; and in such case the change of ship does not discharge the underwriter on goods freight & property, from his liability for any loss on the subjects they have insured, which may occur

subsequently to such change of ship — 1 Arnold on Ins. 178-9 —

In the case of Field vs The Citizens Ins. Company 11 Mo. Rep. 50 — the original boat was so injured that she could not pursue her voyage — she stored her cargo safely and returned to St Louis; where she was repaired — The ship had her cargo as she thought it her duty to do, but the Master of the original Boat insured, made an agreement with the Insurance Companies, that they must be bound by their policies on the cargo in the new bottom — He did not run the risk of transhipping on the idea that the policy on his boat attached to the transshipped cargo; he therefore made an agreement with the underwriters in relation to it — It does not bear with any authority on this question —

We have carefully looked into the various decisions on this question, and become satisfied that the mere delay occasioned by waiting for the necessary repairs in this case did not justify and

warrant the transshipment in to the new bottom; and that the underwriters are discharged from any loss subsequently happening to the Cargo in the new bottom –

It was the duty of the Master of the Georgia to have repaired his boat. He could have repaired it by taking proper steps and the time necessary to repair is not unreasonable – He acted only for his own interest, disregarding the Underwriters – Permit such an accident or such a disaster under such circumstances, so easily repaired and causing only a few days detention, in a safe port, the Cargo was insured, to justify the Master in breaking up his voyage & changing the Boats and thereby causing the policy to attach on the Cargo in the new bottom; and the rights and safety of Underwriters must gradually give way, and fall without a principle to support or protect them –

Under this view then the judgment of the Court below

Must be reversed — and with the concurrence of the other judges it is reversed accordingly —

John T. Mayland

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Salesbury

vs

Marine Ins. Co. St Louis

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Opinion

Ryland

Filed 22 Decr. 1856
J. W. S. Glanville
Ck

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