

DIVISION II.

Average.

S E C T. I.

Partial Loss.—Meaning of the clause, ‘Free from all Average, unless general, or the ship being stranded.’

1755. *January 18.*LUTWICH *against* GRAY.

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In a shipwreck, part of the cargo being saved, was delivered to the owners for payment of the salvage. The proprietor of the ship claimed the freight of the goods saved *pro rata itineris*. The freighters admitted the claim; but insisted, that as the salvage was beneficial to him on account of his freight, as well as to them on account of their goods, he ought to pay a proportion of the salvage. *Answered*, The expense was laid out entirely in the recovery of the freighter's goods, and therefore they ought to be liable.—THE LORDS found, that the proprietor of the ship ought not to pay any proportion of the salvage.

Fol. Dic. v. 3. p. 334.

1794. *January 16.*JAMES CRAIG and WILLIAM HISLOP, *against* JOHN SPENCE and Others.

A CARGO of grain originally belonging to James Craig, and by him sold to William Hislop, was insured on the voyage from Dantzic to Dumfries, by John Spence and other underwriters in Edinburgh. To the policy was subjoined, as usual, the following note:—‘*N. B.* Corn, seed, salt, fish, fruit, flour, and provisions of all kinds that are in their nature perishable, are warranted free from all average, unless general, or the ship be stranded.’

In a storm, the vessel became leaky, and also shipped a quantity of water, some of which got among the grain. Along with the water, part of the grain was pumped out. The master at last found it necessary to sail for the harbour of Egoag in Norway, to refit. The vessel got into the harbour in the night.

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A vessel, which strikes on a rock, and is got off again without being much damaged, is not held to be stranded.

Loss arising from grain having been accidentally pumped out along with water from a leaky vessel, not held to be a general average.

No 27.

time, and after she had cast anchor, she got foul of another ship. In getting clear, she struck upon a rock; but in consequence of immediate assistance from the shore, she was got off; and it did not appear what, or if any damage was sustained by this accident. In order to repair the ship, it was found necessary that she should be unloaded. A part of the damaged grain was then sold for what could be got for it, and part of it thrown into the sea. After the vessel was repaired, and had been some months at Egoag, the remainder of the cargo was put on board, and the ship, without any further accident, arrived at the port of Dumfries.

In an action before the Court of Admiralty, the insured claimed from the underwriters the damage arising in consequence of the deficiency in the quantity of grain which arrived at Dumfries, from what had been originally put on board at Dantzic, deducting the price of what was sold at Egoag: And the Judge-Admiral gave judgment in their favour.

In a reduction of his decree, the underwriters contended that the vessel was not stranded, and that the loss sustained did not come under the description of a general average, and

Pleaded, In legal, as well as in common language, a vessel is said to be stranded, when it is driven upon the beach, or on a sand bank, and is there wrecked; but not where it merely strikes upon a rock, and is got off; an accident which may happen at a great distance from the shore, and many times in the course of the same voyage; Park on Insurance, p. 69.; 12th Ann, c. 18.; 5th Geo. I. c. 2. § 13.

Besides, in order to support the claim of the insured, it is necessary that the loss should have been occasioned by the stranding; Burrow's Reports, v. 3. p. 1553. Wilson against Smith. A memorandum similar to the present is inserted in all policies, and always with the same view. The expression used, however, varies in different places. In the Glasgow policies, the expression used is, 'Loss by stranding.' It is absurd to suppose, that in the present case the loss sustained on the cargo during the voyage, and which had become a burden on the insured, should, by an after accident at Egoag, be transferred to be a burden upon the insurers.

2do, The damage in the present case falls under the description, not of a general, but of a particular average. So far as it arose from the water getting in upon the grain, it was not occasioned by any measure undertaken for the joint preservation of the ship and cargo, and therefore it was to be borne solely by the proprietor of the latter, and it did not prevent specific delivery of the grain, though in a deteriorated state; Park, p. 127. Wilson v. Smith; Cocking v. Fraser, B. R. East.; 25th Geo. III. Mason v. Scurray, Sittings after Hilary Term 1780, Guildhall. It cannot affect the present question, that the master of the vessel, instead of bringing home the damaged grain, thought proper to dispose of it at Egoag.

So far, again, as the loss arose from the pumping out the water, that measure being undertaken solely for the benefit of the vessel, and the loss of the grain being merely accidental, it does not come under the description of a jetson made for behoof of all concerned.

Answered, imo, A ship may be stranded on a rock, as well as on a sandy beach. The object of the exception of stranding and general average in the note annexed to policies, is to encourage the insured not to abandon the vessel, and thereby incur a total loss. It is therefore to be liberally construed. It makes no difference that the vessel was not wrecked. A ship was found to be stranded, merely because in going down the Thames she had touched the bottom; Millar on Insurance, p. 354. Cantillon against London Assurance Company.

If the ship therefore was stranded, the exception in the policy being general, it is not necessary, and it might frequently, as in the present case, be impossible to shew the extent of the damage she had thereby sustained.

2do, The loss, in the present case, comes under the description of a general average. It was necessary, for the preservation of the ship, cargo, and crew, that a part of the grain should be pumped out along with the water, for the pumps could not be wrought without doing so; and had they been stopped, the whole must have been lost. The unloading the vessel too, in order that she might be repaired, was a measure necessary for the general safety. And had it not been for this circumstance, the remainder of the cargo would have arrived at Dumfries. The necessity of disposing of a part at Egoag, may have arisen from damage received in unloading it, or from its having been improperly kept on shore.

THE LORD ORDINARY found, 'That the defenders have not proved that the vessel was stranded; and, in respect thereof, sustained the reasons of reduction.'

Upon advising a reclaiming petition and answers, it was

Observed on the Bench; A vessel cannot be said to be stranded, which only strikes against a rock, and is got off again, without considerable damage. There is no evidence in the present case that the damage was occasioned by the striking. When the *ipsum corpus* of the subject insured arrives at the end of the voyage, although in a damaged state, there is no general average. This, had it not been for the voluntary act of the master, might have been the case here, except as to what was pumped out, which last having been lost accidentally, does not come under the description of a jetson, or give rise to a claim against the insurers.

'THE LORDS adhered.'

Lord Ordinary, *Abercromby.* Act. *Solicitor-General Blair, Rolland.* Alt. *M. Ross.*
Clerk, *Home.*