LATE SUPREME COURT, PLEA SIDE.

1863. April.

RANSORDA'S BHOGILA'L ..... *Plaintiff.*
KESRISING MOHANLA'L ..... *Defendant.*

Policy of Insurance—Usage of Mangrole—Average Loss—Evidence—Certificate of Mahájans.

In the case of a Native policy of insurance expressed to be "according to the usage of Mangrole," the certificate of the Mahájans at the port of distress or sale, if accompanied by the manifest of the shipment and the account-sales, is to be held sufficient evidence of an average loss and of the amount of such loss, though the underwriter may answer a claim supported on such evidence by showing fraud on the part of the shippers, the master of the vessel, or the Mahájans.

An alleged usage that the Mahájans' certificate is deemed to be conclusive evidence against the underwriter without production of manifest and account-sales, and that upon proof of the certificate *alone* and of the policy the owner is entitled to recover his average loss, cannot be upheld, such not being a reasonable usage.

ON the 10th of April 1863, *Lewis,* Advocate General (*Scoble,* with him), moved, pursuant to leave reserved at the trial of the cause before Arnould, J., to reduce the verdict of Rs. 913-12-0, with costs on the higher scale, to one with nominal damages without costs, if the Full Court should be of opinion that, though there was proof of loss, there was no satisfactory proof of the amount of loss, and that a document called the "Mahájans' certificate" should not have been received as evidence of the latter: or to reduce the verdict to Rs. 799-3-6, with costs, should the Court be of opinion that on the evidence the defendant was liable to the claim to that amount (being the amount claimed less twelve per cent.)

Bayley was heard in support of the verdict as it stood. The evidence taken at the trial as to the usage of Mangrole was read over to the Court. The judgment of the Court (SAUSSE, C. J., and ARNOULD, J.) was afterwards delivered by SAUSSE, C.J., and was as follows:—

This action was brought upon a Native "*khat,*" or policy of insurance, effected with the defendant's firm in Bombay on the 14th of December 1859, "according to the usage of Mangrole," on goods shipped on board the *khoṭiá* "Matsal," on a voyage from Mangrole to Aden. A large quantity of the goods on board having been jettisoned owing to stress of weather, the *khoṭiá* put into the intermediate port of Makallá, where

the sea-damaged goods and the vessel's papers, including the "manifest," were immediately taken possession of by the Mahájans of that port, and the goods were sold under their superintendence and direction. After the sale the Mahájans calculated the average loss incurred, having ascertained "the difference between the goods shipped and those landed, by selling the latter by public auction," and found it proved that 60¾ and 15 *kalis* per cent. had been lost, and 39·5 *kalis* per cent. had been saved. The vessel's papers (including the manifest) were returned to the "supercargo" by the Mahájans, who also gave him an account-sales of the goods auctioned by them, together with a certificate of the average loss incurred. The "supercargo" handed those three documents to the plaintiff.

The Mahájans appear to be a self-constituted body of the principal Native merchants at each of the small ports on the Indian and Arabian coasts of the Indian Sea, who assume cognisance of sea-losses to the extent of fixing the amount of average loss incurred, and payable by Native underwriters. The plaintiff insisted that "according to the usage of Mangrole" the certificate of the Mahájans was conclusive upon the underwriter, and that upon proof of it *alone*, and of the policy, he was entitled to recover the percentage of loss mentioned in the certificate upon the value of the risk, as declared in the policy. The plaintiff failed in proving the usage to that extent, but adduced evidence to show that the certificate had been so received in a great many cases, and in others upon a deduction being made of from 6 to 12½ per cent. according to the agreement of the insured and the underwriter. The defendant denied the existence of the usage to either extent, and produced several witnesses to prove that underwriters had insisted upon and exercised the rights of calling for the ship's manifest and the account-sales at the port of distress, in addition to the Mahájans' certificate, but admitted that upon the production of those documents the underwriter was bound to pay according to the certificate, unless he could establish actual fraud on the part of the shippers, the master of the vessel, or the Mahájans.

We think that "the usage of Mangrole" has been proved to be in accordance with that admission, and that, under a policy so effected, the underwriter, if he cannot establish a case of actual fraud, will be bound to pay an average loss according to the certificate of the Mahájans, when the insurer

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shall also produce the ship's manifest and the account sales at the port of distress.

A "usage" to be binding must be reasonable, and we do not think that the "usage" to the extent claimed by the plaintiff would be so.

This "usage of Mangrole" appears to have originated in the necessities of the petty commerce carried on for ages in the Indian Sea, by means of small open-decked vessels, in which the ventures were both so numerous, and individually of so small an amount, that either commerce would have been checked by the absence of insurance, or some inexpensive mode must have been adopted by common consent of insurers and underwriters, by which insured losses could be recovered from the latter. The Native merchants at each port of resort appear to have constituted themselves, and to have been received by each other, as agents, for the purpose of looking after their respective interests in sea-risks, whether as shippers or as underwriters. The mutual interest of those merchants to act with good faith towards each other, and the exigencies of commerce, reasonably led to such a confidence being placed in the integrity of all acts under their personal cognisance and control, as to allow of their certificate being to that extent received as binding upon both underwriters and insured. Those acts would appear to be—the statement of the goods saved and brought into harbour, the undamaged value at the port of distress of the goods appearing on the manifest, the *bona fides* of the sale and amount of proceeds of the sea-damaged goods, and the calculation of percentage loss, but the reason of the usage does not require that it should be carried any further.

To enable Mahájans to adjust a fair average upon a jettison loss, they must either have the manifest before them, or act upon representations of the Nákodá or other persons respecting the goods shipped. If the manifest be fraudulent (as it has been sworn to be sometimes), or if false representations be made to the Mahájans, neither of which they possess any means of testing, then the underwriter would suffer without redress if, according to the plaintiff, the certificate alone was to be held as conclusive evidence against the underwriter.

There can be no reasonable difficulty in producing the manifest, or its equivalent at the port of shipment, and it affords such an obvious necessary and reasonable check to fraud on the part of shippers, *nákodás*, or others, without trenching on the confidence placed by usage in the Mahájans, that we do not think a usage dispensing with its production, even if such a usage were proved (which it has not been), should be considered as a reasonable usage.

The Mahájans' certificate ought not to have been received in evidence in this case, unaccompanied by the manifest and the account-sales, both of which the plaintiff had in his possession, but thought proper, for some reason or another, to withhold from the underwriters and also from this Court. Throwing that certificate out of consideration, the only materials before us to ascertain the amount of claimed average loss are the facts of a shipment by the defendant to the amount of Rs. 15,000, about half the entire cargo thrown overboard, and Rs. 3,500 paid to the plaintiff as the produce of the sale by the Mahájans of so much of the cargo as belonged to him, but we have no evidence of the quantity or value of the goods belonging to other shippers.

These elements are not sufficient to enable us to arrive at the amount of average loss which the plaintiff has sustained; and we must, therefore, in terms of the liberty reserved, allow the verdict to be reduced to one for nominal damages without costs.