[ORIGINAL CIVIL JURISIDICTION.]

1875.
February 22.

Suit No. 685 *of* 1873 *(Appeal No.* 259.)

HARIDA'S PURSHOTAM and others..... } *(Original Defendants) Appellants.*

HENRY GAMBLE..... *(Original Plaintiff) Respondent.*

English law applicable to Hindus—Insurance—Valued policy—Over-valuation—Subrogation—Practice—Points raised on appeal not taken in the Court below—Civil Procedure Code, Sections 351 *and* 353*—Costs.*

Where the defendants, underwriters of a policy of insurance on goods on board a vessel bound from Bombay to Calcutta, were Hindus, but no principle of Hindu law was applicable, the parties having selected the English language for the expression of their contract, *Held* that the case was to be determined in accordance with the principles of English law.

A valuation of salt, based on the loss which the owner may possibly incur on account of the bonds in respect of the salt passed by him to the Government, though greatly in excess of the real value of the salt, is not such an over-valuation as amounts to proof of fraud.

Where, in a valued policy of insurance, the goods insured were valued at an amount greatly in excess of their real value, which amount was intended to include the amount in which the insured was liable to Government on account of bonds executed by him in respect of the goods insured, and after loss of the goods Government elected not to enforce the bonds, *Held* that the under-writers were entitled to be subrogated in the amount of the bonds, and were liable to the insured only for the real value of the goods, together with a fair profit.

The Appellate Court will not remand a case for re-trial on a point not raised in the court below, if the evidence already recorded is sufficient to enable the Appellate Court itself to decide that point. But where the Appellants succeeded on a point taken by them for the first time in the Appellate Court, they were ordered to pay the respondent's costs of appeal.

THIS was an appeal argued before BAYLEY and GREEN, JJ., from a decision of Sir Charles Sargent, J.

Scoble, A. G., and *Farran*, for the appellants.

Latham and *Purcell* for the respondent.

The facts of the case and the arguments of counsel are fully stated in the following judgment of the Appellate Court delivered by

BAYLEY, J. :—This was a suit brought by Mr. Henry Gamble as Official Assignee of the estate and effects of Ratanji

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Edalji Bottlewálla, an adjudicated insolvent, to recover Rs. 11,000, being the amount for which the defendants underwrote in Bombay a policy of insurance in the English language and form, dated 5th June 1872, the insurance being effected by the insolvent's agent, Mancharji Dorábji, for Rs. 40,000, and declared to be upon 800 tons of loose salt on board the ship *Regina*, bound from Bombay to Calcutta, valued at Rs. 50 per ton, free of particular average, unless stranded, sunk, or burnt.

The plaint alleged that the ship with the said goods on board thereof sailed on the said voyage on or about the 7th June 1872, and that whilst the ship was proceeding on the voyage and during the continuance of the risk, the goods were, by the perils so insured against, wholly lost. The plaint further stated that Ratanji Edalji Bottlewálla was adjudicated an insolvent on 15th October 1872, and that, by an order of that date, his estate was vested in the plaintiff, Henry Gamble. It then alleged that all conditions were fulfilled, all things happened, and all times elapsed, necessary to entitle the plaintiff to be paid the said sum of Rs. 11,000 by the defendants, but that they had not paid the same. The plaint also claimed interest at 9 per cent. per annum from the 1st March 1873 till payment.

The defendants, by their written statement, denied their liability to pay the plaintiff any part of the money claimed in the plaint. They admitted that they subscribed the policy for the sum of Rs. 11,000, but did not admit that Ratanji Edalji caused himself to be insured as alleged. They denied that the goods mentioned in the policy were shipped as alleged, or that Ratanji Edalji was interested therein. They denied that the ship *Regina* sailed as stated, or that the goods were lost as alleged, and they lastly said, but without waiving the defences before stated, that after subscribing the policy they discovered that the valuation of the said goods contained in the policy was a valuation grossly in excess of the real value of such goods, and they stated that they would contend that the said valuation was fraudulent, and that they ought in no event to be held bound by such valua-

tion, the defendants saying that the maximum real value of the goods mentioned in the policy was Rs. 10,000.

The suit came on for hearing before Sir CHARLES SARGENT on the 9th July 1874, when the following issues were framed:—

1. Whether Mancharji Dorábji was the agent of Ratanji Edalji Bottlewállá for the purpose of effecting the policy of assurance as stated in the plaint?

2. Whether Ratanji Edalji Bottlewállá was interested in the goods mentioned in the plaint, as in the 4th paragraph of the plaint mentioned?

3. Whether the valuation of the goods contained in the said policy was a fraudulent one?

Mr. Macpherson, who, with the learned Advocate-General, appeared for the defendants, admitted the shipment of goods, the sailing of the ship, and the loss of the goods.

The policy of the 5th June 1872, with official translations of the Guzerathi writing in the margin, and of the six Guzerathi and three Márwádi underwritings thereto, a notice of the loss, dated 30th August 1872, and two letters of demand, dated 20th November 1872 and 6th September 1873, and a copy of the manifest, were put in evidence on behalf of the plaintiff; and Mancharji Dorábji, the agent of Ratanji Edalji Bottlewállá, and the person in whose name the policy had been effected, Mr. Thomas Lidbetter, who wrote the notice of the 30th August 1872, after news of the cyclone had arrived, in which the vessel is supposed to have been lost, and Rastamji Ratanji Edalji, son of the insolvent, were examined on behalf of the plaintiff.

After Mr. Macpherson had addressed the Court on behalf of the defendants, Mr. William Maidment, Assistant Collector of Salt Revenue in Bombay, and Harkisan Jivandás, a member of two firms in Bombay, which were extensive salt dealers, were examined on behalf of the defendants. The vesting order and copies of three bonds (to be presently noticed) were put in evidence for the defence. Mr. Latham, on behalf of the plaintiff, appears, from the learned Judge's notes,

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to have tendered evidence of the price of salt at Calcutta, after which the learned Judge found all the issues for the plaintiff, and gave judgment for the plaintiff for Rs. 11,000 with interest at 9 per cent. from the 1st March 1873 until judgment, with costs and interest at 6 per cent. upon the judgment-debt.

Against such judgment the defendants appealed, their memorandum of appeal stating the nine following grounds:—

1. That the Judge erred in finding that the interest of Ratanji Edalji Bottlewállá in the salt insured by the policy was duly proved.

2. That he erred in finding that the salt was not fraudulently overvalued in and by the policy.

3. That he erred in not holding that the policy was vitiated by reason of the fraudulent overvaluation of the salt, and the plaintiff thereby precluded from receiving the amount claimed in this action.

4. That he erred in finding that the liability of the obligors under the bonds (Exhibits Nos. 1, 2, and 3,) could legally be included in the valuation of the salt.

5. That he erred in finding that the liability under the bonds was intended to be included in the valuation of the salt.

6. That he gave no weight to the fact that the bonds had not been enforced, and that the deposits made thereunder were refunded.

7. That he ought to have held that the plaintiff was not entitled to recover more than the actual value of the salt, as proved at the hearing of the suit.

8. That he ought to have passed judgment for the defendants with costs.

9. That the decree was contrary to equity, justice, and good conscience.

The appeal was argued before my brother GREEN and myself in December last by the Advocate-General and Mr.

Farran for the appellants, and by Mr. Latham and Mr. Purcell for the respondent.

In answer to a question from the Court, it was stated by Mr. Latham that this was a specimen case, and that there was a consolidation rule as to other suits brought against the other underwriters to the policy of the 5th June 1872.

Upon reference to the proceedings, we find that on the 9th February 1874, by a Judge's order of that date, entitled in the suit, and in seven other suits brought by Mr. Gamble, as Official Assignee, against seven of the other underwriters, and numbered successively suit 678 of 1873 to suit 684 of 1873, both inclusive, it was, upon reading the consent of Messrs. Macfarlane and Skipsey, attorneys for the plaintiff in all the abovementioned suits, and of Messrs. Manisty, Fletcher, and Smith, attorneys for all the defendants in the above suits, ordered that all further proceedings in such other suits be stayed until a decree should be made in this present suit, and that in case of an appeal by either of the parties herein all further proceedings in the other suits should be stayed until a decree should be made by the Appellate Court in this suit, the parties in such other suits undertaking to be bound and concluded by the judgment that should finally be made in this suit, unless the Court, whose judgment should form the judgment in this suit, should certify that such plaintiffs or defendants should not be bound thereby.

The present suit, therefore, virtually involves the right of the plaintiff, as assignee of the insolvent Ratanji Edalji Bottlewállá, to recover the aggregate amount underwritten by the different underwriters to the policy sued on, viz., Rs. 40,000.

Upon the argument before us it was contended on behalf of the appellants either (1) that there was such an overvaluation of the salt as to amount to fraud, in which case it was contended that the policy would be void; or (2) that the underwriters were entitled to be subrogated for the assured, in respect of the goods assured, to such an extent as to render them liable only for the actual loss sustained by the assured.

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The counsel for the respondent, on the other hand, argued (1) that the learned Judge was correct in holding that the liability of Ratanji Edalji Bottlewálla's agent, Mancharji Dorábji, on the bonds (Exhibits 1, 2, and 3,) might be taken into consideration by the assured in fixing the high value of Rs. 50 per ton of salt, that there were no circumstances to show fraud, and that the valuation could not be opened; and (2) that this Court ought not to entertain the question of subrogation at all, inasmuch as the point as to subrogation was admittedly not even mentioned during the hearing before Sir Charles Sargent.

We entertain, however, no doubt as to our power to consider and decide such point, Section 353 of the Civil Procedure Code having enacted that "when the evidence upon the record of the lower court is sufficient to enable the Appellate Court to pronounce a satisfactory judgment, the Appellate Court shall finally determine the case, notwithstanding that the judgment of the lower court has proceeded wholly upon some other ground."

Now, Mancharji Dorábji stated in his evidence in the court below that Rs. 5,600, being the total amount of deposit money at the rate of 4 annas per *maund*, paid by him in Bombay when he signed the bonds for the customs duty, was afterwards returned to him; and Mr. Maidment stated that no duty is paid on salt exported from Bombay to Calcutta. Rs. 3-4-0 duty per *maund*, he said, are payable at Calcutta, and that bonds are taken from exporters in Bombay, and a deposit paid at 4 annas per *maund*, that the deposit in the present case had been returned, and the bonds which are in a penal sum fixed at twice the rate of the Bombay duty, were not enforced in this case, Government having ordered the deposit to be returned after inquiry had been made.

There is no necessity for us to remand the case under Section 351 of the Civil Procedure Code for further investigation. We concur in the remarks of Sir Barnes Peacock, C.J., in *Fuzeelun Bebee* v. *Omdah Bebee and another* (*a*) that

(*a*) 10 Calc. W. Rep. 469 Civ. Rul., see p. 471.

"the object of the Act was that the Appellate Court should not remand cases when it has the materials for determining them itself. * * * The object of the Legislature was that litigation between the parties should come to an end as soon as it could consistently with justice."

It was, of course, further contended, on behalf of the respondent, that the underwriters were not entitled to subrogation at all.

It was stated by the learned counsel, who so ably argued the case before us; and, so far as we are aware, correctly stated, that there was no decision, either in England or in India, in which the main question argued before us had been expressly determined. It was, however, contended that upon the principles laid down in some of the cases cited, the appellants ought to have the Rs. 5,600 paid or credited to them, and that they ought to be relieved from any liability in respect of the three bonds which the obligees, viz., the Government of Bombay, have not caused to be enforced, and apparently have no intention of enforcing, seeing that after inquiry they have ordered the deposits paid on their execution, to be returned, and which deposits have been returned to Mancharji Dorábji, the principal obligor.

Upon the facts proved in the court below, it was contended before us for the appellants that, taking the cost price of the salt in Bombay, and adding thereto the maximum profit of 25 per cent. upon the sale of the salt in Calcutta, that being the maximum profit according to the evidence of Harkisan Jivandás upon salt exported from Bombay to Calcutta, the real value of the salt would be a little over Rs. 3,000, whilst Mr. Latham, on behalf of the respondent, did not urge that the salt could, at Calcutta, be worth more than about Rs. 7,000. Counsel on both sides, at the conclusion of the argument, agreed that, if necessary, evidence could be given either in this Court, or, in case of a remand, in the court below, of the value of the salt in Calcutta. The duty to which the 22,400 *maunds* of loose salt were liable in Bombay amounted to Rs. 40,600. Mr. Maidment, the Assis-

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tant Collector of Salt Revenue in Bombay, proved that no duty is paid on salt exported from Bombay to Calcutta, but that bonds are taken from exporters, the penal sum in such bonds being fixed at twice the rate of the Bombay duty. The three bonds (Exhibits 1, 2, and 3,) are for the respective penal sums of Rs. 36,250, Rs. 8,700, and Rs. 36,250, aggregating Rs. 81,200. The bonds respectively recite that Mancharji Dorábji is indebted to Her Majesty's Government of Bombay in the sums of Rs. 18,125, Rs. 4,350, and Rs. 18,125 (aggregating Rs. 40,600), being the excise duty on *maunds* 10,000, 2,400, and 10,000, in all 22,400 *maunds* of salt, which he has agreed and received permission from the Collector of Salt Revenue to remove from the salt pans in Taluka Trombay, for the purpose of exporting the same to Calcutta per ship *Regina*, and the condition of each bond is that if Mancharji Dorábji and his two sureties, or either of them, shall produce to the Commissioner of Customs, within four months after the date of exportation, a certificate showing that the aforesaid quantity of salt has duly arrived and been landed at Calcutta, then the obligation is to be void and of no effect, but if they, or either of them, shall fail to produce to the said Collector of Salt Revenue, within the said period of four months, such certificate, whatever cause such failure shall arise from, whether the act of God or otherwise, then the obligation is to be and remain in full force and virtue.

Mr. Maidment stated that the amount of duty on the salt payable at Calcutta was Rs. 3-4-0 per *maund*; and on referring "to the Indian Tariff Act," passed by the Governor General of India in Council, No. XIII. of 1871, Schedule No. 42, we find that the import duty payable on salt imported from any place, whether within or without British India, into the territories under the Government of the Lieutenant-Governor of Bengal is Rs. 3-4-0 per *maund*, whilst the duty on salt imported into any other part of British India (except British Burmah) is Rs. 1-13-0 per *maund*.

The duty payable at Calcutta upon the 22,400 *maunds*, and which would amount to Rs. 72,800, would not, of

course, be payable, unless the salt had arrived there. The ship *Regina* having been totally lost during the voyage from Bombay, the obligors were unable to comply with the condition in each of the bonds: the bonds were in fact forfeited, and the Government of Bombay might, if they pleased, have enforced them. Although the policy might have been framed with more appropriate terms to expressly include the risk which Mancharji Dorábji undoubtedly incurred in case of the loss of the salt by the perils insured against, we agree with the learned Judge in the court below that such possible loss may have been the reason why the value was fixed so high as Rs. 50 per ton, and we concur with him in thinking that the valuation having apparently been made upon the principle that the risk on the bonds was included in the insurance, no fraud was shown, and that the policy cannot be opened on the ground that the sum inserted as the value of the salt was so outrageously large as to make it plain that the assured intended a fraud on the underwriters. Mr. Justice Willes, in his judgment in *Lidgett* v. *Secretan* (*b*) states that the result of the decisions in England, as well as in the United States, and, he believes, in North Germany, was that the value mentioned in the policy is a conventional sum not representing the real value of the vessel (or goods), but the sum to be paid by the underwriters in the event of a loss.

The next question for our determination is whether, under the special circumstances of this case, the underwriters are entitled to the benefit, which, owing to the Government of Bombay having returned the deposit, amounting to Rs. 5,600, and to their having virtually cancelled the bonds, the assured has undoubtedly received from such liberal action on the part of the Government.

The difficulty arises from the fact that the policy in question is a valued one. The defendants in the present suit are described in the plaint as Hindus, residing in Bombay, and the defendants in the seven consolidated suits appear, from their names, to be also Hindus. This being a matter of contract in which the defendants are Hindus, has to be

(*b*) L. R. 6 C. P. 616, see p. 628.

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determined in this Court under clause 29 of the old Supreme Court Charter of 1823, continued in force by clause 18 of the Letters Patent of 1862 and clause 19 of the Lette Patent of 1865, by the laws and usages of the Hindus, or by such laws and usages as the same would have been determined by, if the suit had been brought and the action commenced in a native court, as pointed out by Sir Joseph Arnould in *Davlatrám Shrirám* v. *Bulákidás Khemchand* (*c*).

It was not, however, contended before us, nor are we aware, that the Hindu law contains anything which might be considered applicable to the point now under consideration. The policy on which this suit is brought is in English, with which language the underwriters were apparently unacquainted, as of the nine underwriters six wrote their subscription to it in Guzerathi and three in Márwádi. In the absence of any Hindu law or usage the present case must, we conceive, be determined according to the principles of English law, and more especially as the parties to this policy have selected the English language for the purpose of expressing their contract. In *Dvárkadás Lalubhái* v. *Adam Ali Sultán Ali* (*d*), which was a special appeal from the District Court of Surat, the suit being brought on a policy of insurance on goods shipped on board a native vessel for a voyage from Surat to Kurrachee, Sir Richard Couch, C. J., and his learned colleague decided the case upon the English authorities as to constructive total loss. In *Martin* v. *Lee* (*e*), which was an appeal from Lower Canada, the question being as to the construction of the word "children" in a will made in the English language by a married woman domiciled in Lower Canada, the Lords of the Judicial Committee, without, however, giving an express decision upon the point, said:—"It may well be that this will, having been written in the English language, the proper mode of dealing with the case may have been for the courts in Canada to ascertain what, according to the English law, was the meaning of the word 'children' as used in the will, * * *' resorting to

(*c*) 6 Bom. H. C. Rep. O.C.J. 24.

(*d*) 3 Bom. H. C. Rep. A.C.J. 1.

(*e*) 14 Moroe P. C. 142.

the foreign" (*i.e.*, English,) "law or language for the purpose of deciding the meaning of the words used in the will" (p. 155).

What, then, have been the decisions in England (in India the point does not appear as yet to have arisen) upon this branch of the law of Marine Insurance? Under what circumstances, and to what extent, has the doctrine of subrogation been held to apply? And do such cases, or the principles to be deduced from them, afford any guide for the determination of the present case?

The subrogation, *i. e.*, the substitution of the underwriters in the place of the assured, entitling them to all the rights of the latter, has, in cases of total loss, long been a well established principle in the law of marine insurance. The doctrine of abandonment in cases of constructive total loss is a familiar instance of that principle.

Lord Abinger, C.B., in delivering the celebrated judgment of the Court of Exchequer Chamber in *Roux* v. *Salvador* (*f*), said: "The history of our own law furnishes few, if any, illustrations of the subjects of abandonment before the time of Lord Mansfield. That great Judge was obliged to resort to the aid of foreign codes and to the opinion of foreign jurists for the rules and principles which he laid down in the leading cases of *Goss* v. *Withers* (*g*) and *Hamilton* v. *Mendez* (*h*). But even those principles are, comparatively speaking, of modern date." After referring to the Code of Florence, dated 1523, and to the decisions of the rota of Genoa as containing no allusion to abandonment, Lord Abinger proceeds thus:—"But when assurances came to be considered as contracts of indemnity, and not as mere wagers, it became necessary to make some rules for the conduct of the parties where the loss was partial, as well as to secure to the assured, when it was total, the full measure of his indemnity, and no more. The obligation of abandonment was the necessary consequence of confirming the object of the contract to a strict indemnity;" and, after referring to the continental law upon the subject, he proceeds: "But what-

(*f*) 3 Bingh. N. C. 266.

(*g*) 2 Burr 683. (*h*) 1 W. Blackst. 276.

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ever lights might have been heretofore derived from foreign codes and jurists, the practice of insurance in England has been so extensive, and the questions arising upon every branch of it have been so thoroughly considered and settled, that we need not now look beyond the authorities of the English law to illustrate the principle on which the doctrine of abandonment rests and the consequences which result from it. It is, indeed, satisfactory to know that, however the laws of foreign States upon this subject may vary from each other and from our own, they are all directed to the common object of making the contract of insurance a contract of indemnity, and nothing more. Upon that principle is founded the whole doctrine of abandonment in our law." He then states several cases of loss, and points out that if the assured, upon the information he has received, elects to treat the case as one of total loss and demand the full sum insured, "as the thing insured, or a portion of it still exists, and is vested in him, the very principle of the indemnity requires that he should make a cession of all his right to the recovery of it, and that, too, within a reasonable time after he receives the intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of value, and that he may, if he pleases, take measures at his own cost for realizing or increasing that value."

In *Brotherston* v. *Barber* (*i*), the vessel insured was captured by an American Privateer off the coast of Ireland, on the 19th of April 1814. Notice of abandonment was given on the 25th of April, and the recapture and restoration of the ship took place before action brought. It was held by the Court of King's Bench, a partial loss having been sustained, that the assured could only recover for a partial loss. Mr. Justice Bayley said: "This is a contract of indemnity only. The ship was captured in the course of her voyage. Now, capture is an event which may or may not terminate in a total loss. If it continue and terminate in a total loss, the assured will be entitled to his full indemnity,

(*i*) 5 M. and Selw. 418.

but if the capture be only temporary and the loss partial, it would be against the spirit as well as the letter of the contract to hold the underwriter bound to take to the subject-matter insured, and to allow the assured, who stipulates only for indemnity, to come upon the underwriter for the whole amount of his subscription while the subject-matter insured subsists in perfect safety. What is it that is thus to entitle the assured to demand more than the safety of the thing insured? It is said that abandonment gives this right by closing the transaction between the underwriter and assured. But notice of abandonment is no more than a proposal on the part of the assured, which the underwriter may accept, and then there will be a new agreement between them, binding on both parties. But while the transaction rests in abandonment only on one side, the underwriter's responsibility may vary and cannot amount to a total loss, if by subsequent events it has become otherwise at the time of action brought."

Mr. Justice Holroyd, in the course of his judgment, said: "It is clear that a policy of insurance both in its object and form" (he was speaking apparently of an open policy), "is merely a contract of indemnity. It contains no stipulation respecting abandonment. * * * Abandonment has its origin from the contract being a contract of indemnity. But it is apparent that if the assured might abandon at his pleasure, he might be a gainer to a much greater extent than the value of the loss, which is inconsistent with a contract of indemnity. What, then, is the loss which the assured in this case have sustained? It is a loss arising out of the capture of the ship, and if the ship had been conveyed *infra-præsidia* of the enemy and condemned, this loss would have been total; but as events have made it at the time when the action was brought, it is but a partial loss. I am not aware that in any case a plaintiff can recover larger damages than what he has sustained at the time of bringing the action."

An abandonment, although generally in writing, may be parol: *Parmeter* v. *Todhunter* (*j*), *Read* v. *Bonham* (*k*).

(*j*) 1 Campb. 541. (*k*) 3 Brod. and Bingh. 147.

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Where the underwriter has accepted the notice of abandonment, or where the totality of the loss continues down to the commencement of the action, a notice of abandonment, if originally valid, has, as Sir Joseph Arnould, in his Treatise on Marine Insurance, Vol. II., p. 1012 (2nd Edn., 1857,) states, precisely the same effect in England as everywhere else: "In such case" (he says) "it operates as a complete and effectual transfer of property from the assured to the underwriters, who, in the language of the continental jurists, are by virtue of it *subrogated* into the place of the assured (*par le delaissement, l' assure subroge les assureurs en son lieu et place*). It has even a retrospective effect, and operates as an assignment of the property not only from the time when it was given, but from the moment of the loss which justified it, so that the underwriters are presumed to the extent of their respective subscriptions to have been the owners of the thing insured from the period of the loss. In a word, a valid notice of abandonment under the limitations already indicated has a retrospective effect, and does of itself without any deed of cession transfer the right of property to the underwriters to the extent of the insurance from the moment of the loss."

This view as to the retrospective operation of a valid abandonment from the moment of the casualty was held to be correct in *Cammell* v. *Sewell* (*l*) affirmed in the Exchequer Chamber (*m*).

In 2 Arnould on Insurance (2nd Edn.,) p. 1011, it is stated that "the rule must now be considered as established by a long and uniform course of decisions (*Bainbridge* v. *Neilson*, 10 East. 329; *Patterson* v. *Ritchie*, 4 M. and S. 393; *Brotherston* v. *Barber*, 5 M. and S. 418; *Naylor* v. *Taylor*, 9 B. and Cr. 725; *Holdsworth* v. *Wise*, 7 B. and Cr. 794), that even although the facts were such as to justify the assured in giving notice of abandonment at the time he did so, yet he cannot insist on such notice and recover as for a total loss, if the thing insured be restored, before he commences his action in such a state that he may reasonably be expected to

(*l*) 4 Jur. N. S. 978. (*m*) 6 *Idem*. 918.

take possession of it. In fact in English law, to use the words of Lord Ellenborough in *McIver* v. *Henderson* (*n*), 'The nature of the damnification at the time when the action is brought is to be regarded as the criterion of the right to recover as for a total loss; and if at that time what had antecedently been a total loss has, by subsequent events, ceased to be so, and become an average loss merely, a compensation for an average loss can alone be recovered'."

These cases, we think, throw much light upon the question now under consideration. In several of them, the policies sued on were valued policies. In *Bainbridge* v. *Neilson* (*o*) the ship *Mary* was valued at £6,000, and the second policy also sued on was upon the freight of the same ship valued at £4,000. In *Patterson* v. *Ritchie* (*p*), the policy was on goods valued at £14,000, on board the *Dispatch* from Liverpool to Quebec. In *Holdsworth* v. *Wise* (*q*), the policy was on the ship *Westbury*, valued at £1,800. And in *McIver* v. *Henderson* (*r*), the two policies sued on were on the ship *Tartar* valued at £3,000 at and from Liverpool to Sierra Leone.

They also show that underwriters may undoubtedly acquire rights over, and have the property in, the ship freight or goods insured transferred to them without any act or assent of their own, and that such rights and property may accrue to, and vest in, them long before they have paid, as on a total loss, the full amount of their subscriptions, and indeed before any action has been commenced against them to recover the sum for which they have underwritten. It is well to bear this latter feature in view, as it will prove that in the few authorities directly bearing, *eo nomine*, upon the point of subrogation, the underwriters paid in each case in the first instance for a total loss, and it was not until after such payment in full that the events happened to the benefit of which the underwriters, not the assured, were held to be entitled.

(*n*) 4 M. and S. 576, see p. 583.
(*o*) 10 East. 329.
(*p*) 4 M. and S. 393.
(*q*) 7 B. and Cr. 794.
(*r*) 4 M. and Sel. 576.

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As already noticed, the difficulty in the present case is caused by the policy on the 800 tons of loose salt being a valued one, the salt being "valued at Rs. 50 per ton."

In 1 Arnould on Insurance, p. 361 (we quote again from the 2nd Edition, which is the last one published entirely by Sir Joseph Arnould himself), it is stated that in cases of total loss the value in the policy has always been held as the conclusive standard of indemnity, citing *Shawe* v. *Felton* (*s*). "As a general rule," says the learned author, "the valuation fixes the amount of the insurable interest as between the parties, and can never, except in cases of fraud or excessive valuation, be set aside; but whether the loss be only total or partial remains the basis upon which the sum due to the assured in respect of the loss is calculated."

We think that Sir Joseph Arnould is quite correct in saying, as he does in a note to the above quoted passage, that the doctrine thus stated by him is conclusively established by the decision in the House of Lords in the year 1847 of the case of *Irving* v. *Manning* (*t*).

It was, however, decided by the Court of King's Bench in the year 1811, in the leading case of *Forbes* v. *Aspinall* (*u*), that the valuation in the policy, though it fixes the value of the interest, does not preclude the inquiry whether or not the whole of the interest, intended to be insured, and to which the valuation refers, has, in fact, been at risk. There the insurance was on freight at and from Hayti to Liverpool valued at £6,500, and it appearing that the vessel was lost off the coast of Hayti, when she had only taken in fifty-five bales of cotton, which formed but a small part of the cargo, intended to be shipped on board her, and on which the freight was valued, the court would not allow the assured to recover the whole amount of the valuation, but only such a proportion of it as the goods actually shipped on board bore to the full cargo intended to be loaded and on which the freight was estimated.

(*s*) 2 East. 109.
(*t*) 1 House of Lords Rep. 287.
(*u*) 13 East. 323; S. C. Tud. L. C. on Merc. and Marit. Law 185.

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That case was argued by the most eminent counsel then at the English bar, and in a considered judgment delivered by Lord Ellenborough, C.J., the law is thus lucidly stated:— "The object of valuation in a policy is to fix, by agreement between the parties, an estimate upon the subject insured and to supersede the necessity of proving the actual value by specifying a certain sum as the amount of that value. In fixing that sum, if the assured keep fairly within the principle of insurances, which is merely to obtain an indemnity, he will never go beyond the first cost in the case of the goods, adding thereto only the premium and commission, and, if he think fit, the probable profit; and in the case of freight he will not go beyond the amount of what the ship would earn with the premiums and commission thereupon. The valuation, however, in the case of goods looks to *all* the goods intended to be loaded * * * ; and if, by the perils insured against in a valued policy on goods, part only of the goods, intended to be covered, be lost, the valuation must be opened, and the assured can only recover in respect of that part. * * * If, for instance, the insurance be generally upon goods, and the goods, intended to be protected, be 500 hogsheads of sugar, and a valuation be made accordingly, but the ship, by accident, takes on board 100 only, and sails, and is afterwards lost by one of the perils insured against with those 100 on board, can it be contended that the assured shall recover to the full amount of the valuation, that is, for the whole 500 when he has lost only 100? * * * and yet to this extent the plaintiff's argument in this case is carried. The proposition is monstrous. * * * The court, therefore, will look to very strong authorities before they yield to such a proposition.

"It was pressed upon the argument that in the case of a valued policy, if any interest be proved to be on board, and there be no fraud, a total loss will entitle the assured to recover the sum specified in the valuation. And to that position we accede with this limitation, that is, provided there is a total loss by any of the perils insured against *of*

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the whole subject-matter of insurance to which the valuation applied, viz., of *all* the intended cargo of goods where the insurance was on goods, and of *all* the intended freight where the insurance was upon freight. But if it be meant to carry that position to this extent, that the underwriter is not at liberty to inquire *what* was *intended* to have been included in that valuation, or, when he has ascertained that point, that he cannot reduce the sum below the valuation by proving that a part only of what was included in the valuation has been lost by a peril insured against, we deny the position when so extended."

In *Rickman* v. *Carstairs* (*v*), the same principle was acted upon in the case of a valued policy on goods.

In *Tobin* v. *Harford* (*w*), decided in 1863, and affirmed in the Exchequer Chamber (*x*), a policy of insurance for twelve months on ship and cargo, the ship being intended for the barter trade on the coast of Africa, contained a stipulation that "outward cargo should be considered homeward interest 24 hours after arrival at the first port or place of trade." By a subsequent clause, the policy was declared to be "on the ship valued at £2,000, cargo valued at £8,000 with liberty to increase the valuation of the homeward cargo." There was also liberty given to the insured "to discharge, load, unload, sell, barter, exchange, and trade" any part of the cargo. The ship arrived at a port on the coast of Africa, and there discharged one-third of her cargo, and, after a stay of more than 24 hours, proceeded towards other ports, in order to take in homeward cargo, and, before arriving at her next port of destination, she was totally lost. It was held that the insurers were not liable to pay the whole £8,000, but a proportion only. That the valuation in the policy was applicable to what was substantially a full cargo, whereas here there was not substantially a full cargo. It was also held that the proportion of the £8,000, which the underwriters were liable to pay, was to be ascertained by

(*v*) 5 B. and Ad. 651.

(*w*) 13 C. B. N. S. 791; S. C. 32 L. J. C. P. 134. (*x*) 34 L. J. C. P. 37.

finding the proportion of a full cargo which was on board at the time of the loss; and if this proportion could not be found then the underwriters would be liable as upon an open policy underwriten for £8,000.

It remains to notice the cases cited at the bar, in which the underwriters were subrogated in the place of the assured as regards claims made by the assured against third parties.

The earliest was a decision of Lord Hardwicke, C., in the year 1748, in *Randal* v. *Cockran* (*y*). The case is very shortly reported, and in the following words:—The King having granted general letters of reprisal on the Spaniards for the benefit of his subjects, in consideration of the losses they sustained by unjust captures, the Commissioners would not suffer the insurers to make claim to part of the prizes, but the owners only, although they were already satisfied for their loss by the insurers, who thereupon brought the present bill.

The Lord Chancellor was of opinion that the plaintiffs had the plainest equity that could be. The person originally sustaining the loss was the owner; but after satisfaction made to him, the insurer. No doubt, but from that time, as to the goods themselves, if restored in specie or compensation made for them, the assured stands as a trustee for the insurer in proportion for what he paid, although the Commissioners did right in avoiding being entangled in accounts and in adjusting the proportion between them. Their commission was limited in time; they see who was owner, nor was it material to them to whom he assigned his interest, as it was in effect after satisfaction made.

That case was stated by the counsel for the respondent to be the only one in the books, to which we can scarcely assent. The principle on which it was decided, viz., that the assured ought not to be paid twice over in respect of a policy, which is merely a contract of indemnity, has been repeatedly acted upon in England during the century and a quarter which has elapsed since Lord Hardwick's decision in favour of the underwriters in that case, and it is cited with no indication

(*y*) 1 Vesey Sen. 98.

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of disapproval by Sir Joseph Arnould in the three editions of his Treatise to which we have had access: 2 Arnould on Insurance, 2nd Edn. p. 1180, 3rd Edn. p. 867, 4th Edn. p. 864.

In *Yates* v. *Whyte* (*z*) it was held that after abandonment for damage arising from collision, caused by the fault of another ship, the underwriters had the same right of action in the name of the assured against the owner of such ship as the assured himself had before abandonment, and might recover in proportion to the extent in which the ship was covered by the policy.

In *Miller* v. *Woodfall* (*aa*), Lord Campbell, C. J., in delivering the judgment of the Court, said:—"The abandonees are considered as purchasers of the ship at the moment of the casualty to which the abandonment refers, and although the contract of a shipowner does not run with the ship, it is well settled that, as incident to the ship, the right to the whole freight, pending at the time of the sale and subsequently earned, belongs to the purchaser of the ship. * * * The abandonee of the ship, like the purchaser, has a right to the whole of the freight pending at the casualty, although he could not claim freight paid or completely earned in a prior part of the voyage: *Stewart* v. *Greenock Marine Insurance Company*, 2 House of Lords Rep. 159; *The Scottish Marine Insurance Company of Glasgow* v. *Turner*, 1 Mag. Scotch Appeals 334."

In the *Quebec Fire Assurance Company* v. *St. Louis and another* (*bb*), an appeal from Lower Canada, and which turned upon the old law of France, it appeared that the parish church of Borecherville in Lower Canada having been, in great part, destroyed by a fire occasioned by the negligence of the servants of the respondents (St. Louis and another), and being at the time insured by a policy effected by the cure upon the church and sacristy, the cure and one of the marquilliers in charge, by a notarial instrument transferred to the appellants (the Quebec Fire Insurance

(*z*) 4 Bingh. N. C. 272.

(*aa*) 3 Ell. and Blackb. 493. (*bb*) 7 Moore P. C. 286.

Company), who had granted the policy, in consideration of the payment by them of part of the amount of the damage sustained by the fire, the right to sue and claim from the respondents the amount so paid. The Judicial Committee of the Privy Council held that this constituted a valid subrogation of the debt due to the insurers in right of the fabrique according to the French law prevailing in Lower Canada.

The judgment of the Judicial Committee was delivered by the late Lord Wensleydale, and at p. 316 proceeds thus: "But the learned counsel contended that an assuree, by a policy against either maritime or terrestial risks, is clearly within the equity of the rules, and has a similar right to require a subrogation at the time of the payment of the loss. The authorities cited in support of that position seem to us to establish that the assurees have that right." He then quotes Alauzel on Assurance, Pardessus, Quinault, Toullier, Emerigon, and Pothier "on Assurance," p. 248, "who" (Lord Wensleydale proceeds) "lays it down that in the case of a general average, the assurer, after having indemnified the assured against the losses sustained for the common benefit, ought to be subrogated to the rights of the assured to the contribution, which in such case must be made. These authorities are so consistent with justice, and founded upon so equitable a principle, that we have no difficulty in adopting them, and we do not think that any of these are shown to have been derived, as was suggested in argument, from the Code Napoleon, which is not in force in Canada. Assuming then that it is the old law of France that an assuree may, on payment, require to be subrogated, two objections remain to be answered,"—which it is not necessary or material for us to notice here.

In the *North of England Iron Steam Ship Insurance Association* v. *Armstrong* (*cc*), decided in January 1780, the right of the underwriters, paying on a total loss, to be subrogated for the assured, was expressly decided. There a policy was effected for £6,000 on the steamer *Hetton*,

(*cc*) L. R. 5 Q. B. 244.

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valued at £6,000. She was run down and sunk by another steamer, and the underwriters paid the owners the £6,000 as for a total loss. Afterwards £5,000 was recovered in the Court of Admiralty in respect of the *Hetton* against the owners of the other ship. The real value of the *Hetton* was £9,000, and there was no other insurance upon her. The Court held that as between the assured and the underwriters the value of the *Hetton* must be taken to be £6,000 for all purposes, and that, therefore, the damages recovered, which were in the nature of salvage, belonged entirely to the underwriters.

Cockburn, C.J., says (*dd*): "It is conceded by Mr. Smith that if there were this valued policy and an open policy, and the assured were first to sue upon his open policy, and recovered £3,000, he would not be afterwards entitled to recover on the valued policy the whole amount in that policy, but only £3,000, the difference between the amount recovered on the open policy and the amount of the estimated value on the valued policy. So, again, it must be conceded that if this sum, by way of damages, had been recovered first from the owners of the vessel which caused the damage, the underwriters upon this valued policy could not have been compelled to pay to the assured the whole of the sum insured, because the value of the vessel as between them must always be taken to be the amount at which it is stated in the policy. * * * * It has always been considered a settled rule in insurance law that where there is a total loss, the underwriters, who pay upon a total loss, whether it is actual or whether it is constructive, are entitled to anything that remains of the vessel, and to anything which would otherwise have accrued to the owner of the vessel by reason of his ownership. * * * It is only because it is a valued policy that these difficulties present themselves."

There are, no doubt, expressions in the judgments of the learned Judges in that case, which have a tendency to support the arguments adduced to us on behalf of the respondent,

(*dd*) *Ibid.* 249.

but we think they must be taken to have reference to the facts then before the Court of Queen's Bench.

The case of *Bruce* v. *Jones* (*ee*), decided in 1863, is an important one, and shows, as does also the already cited case of *Tobin* v. *Harford* (*ff*) affirmed in the Exchequer Chamber (*gg*), that even since the decision in *Irving* v. *Manning* (*hh*), the principle of indemnity is by no means to be disregarded in the case of a valued policy. There the plaintiff, a ship-owner, brought an action against one of the underwriters to a policy on the ship, valued in the policy at £3,200, to recover the defendant's share for a total loss. At the trial it appeared that the plaintiff had effected three other policies of insurance on the same ship, in which she was valued at £3,000, £3,000, and £5,000, respectively, and had received on the three last mentioned policies the sum of £3,126-13-6.

Mr. Justice Willes, who tried the cause at the Liverpool Assizes, a very high authority upon all questions of commercial law, directed the Jury, with respect to the measure of damages, that insurance was a contract of indemnity, and that for the purposes of that action, and as between the plaintiff and the defendant, the value agreed upon and stated in the policy must be taken to be the real value of the ship, viz., £ 3,200, and that if the plaintiff was entitled to recover in respect of a total loss, he would be entitled to be indemnified to that amount; that the sum the plaintiff had already recovered on the other policies must, therefore, be deducted from such value, and the plaintiff would thus be entitled to recover from the defendant in that action the difference of those sums. The jury found a verdict for the plaintiff for the difference so estimated, viz., £73-6-6. A rule *nisi* having been obtained for a new trial on the ground of misdirection as to the measure of damages, the court, consisting of Pollock, C.B., Martin and Channell, BB., after argument, decided that the direction of Mr. Justice Willes had been

(*ee*) 1 H. and C. 769.
(*ff*) 32 L.J.C.P. 134.
(*gg*) 34 *Idem* 37.
(*hh*) 1 House of Lords Rep. 287.

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quite right, discharged the rule, and refused leave to appeal to the Exchequer Chamber.

Now, what are the facts in the present case? The ship *Regina* having sailed from Bombay on or about the 10th June 1872, is believed to have foundered, with all hands on board, in the cyclone that occurred soon afterwards in the Bay of Bengal. Notice of the alleged total loss was given to the underwriters by the letter of the 30th August 1872 (Exhibit B.)

On the 15th October 1872, Ratanji Edalji Bottlewálá, the owner of the salt, and on whose behalf the policy had been made, was adjudicated an insolvent, and on the same day a vesting order was made (Exhibit F), vesting his property in the plaintiff, Mr. Gamble. It was stated before us by the Advocate General, and not denied by the counsel for the respondent, that the deposit upon the three bonds, amounting in the aggregate to Rs. 5,600, was repaid by the Government of Bombay and the bonds virtually cancelled on the 3rd July 1873. The plaint in the present suit was filed on the 30th September 1873.

What then were the rights of the plaintiff as the assignee of Ratanji Edalji Bottlewálá on that day? for to quote again the passage in 2 Arnould on Insurance, p. 1011, "In English law the nature of the damnification at the time when the action is brought, is to be regarded as the criterion of the right to recover as for a total loss, and if, at that time, what had antecedently been a total loss has, by subsequent events, ceased to be so, and become an average loss merely, a compensation for an average loss can alone be recovered."

The salt insured had, by the perils insured against, been totally lost, but not salt of anything like the value of Rs. 40,000, the amount at which it was valued in the policy. Taking the highest estimate suggested in the argument before us by the counsel for the respondent, the utmost value of the salt at Calcutta could not have been greater than Rs. 7,000. We have expressed our opinion that the assured was justified in adding the possible risk

upon the bonds, at least that in so doing he rendered what otherwise would have been a grossly exorbitant and fraudulent valuation a fair and legitimate one. It can scarcely, we think, be doubted that, if the risk on the bonds was not a motive for the high value being fixed, a valuation at about six times the value of the salt at Calcutta must certainly be considered as so preposterous, so grossly exaggerated, as to furnish conclusive evidence of fraud : *Ionides* v. *Pender* (*ii*).

Had Government enforced payment of the bonds, either in whole or in part, we think that the underwriters would have been liable, upon this policy, to the amount which the obligors would have been thus legally called upon to pay under the bonds. But a little more than two months before the commencement of the present suit, the Government elected to treat the three bonds as cancelled, and returned to Mancharji Dorábji, the principal obligor, the whole of the deposit paid upon the execution of the bonds in May 1872.

The "whole subject-matter of insurance to which the valuation applied," to borrow the language of the Court in *Forbes* v. *Aspinall* (*jj*), what was intended to be and what was in fact included in the valuation, was the 800 tons of loose salt and the risk on the bonds. If it was not so, then the policy was void on the ground of an exorbitant and fraudulent valuation. Assuming, as we think we are bound to do, that such was the whole subject-matter of insurance, the assured's agent, Mancharji Dorábji, at the time of the filing of the present suit, had been freed from his liability in respect of the bonds, and the plaintiff, the assignee of the owner and shipper of the salt, cannot, we think, be entitled to recover from the underwriters, as for a total loss, when, so far as the bonds are concerned, there was not, at the commencement of this suit, any loss, either total or partial. Suppose that the Government had not returned the Rs. 5,600 deposit when they did, if the underwriters had in the first instance paid the Rs. 40,000 for which they underwrote, and if the Government, after enforcing the bonds, and after having been paid their full value, had, of their own mere

(*ii*) L. R. 9 Q. B. 531. (*jj*) 13 East 323.

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motion, or upon receiving instructions from the Government of India or the Secretary of State, returned the amount so recovered upon the bonds to the assured or to his principal, would the insolvent or the plaintiff have been allowed to have retained, for his own benefit, such moneys as well as the whole Rs. 40,000 paid by the underwriters? We think clearly not, and that upon the authority of the cases we have cited, such moneys returned by the Government would have vested in the assured as trustee for the underwriters, or that, in other words, the underwriters would have been subrogated to the rights of the assured to the extent of such moneys so returned to him. We are unable to distinguish in principle such case from the present, and bearing in mind the doctrine of abandonment, and that under a valid notice of abandonment, underwriters may and unquestionably do acquire rights in the property insured before they are called upon to pay as upon a total loss, and that, as already pointed out, the subsequent restoration of the property defeats the right of the assured, even in the case of a valued policy, to insist on his notice of abandonment, we think that it would be contrary to decided cases, and to the principles to be deduced from them, as well as contrary to equity and justice, to allow the plaintiff to recover the whole Rs. 40,000 as for a total loss when the assured had, two months before the commencement of the present suit, by an act of bounty on the part of the Government of Bombay, been virtually released from all liability on the bonds, the possible liability upon which bonds alone prevented the valuation being excessive and fraudulent.

To quote the words of Lord Mansfield, C.J., in *Hamilton* v. *Mendez* (*kk*), where the ship (which was valued in the policy at £1,200), after capture, after notice of abandonment which the underwriters refused to accept, and before action brought, was brought into the port of London, the ship having received no damage from the capture, and the cargo was delivered to the freighters, who paid full freight "the plaintiff's demand" (said Lord Mansfield) "is for an

(*kk*) 2 Burr. 1198, see p. 1210.

indemnity. His action then must be founded on the nature of his damnification as it really was at the time of action brought. It is repugnant, on a contract of indemnity, to recover as for a total loss when the final event has determined that the damnification is in truth an average loss."

The decree, therefore, in the court below, which was based upon the assumption that the assured suffered a total loss to the extent of the whole Rs. 40,000 insured by the underwriters, cannot stand, and must be reversed, and in lieu thereof a decree must be passed for such sum as will represent the value of the salt, with the fair profit thereon, had it reached Calcutta. We do not think that the Rs. 5,600, returned to Mancharji Dorábji, was money had and received to the use of the underwriters, or that they are entitled to any part of it as against the insolvent or his assignee, the present plaintiff.

We will, if the parties cannot agree to the amount, take evidence ourselves of the value of the salt at Calcutta, and so avoid sending the case down to the court below.

We think that the order of the lower court as to costs ought not to be disturbed; and as the point, upon which we decide this appeal, was not put forward in the written statement, or even alluded to during the hearing before Sir Charles Sargent, we think that the appellants must pay to the respondent his costs of this appeal as well as their own.

As the sum claimed in the present suit and underwritten by the appellants, viz., Rs. 11,000, will more than cover the amount which, in our opinion, the plaintiff can recover upon the policy, we propose, subject to anything which we may hear from counsel, that as the seven consolidated suits brought against seven of the eight other underwriters will doubtless fail, the same should, in accordance with the Judge's order, dated the 19th February 1874, be either dismissed or judgment be passed in favour of the defendants in each of such suits, numbered 678 to 684 of 1873 (both inclusive), each party thereto bearing his own costs.

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The defendants in those suits must pay to the defendants and appellants in the present suit their rateable contribution towards the amount which will be hereafter found due by the present defendants and appellants to the respondent as well as their contribution towards the plaintiff's and the defendants' and the appellants' costs of the hearing of the present suit in the court below, and the costs now ordered to be paid by the defendants and appellants in this appeal.

Note.—It was subsequently agreed between the parties that Rs. 5,000 should be taken as the value of the salt with a fair profit on it, had it reached Calcutta, and the decree of the Appellate Court was accordingly drawn up, reversing the decree of the court of first instance, in favour of the plaintiff and respondent for the sum of Rs. 5,000, being the sum agreed by counsel for the appellant and respondent to be the amount of the liabilities of the underwriters on the policy in the plaint mentioned according to the principle deemed applicable by the Appellate Court, and ordering the dismissal under the provisions of Section 110 of Act VIII. of 1859 of the seven suits mentioned in the Judge's order of 19th February 1874, and ordering the defendants in each of such suits to pay to the plaintiff the sum of Rs. 125, which the plaintiff had consented to take in lieu of his taxed costs of such suits, and ordering the defendants in this and each of such seven suits to pay to the plaintiff rateably and in proportion to their respective subscriptions the costs of the plaintiff in this suit in both courts, and all costs in the seven other suits, and to bear rateably and in proportion as aforesaid the taxed costs of all the defendants in the said suits.