

expressed and made in good faith, and for the public good. The opinion expressed by the accused, that the character [304] of the complainant required investigation, because he had been criminally prosecuted, was not expressed in good faith, because the accused knew that the circumstances of the prosecution called for no inquiry; and, although the statement made by the accused contained only the truth, yet it contained only half the truth, and it was not for the public good that an imputation should be conveyed by a statement which was misleading because it was incomplete.

For these reasons I concur with Mr. Justice F. D. Melvill in thinking that we should not interfere with the Magistrate's order.

I have not thought it necessary to consider whether that portion of the article complained of, which refers to the dismissal of the complainant from the office of bailiff, is or is not defamatory. But I may observe that Mr. Justice Pinhey appears to be mistaken in supposing that the complainant was dismissed for the same act for which the criminal prosecution had been ordered. The complainant was dismissed merely because he had overstayed his leave; and dismissal for such a cause would be no ground for any imputation upon the complainant's character, and perhaps could scarcely affect the question of his fitness for re-employment in the service of Government.

Petition rejected.

4 B. 305.

[305] ORIGINAL CIVIL.

Before Sir Charles Sargent, Justice.

JIVANJI NOORBHOY (*Plaintiff*) v. COORJI LILLADHAR AND OTHERS
(*Defendants*).^{*} [4th and 14th April, 1879.]

Marine insurance—Insurable interest—“Interest or no interest” effect of these words in a policy—Stat. 19, Geo. II, c. 37—Loan on ‘avung’—Insurance effected after loss of subject matter of insurance—Meaning and effect of the words “lost or not lost” in a policy.

Policies of insurance between Natives of India (those, at least, which do not contain the words “interest or no interest”) are to be construed in the same way as such instruments have been uniformly construed by the general law merchant in Western Europe, *viz.*, as contracts of indemnity.

A certain trade is carried on between native merchants in Western India with the coast of Africa and Madagascar by means of native vessels which leave the Indian ports early in the year, and after remaining in the ports of Africa and Madagascar for four or five months, leave on the return voyage about August or September. This trade consists in shipping goods at the Indian ports, to be disposed of at the African and Madagascar ports, and purchasing with the proceeds fresh goods to be similarly disposed of in the home ports. To enable traders to embark in this venture, it is their practice to borrow money of merchants on what is termed ‘*avung*’; that is, money borrowed on the condition that it is not to be repaid except in case of the safe arrival of the goods in the home ports on the return voyage, in which event the loan becomes repayable with interest at a high rate.

Held. that, having regard to the long-established practice, in the port of Bombay of insuring such risks, the interest of the lender of such a loan, in the goods on board a ship on her return voyage to India, is an insurable interest.

Seemle—That an *avung* loan does not give the lender a charge on the goods.

^{*} Suit No. 772 of 1877.

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Held, also, that a policy of marine insurance on goods is not invalid by reason of its having been effected subsequently to the loss of the goods, although the policy does not contain the words "lost or not lost."

THE plaintiff sued to recover the sum of Rs. 1,960 from the defendants as underwriters of two policies of insurance upon certain goods, shipped by the plaintiff on board the ship "Saleh" for carriage from Madagascar to Bombay. The policies were dated the 16th October 1875, and were drawn in the same form. The material part was as follows:—

"The conditions: On the anchor being weighed from the creek of the port of Koomarbookin the risk is agreed for. That vessel touching at any port. On the anchor being dropped in the [306] creek of Cutch-Mandvi in the port of Bombay, the risk is truly to cease. As to this insurance, in accordance with the usage in the manner of the country of Cutch-Mandvi, the risk is agreed for. In case of accident, the time (for payment) is six months; rebate is truly to be deducted at the rate of Rs. 2 per cent. The rate of premium hereof is fixed at the rate of Rs. through the broker Thaker Dhanji Dharamsi. The day of the week, Saturday, 16th October 1875. This insurance is caused to be effected on behalf of your *vachhyat* (i.e., constituent) Wora. It is through the broker Mathuradas Pragji.

"Rs. 1,000, Lilladhar Praji. To wit.

"Insurance for Rs. 1,000."

The ship and goods were totally lost on the 10th September 1875, off the coast of Africa, while on the voyage to Bombay.

The defendants raised a number of defences as to the shipping of the goods, the seaworthiness of the ship, &c., &c., which are not material for this report. The principal questions discussed at the hearing were:—1st, whether the plaintiff had an insurable interest in the goods which had been lost; 2nd, whether the plaintiff could recover on the policies which had been effected subsequently to the loss of the vessel.

Evidence was given, that a large trade was carried by the merchants of Cutch-Mandvi and Bombay with the ports of Madagascar and Africa, by means of native vessels which leave the Indian ports early in the year, and return in the months of August or September. In this trade, goods were shipped from India, disposed of in the foreign ports and with the proceeds, fresh goods were purchased there, and carried back to India. It was alleged to be the practice, among those engaged in this trade, to borrow money on *avung*, i.e., on condition that it was not to be repaid unless the goods purchased abroad, arrived safely in the home port, in which case the loan was repayable with interest at a high rate.

The plaintiff stated that in January 1875, a few days before the "Saleh" sailed from Bombay for Madagascar, he had lent Rs. 1,000 on *avung* to one Karimji Alibhoy, the owner of the vessel, and that in the middle of the same year he (plaintiff) had been requested by his brother Walji to insure for him, goods which he expected [307] to be shipped on board, the "Saleh" at Madagascar, for her return voyage, to the value of Rs. 700. That, accordingly, in October 1875 he insured his brother's goods in the "Saleh" for Rs. 700, and effected a further insurance for Rs. 1,300 on the goods of Karimji Alibhoy in the same vessel, in order to secure the sum of Rs. 1,000 which he had lent to Karimji, on *avung*, together with interest and commission. The two policies sued on (each for Rs. 1,000) were effected to cover the above risks. The defendants were underwriters.

Latham and *B. Tyabji*, for the plaintiff.—The mere fact that the policies were effected after the goods were lost, does not render the policies void, although the policies do not contain the words “lost or not lost”: *Arnould on Insurance* (5th ed.), 235: 1 *Phillips on Insurance*, p. 512, para. 925; *Mead v. Davison* (1); *Haste v. Couturier* (2). The loan on *avung* gave the plaintiff an insurable interest; 1 *Phillips on Insurance*, Chap. III; *Arnould* (5th ed.), p. 55; *Wilson v. Jones* (3). A loan on *avung* is in the nature of a loan on *respondentia* which may be insured. See *Smith's Mercantile Law*, p. 410.

The Advocate-General (*Hon'ble J. Marriott*) and *Macpherson*, for the defendants.—The policies are void, because made after the goods were lost: *Smith's Mercantile Law*, p. 347; *Crump on Insurance*, pl. 389 and p. 231. In order that the insurance might cover losses already incurred at the time the policies were effected, the words “lost or not lost” should appear in the policies: *Hastie v. Couturier* (2); *Duer on Insurance*, Vol. II, p. 5; *Sutherland v. Pratt* (4). The loss took place five weeks before the date of the policy, and plaintiff may have heard of it. The plaintiff had no insurable interest in the goods insured: *Glover v. Black* (5). As to what is an insurable interest, see *Arnould on Insurance* (5th ed.), Vol. I, p. 55: *Lucena v. Craufurd* (6); *Stockdale v. Dunlop* (7); *North of England Pure Oil Cake Company v. The Archangel Maritime Insurance Company* (8). The English Common Law applies in India, where there is no special Hindu law in force. Counsel referred to *Busk v. Fearon* (9).

JUDGMENT.

[308] SARGENT, J.—[His Lordships having discussed the evidence, and having decided, the issues raised upon the facts of the case in favour of the plaintiff, continued] :— I think, therefore, that the plaintiff must be taken to have proved his case satisfactorily, subject to the points of law which have been raised as to the validity of the policies, *viz.* :—

1. Whether the policies are void for want of an insurable interest in the plaintiff in the goods.

2. Whether the plaintiff can recover on the policies, they having been effected after the loss of the vessel.

It was contended for the plaintiff that there was no necessity in this country for the assured to have an interest in the subject-matter of the insurance; indeed, it was said that such was the case in England before the Stat. 19, Geo. II, c. 37. Now, I need scarcely say that the contract of marine assurance has been treated by the writers of all countries as one merely of indemnity. Reference to these authorities is to be found in the elaborate judgments of the learned Judges in *Lucena v. Craufurd* (6). It follows from this as a general principle, as pointed out in that case, that the assured must have an interest capable of being affected by the perils insured against, and upon which the indemnity can operate, and such, the learned Judges say, “had always been established law amongst all the commercial nations of Europe.” As to the Act of Geo. II, I will only observe that the causes which led to it, are stated with great clearness in the above judgment at p. 296 of the Report. The same account of the necessity for the Act is given by Mr. Justice Blackstone in his Commentaries; and Lord Eldon, in delivering the judgment of the House of Lords in *Lucena v. Craufurd* (6), explains, upon the authority of Lord Hardwicke,

(1) 3 Ad. & El. 303. (2) 9 Ex. 102 = 5 H.L.C. 673. (3) L.R. 2 Ex. 139.
 (4) 11 M. & W. 296. (5) 3 Burr. 1394. (6) 2 B. & P.N.R. 269 (392).
 (7) 6 M. & W. 224. (8) L.R. 10 Q.B. 249. (9) 4 East. 319.

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that the words "interest or no interest" were only meant to dispense with the proof of interest at the trial. This shows that the object of the Act was, on grounds of public policy, to prevent the operation (at least in the case of British property) of certain words which had been recently introduced into policies of assurance, and which, without infringing the common law, virtually destroyed the original character of maritime policies as contracts [309] of indemnity, and thus, as the Act says, "by introducing a mischievous kind of gaming or wagering, the institution and laudable designs of making assurances had been perverted." In other words, as Sir J. Arnold expresses it at p. 55, Vol. I, 5th ed.) of his work on Marine Insurance: "As to British property, the Statute, in effect, reduces the policy once more to a contract of indemnity."

No reason was attempted to be given, nor was any authority cited, for construing a policy of maritime assurance between natives of this country (at least where the words "interest or no interest" are not to be found) otherwise than as such an instrument has been uniformly construed by the general law of merchants throughout Western Europe, *viz.*, as a contract of indemnity. Further, it is the well-established practice in the Courts of India to apply to native policies the same principles as obtain in those of Western Europe. I must, therefore, hold that the plaintiff is bound to show that he had an interest in the goods. Whether the introduction of the words "interest or no interest" into an Indian policy, would make it void by reason of the wagering Acts (1) in force here, it is not necessary for me to determine.

The next question is, what interest must the assured have in the thing insured to enable him to recover. Now, the evidence establishes satisfactorily, that a considerable trade has for many years been carried on between native merchants in this part of India, and more especially those residing at the ports of Cutch-Mandvi and Bombay, with ports on the coast of Africa and in Madagascar by means of native vessels, which leave the Indian ports early in the year, and after remaining in the ports of Africa and Madagascar for four or five months, leave on the return voyage about August or September. This trade consists in shipping goods at the Indian ports, to be disposed of at the African or Madagascar ports, and purchasing with the proceeds, fresh goods, to be similarly disposed of in the home ports. To enable traders to embark in this venture, it is their practice to borrow money of merchants on what is termed '*avung*,'—that is, money borrowed on the condition that it is not to be repaid, except in case of the [310] safe arrival of the goods in the home ports, on the return voyage, in which event the loan becomes repayable, with interest at a high rate.

It was, however, contended for the defendant, that this contract does not give the lender any charge upon the goods, or right to the possession of the goods on their arrival, and that such interest as the lender has in the safe arrival of the goods is not an insurable interest. As to this, I think that the evidence, whilst satisfactorily establishing that it is always in the contemplation of the parties that goods are to be shipped for the outward and inward voyages, nevertheless points to the conclusion that the money is deemed to be lent exclusively on the personal credit of the borrower and not on the credit of the goods. In answer to me the plaintiff says: "I only lent on the personal security of Karimji. Such is the practice." "I had nothing to do with the goods; if he did not pay, I could

(1) See Act XXI of 1848 amended by Act III of 1865.

attach the goods. I could bring a suit, and recover my money out of his property. I had the same interest in his goods shipped at Madagascar as I should have in a house, if he had one." Karimji says: "I never heard of the *avung* borrowers not paying; so I cannot say what the lenders would do if not paid. I never heard of a lender taking possession of the goods; he never knows what goods are shipped." Later on, indeed, in this case, when the importance of the contract giving the lender a charge on the goods was more clearly understood by the plaintiff, we find the brokers speaking of the lender's right as superior to that of general creditors, and on a par with the holders of *hundis* drawn against the goods; but the plaintiff admits, as they all do, that he never heard of a case in which the lender had to enforce his rights. The contract would rather appear to be similar to those alluded to by Blackstone in his Commentaries (Vol. II, p. 144) under the head of "Offences, Maritime" and by Bayley (Serjeant) in *Busk v. Faron*(1). However, it would be inconvenient, in a case like the present, to arrive at a positive conclusion as to the borrower's rights with respect to the goods shipped on the return voyage. Nor, indeed, is it necessary that I should do so, as I am of opinion that the interest which the lender necessarily has in the safe arrival of the [311] goods from its being made a condition of his right to be repaid, is such, as, with due regard to the long-established practice, in this port, of insuring such risks, this Court ought to regard as sufficient for the purposes of insurance. In the well-known definition of an "insurable interest" contained in the judgment of Lawrence, J., in *Lucena v. Craufurd* that learned Judge says: "To be interested in the preservation of a thing, is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction. The property of a thing and the interest derivable from it may be different; of the first, the price is generally the measure, but by interest in the thing every benefit or advantage arising out of or depending on such thing may be considered as being comprehended. These remarks were made in answer to the same objection that is now urged, *viz.*, that the assured had no property in the thing insured. He concludes thus: "On these grounds it seems to me that the contract of marine insurance may extend to every kind of interest that may subsist in, or be dependent upon, things exposed to damages to which maritime adventures are exposed." The very general language of the learned Judge's conclusion has, doubtless, been limited by subsequent English decisions so as to exclude mere expectations; but with that limitation the definition has been always accepted as a safe test in determining whether the insurer has an insurable interest. In the case of *Wilson v. Jones* (2) Blackburn says: "I know no better definition of an interest in an event than that indicated by Lawrence, J., in *Barclay v. Cousins*, and more fully stated by him in *Lucena v. Craufurd*, that if the event happens the party will gain an advantage, if it is frustrated he will suffer a loss. Now, we must see whether the plaintiff was in this position. He was interested in a company which was about to lay a cable across the Atlantic. If that event happened, there can be no doubt the owner of the shares in the company would be better off; if it did not happen, there can be no doubt his position would be worse. It follows, then, equally, without doubt, that if by proper words the parties have entered into a contract of insurance for that interest, the policy is good."

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(1) 4 East 319.

(2) L. R. 2 Ex. 139 at p. 150.

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[312] Now, in the present case it is plain that as the plaintiff's right to be repaid the money lent on *avung* was conditional on the safe arrival of the goods shipped at Madagascar, it depended on that event whether he should recover his Rs. 1,000 or be a loser to that amount. He had, therefore, a direct interest in their safe arrival. Moreover, the evidence given by the plaintiff and his witnesses shows, that it is the well-established practice for the lender of an *avung* loan, to insure the goods, as a means of indemnifying himself against the loss which he necessarily must sustain if the goods do not arrive safely; and no attempt was made by the defendant to dispute that such was the practice. It was urged for the defendant, that the Court ought not to support such policies, because by doing so it would open the door to mere wagering contracts. If such be the case, we should only be the more careful, that the transaction is really what it is represented to be; but, as was said by Willes, J., in *Wilson v. Jones* (1) in answer to a similar argument, "we should not be deterred from giving it effect, by reason of the alleged danger." In that case the policy was admittedly of a novel character; here, however, it is admitted (for so it must be taken to be, on the evidence) that it is the common practice in this particular trade between India and the coast of Africa (a trade in which plaintiff says he has been engaged for the last fifty years) for lenders of money on *avung*, to insure themselves by policies on the goods of the borrower.

Upon all these grounds, therefore, I think this Court is bound to give effect to policies on goods to insure *avung* risks. In the present case I see no reason to doubt that there was a genuine *avung* risk, or that goods were shipped on board at Madagascar by the borrower; and I must, therefore, hold that the plaintiff had an insurable interest in respect of his *avung* loan, interest and commission. Further, it is clear that plaintiff, as the authorized agent of his brother, was entitled to effect policies in question so far as they were intended to cover the goods shipped by him.

It was, however, contended that these particular policies were void, having been effected after the loss of the vessel and goods. Sir Joseph Arnould at p. 223, Vol. I, of his work says the words [313] "lost or not lost" are not in all cases strictly necessary, as there can be no reason why a previous loss of the subject insured should prejudice an insurance subsequently effected if both the assured and underwriters were equally ignorant of the loss—an opinion in which he is fortified by Phillips and Marshall in their works on Insurance, as well as by Kent, J., in his Commentaries and by the decision of Story, J., in *Hammond v. Allen* (2). He has omitted to refer to the case of *Earl of March v. Pigot* (3) which is mentioned by Denman, C. J., in *Mead v. Davson* (4), as laying down the general law in the same sense. The words "lost or not lost" may, however, be important where the insured has not acquired any interest in the goods until after the goods were lost—by virtue of their operation as an express indemnity against past as well as future risks as explained by Parke, B., in *Sutherland v. Pratt* (5). In the present case the plaintiff was interested in the goods in the manner in which I have stated, from the moment they were put on board, and the very nature of the risk shows that the insurance was intended to cover a previous loss if it had occurred. In this state of the authorities, and in the absence of proof of any custom in an opposite sense, I must hold that the policies were

(1) L.R. 2 Ex. at p. 146.

(2) 2 Sumner's Rep. 397.

(3) 5 Burr. 2302.

(4) 3 Ad. & E. 303.

(5) 11 M. & W. 296.

not invalidated by the circumstance that they were effected after the loss of the goods. It was, indeed, suggested that the plaintiff had knowledge of the loss when he effected the policies. There is, however, no evidence which would justify such a conclusion.

On the whole, I am of opinion that the plaintiff has satisfactorily proved that goods of much more than the value of Rs. 2,000 were shipped at Madagascar on board the "Saleh," and that the plaintiff in his own right, and as an authorized agent for his brother, had an interest to the extent of Rs. 2,000, at least, in the goods placed on board. I must, therefore, find all the issues for the plaintiff, and pass judgment for him for Rs. 2,000, with interest at 9 per cent. from 14th April 1877 till judgment.

Decree for the plaintiff.

Attorneys for the plaintiff.—Messrs. *Jefferson and Payne.*
Attorneys for the defendants.—Messrs. *Smith and Frere.*

4 B. 314.

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Before Sir C. Sargent, Justice.

RICHARD LATHAM AND OTHERS (*Plaintiffs*) v. HURRUCKCHAND SOORATRAM (*Defendant*). * [22nd August, 1878.]

Marine insurance—Notice of claim by insured—Action brought before expiration of six months from date of notice—Constructive total loss—Meaning of the words "sunk" "stranded."

* Where insurers on receiving notice of a claim made against them under a policy of insurance distinctly repudiate their liability and deny that any claim exists against them, or that the party serving such notice has any right to recover against them, there arises an immediate right to sue, and the insured is not bound to wait for the expiration of six months before taking proceedings to enforce his claim.

Where it appeared upon evidence, that goods on board a ship that was wrecked on a voyage from Kurrachee to Bombay, although much damaged by sea water, were nevertheless of such merchantable value as to make it worth while to send them on to their port of destination.

Held, in an action against the insurers of the goods, that no claim for constructive total loss was maintainable.

In an action upon a policy of marine insurance the evidence given with respect to the loss of the ship was as follows:—"The vessel grounded near Dwarka. After the vessel struck, the water constantly broke right over all * * * The cargo was all under water. The labourers were only able to work at ebb tide, and at high tide they could only see the top of the vessel's masts. * * * The vessel lay where she stranded seven days, and was then raised with casks." Some of the goods on board were insured by a policy which contained the clause "warranted free of particular average, unless sunk or burnt." It was contended for the plaintiffs that the ship had "sunk," and that the damage to the goods was, therefore, covered by the policy.

Held, that where a vessel runs aground and lists over, and is in consequence covered by the high tide, which causes damage to goods on board, it cannot be said that she has 'sunk' within the meaning of the word as used in a policy of insurance, and, therefore, that a claim for particular average cannot be sustained under the clause—"warranted free of particular average, unless sunk or burnt."

[R., 7 Bom.L.R. 282.]

* Suit No. 268 of 1878.