



**LAW COMMISSION  
OF INDIA**

**TWENTY-FIRST REPORT**

**(MARINE INSURANCE)**

**GOVERNMENT OF INDIA : MINISTRY OF LAW**

D.O. No. F.1(3)/60-L.C.

CHAIRMAN,  
LAW COMMISSION.

*New Delhi-3, the 1st September, 1961.*

Shri Asoke Kumar Sen,  
*Minister of Law,*  
*New Delhi.*

MY DEAR MINISTER,

I have great pleasure in forwarding herewith the twenty-first Report of the Law Commission on the Law of Marine Insurance.

2. In April 1960, the Government of India referred to the Law Commission the questions as to whether there was need for legislation on the Law of Marine Insurance, and if there was, the lines on which it should be undertaken. I took up this subject and prepared a draft Report on the Law of Marine Insurance, and the same was circulated to the Members. At the meeting of the Commission held on the 15th October, 1960, it was decided that the draft should be circulated for opinion to the State Governments, High Courts, and other persons interested in the subject. The opinions received from them were considered by the Commission at its meeting held on the 5th May, 1961. The Report has been revised in accordance with the decisions taken at that meeting.

3. The Commission wishes to acknowledge the services rendered by Shri P. M. Bakshi, Deputy Draftsman, in connection with the preparation of the draft and the Report.

Yours sincerely,

T. L. VENKATARAMA AIYAR.

# REPORT ON MARINE INSURANCE

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## REPORT ON MARINE INSURANCE

1. There is no enactment of the Indian Legislature on the law relating to marine insurance.<sup>1</sup> The Indian Stamp Act, 1899, prescribes the duties payable on insurance policies. The Transfer of Property Act, 1882, contains provisions relating to the formalities to be observed in the assignment of marine policies. The Insurance Act, 1938, regulates generally the carrying on of the business of insurance (including marine insurance) by associations incorporated and unincorporated and by individuals, and does not deal with the contract of insurance between the insurer and the assured. The Merchant Shipping Act, 1958 (Central Act 44 of 1958), deals with the law relating to shipping such as registration of vessels, qualifications of Masters, the rights and obligations of the crew, the construction of ships and their equipments and the like, but not with marine insurance. The last mentioned Act does, however, contain provisions on such topics as sea-worthiness, collision and salvage, which arise for consideration in the law of marine insurance. Thus there is no statute which deals directly with the subject of marine insurance contracts and the rights of the parties thereto. In the absence of such a statute, the courts were guided on the few occasions on which questions relating to marine insurance arose for decision, by the corresponding provisions of the (English) Marine Insurance Act, 1906, and by the principles laid down in the decisions of English Courts in dealing with such contracts.

No Indian statute on marine insurance.

That a comprehensive enactment on the law of marine insurance is a *desideratum* was expressed in 1944, when the Bill for amending the provisions of the Transfer of Property Act relating to the assignment of policy of Marine insurance was introduced. In the statement of Objects and Reasons appended to that Bill<sup>2</sup> occur the following observations:—

“It is recognised that while legislation on the above lines would clarify the Law of Assignment, and subrogation of marine insurance policies, the whole law of marine insurance will not be put on a satisfactory basis, unless comprehensive legislation on the lines of the Marine Insurance Act, 1906, is enacted for British India. Such a project, however, must necessarily await the termination of the war.”

<sup>1</sup>For details of statistics touching on the subject, see Appendix II, (Notes on Clauses), topic discussed at the beginning under ‘Existing Law in India’.

<sup>2</sup>For details see Appendix II, Notes on Clauses under clauses 52-53.

As a first step in the codification of the entire law relating to shipping, our Parliament has enacted the Indian Merchant Shipping Act, 1958. In 1959, a Bill on marine insurance<sup>1</sup> was introduced in the Rajya Sabha by a Private Member.<sup>2</sup> In due course, the Bill was circulated for the opinion of the State Governments, High Courts, and other bodies and persons interested. After the receipt of their comments, the Government of India referred to the Law Commission the questions as to whether there was need for legislation on this subject, and if there was, the lines on which it should be undertaken. That is how this matter has come before this Commission.

Need for legislation.

2. That there is need for this legislation was recognised, as already stated,<sup>3</sup> in the statement of Objects and Reasons appended to the Bill for amendment of the provisions of the Transfer of Property Act. That statement was made in 1944, and since then the need for such a legislation has become greater. There has been, in recent years, a marked increase in the mercantile marine owned by this country. We have moreover entered on an era of industrial expansion, and to carry on our export and import trade effectively, it is necessary that we should own our own vessels. There is even now an appreciable volume of business in the taking up of marine insurance policy on ships, cargo and freight, and that is bound to increase in the not distant future. Under the circumstances, a law on marine insurance would facilitate the expansion of business in exports and imports, and in the settlement of disputes arising in the course thereof. Such a legislation would also be in furtherance of the policy underlying the enactment of the Merchant Shipping Act, 1958. We are therefore of opinion that there is ample need for enactment of a statute on marine insurance.

Desirability of following the English Marine Insurance Act, 1906.

3. We are also of opinion that the statute should, in general, follow the (English) Marine Insurance Act, 1906. The law as embodied therein represents the experience of a leading maritime nation, extending over nearly three centuries. Marine insurance policy as embodied in the Lloyd's was settled in its present form in 1779, but many of its provisions go back to a much earlier date. Lloyd's policy has been criticised as "an absurd and incoherent instrument",<sup>4</sup> "a very strange instrument",<sup>5</sup> and its language as "crabbed and obscure".<sup>6</sup> But it is based on usage and has been in vogue in the commercial world for too long a period, now

<sup>1</sup>The Indian Marine Insurance Bill 1959 (Bill No. 1 of 1959)—Rajya Sabha.

<sup>2</sup>Shri M. P. Bhargava.

<sup>3</sup>Para. 1, *supra*.

<sup>4</sup>Per Buller, J., in *Brough v. Whitmore* (1791) 4 T.R. at p. 210.

<sup>5</sup>Per Mansfield, C.J., in *Lo Cheminant v. Pearson* (1812) 4 Taunt. 380.

<sup>6</sup>Chalmers' Marine Insurance Act, 1906, 5th edn., p. 3.

to be lightly disturbed. There are numerous decisions of courts, some of them by the House of Lords, construing its provisions, and the rules of interpretation applicable to them may now be taken to be fairly well-settled, and they are embodied in the Schedule to the English Act.

We are aware of the criticisms levelled against the English Act, that it embodies only some of the legal principles governing marine insurance, that its language is cryptic, wide and indefinite, with the result that to understand its true import one has to refer to the law as it stood at the time of the enactment, as expressed in the decided cases.<sup>1</sup> But then it has to be remembered that the statute has stood the test of time, having worked satisfactorily for more than half a century, and that it has been adopted in the Commonwealth countries such as Australia and Canada, so much so it can well be said to have assumed the status of a law of nations. As the topic is one which is international in character, both convenience and expediency require that our law should, as far as possible, be in conformity with it.

In fact, business in maritime insurance in this country follows closely the English pattern. Our marine insurance policies are drawn up on the model of Lloyd's policy. Many of our policies are re-insured in England, and these re-insurance policies are governed by the English law. Moreover, when our goods are exported, they are insured, and when those goods are transferred, the relative insurance policies have to be assigned for protecting the rights of the transferee and it will facilitate business if there is uniformity of law. We have therefore decided to follow, in general, the pattern of the (English) Marine Insurance Act, 1906.

4. There are, however, certain provisions in the English Departure Act which, in our view, require modification, when regard from English law is had to the opinions expressed in English decisions subsequent to the Act of 1906, or to the conditions in this country.

5. The English Act contains no definition of "ship". Definition of ship included. Rule 15 in Schedule I of that Act provides that certain things forming fittings and equipments of the ship are also included therein. But the Act is silent as to what vessels should be included in the definition of "ship". The question has accordingly been raised whether sailing vessels propelled by oars should be included in it. Even in England the view has been expressed by Arnould<sup>2</sup> that "ship" probably includes all builds of vessels. Referring next to the definition of "ship" in Indian statutes, s. 3(55) of the General

<sup>1</sup>*Rishards v. Forestal Land Co.*, (1942/3) All. England Reports 62, 76—1942 A.C. 50 (House of Lords).

Arnould, *arine Insurance* 1954) Vol. I, page 199, Articles 184-185.

Clauses Act<sup>1</sup> provides that a "ship" includes vessels not exclusively propelled by oars. Section 48 of the Indian Penal Code defines vessel as "anything made for the conveyance by water of human beings or property". This would include vessels propelled by oars. Section 3(45) of the Indian Merchant Shipping Act (44 of 1958) enacts that a ship does not include sailing vessels. But this definition is only for the purpose of that Act, and is itself based on the view that but for the specific provision contained in this Act, the word "ship" would include sailing vessels. There has been a considerable body of opinion from South India, where such vessels are largely in use, for their inclusion in the definition of "ship". We have accordingly decided to include<sup>2</sup> a definition of "ship" as including sailing vessels propelled by oars.

Insurable value of ships driven by power other than steam.

6. Section 16 of the English Act provides that insurable value in the case of steam ships includes also the machinery, etc., if owned by the assured. This does not cover the case of a ship driven by power other than steam. A provision relating to such a ship is also necessary, and we have accordingly provided<sup>3-4</sup> that in the case of a ship driven by power other than steam, the insurable value includes also the machinery and the fuel and engine stores if owned by the assured.

Deviation for saving property.

7. Another topic on which we have departed from the English law has reference to "deviation". Where a ship deviates from the voyage contemplated by the policy, the insurer is discharged from liability under the policy from the time of deviation (section 46, English Act). But the law recognises certain lawful excuses for such deviation, one of which under the English law is that it is for the purpose of saving human life [section 49(1) (e), English Act]. When the deviation is for saving *property* and not human life, it is not excused, and the insurer is discharged. That is the law also in America.<sup>5</sup>

It should be noted that the position is different when the question arises between the cargo-owner and the ship-owner under a contract of affreightment. According to the (English) Carriage of Goods by Sea Act, 1924, Schedule, Article IV, para. 4, a deviation in saving or attempting to save life or property at sea or any reasonable deviation is

<sup>1</sup>The definition in the General Clause Act follows section 742, (English) Merchant Shipping Act. For cases on the definition in the latter Act, see Temperley, Merchant Shipping Acts, 5th Edn. p. 441-443.

<sup>2</sup>See Appendix I, clause 2-"ship".

<sup>3</sup>See Appendix I, clause 14.

<sup>4</sup>Cf. also the First Schedule, rule 15 of the English Act and the departure proposed therefrom.

<sup>5</sup>Vide 45 Corpus Juris Secundum, "Insurance," p. 570, para. 653, right hand column.

excused. And the Indian Carriage of Goods by Sea Act, 1925, Schedule, Article IV, para. 4, has also enacted the law in the same terms. The question is whether two different rules should apply as regards lawfulness of deviation, one as between the insurer and the assured, and the other as between the cargo-owner and the ship-owner. The rule enacted in the (English) Marine Insurance Act, 1906, is based on common law<sup>1</sup> and that has been departed from as regards contracts of affreightment in 1924. We think that there is no good ground for applying two different rules between marine insurance contracts and contracts of affreightment, and we have therefore adopted the law<sup>2</sup> as enacted in the Indian Carriage of Goods by Sea Act, as more equitable, and accordingly substituted a provision excusing deviation for the purpose of saving or attempting to save life or property at sea. We, however, consider that "other reasonable deviation" (allowed in the Carriage of Goods by Sea Act), is too wide in its terms to be adopted for purposes of insurance.

8. The law as to the rights of the assured when there is constructive total loss as enacted in the English Act of 1906 requires, in our opinion, to be clarified. Under that law, when there is a constructive total loss, the assured may abandon the subject-matter and treat the loss as if it were an actual total loss.

Abandonment—effect of subsequent acts of the insurer or change of circumstances.

Two questions arise with reference to this provision. The first question is, is it open to the insurer thereafter to salvage the subject-matter, and claim that the assured could recover only on the footing of a partial loss? It is settled law that he cannot.<sup>3</sup> That is because the election of the assured to treat the loss as total constructive loss has the effect of transferring the title to the insurer.<sup>4</sup> The English Act is silent on this question, obviously because the law was not in doubt. We have considered it desirable that it should be made explicit.

9. The other question arising on this topic is as regards "ademption" in case of total loss. When the subject-matter of insurance is seized by a third person and the assured is deprived of possession thereof, he can elect to treat it as constructive total loss. That might happen, for example, when a ship is seized by enemies or pirates. But if after the assured has elected to treat it as a constructive total loss and before he sues to recover the damages, the subject-matter is got back and the insurer is able to deliver possession

<sup>1</sup>*Scaramanga v. Stamp* (1880) 5 C.B.D. 295 C.A. on appeal from 4 C.B.D. 31G.(g). See also Halsbury, 3rd Edn. Vol. 22, p. 73, para. 128 footnote.

<sup>2</sup>See Appendix I clause 50.

<sup>3</sup>Vide *Blairmore Sailing Ships Co. v. Macredie* (1898) A.C. 593, 607; Halsbury's Laws of England, 3rd Edn. Vol. 22, p. 156, para. 302, and Arnould (1954) Vol. 2, Article 1126.

<sup>4</sup>Vide Chalmers' Marine Insurance Act, 1906, 5th Edn., p. 91.



thereof to the assured, can that be pleaded as a defence to the action on the policy by the latter? According to the common law of England, that is a valid defence, and the right of the assured is only to recover for partial loss. But that is not the law in Scotland or the Continent or the United States. The English Act of 1906 is silent on this question, and there has been a difference of opinion as to whether under the Act, the common law of England as to ademption has been changed.<sup>1</sup> We think that the position should be made clear, and in agreement with the law of Scotland, of the Continent and of the United States, we have provided<sup>2</sup> that the right of the insured to recover for total loss should not be affected by events subsequent thereto.

Sale of insured ship without repair—amount to be paid by insurer.

10. Another question on which the English Act is silent is as to the measure of indemnity when a ship damaged by perils insured against is sold without repair. Section 69 of the English Act which prescribes the measure of indemnity in case of partial loss does not deal with this matter. The reason for this might be that the law on the subject was still considered unsettled at the time. The question arose for decision in *Pitman v. Universal Marine Insurance Co.*<sup>3,4</sup> There a ship which was valued by the owners at 4000 consols ran aground. After effecting some repairs the owner sold it for 3897 consols and then sued to recover 781 consols from the insurers on the basis of the estimated cost of repairs, without selling the ship. The defendants contended that they were liable to pay only the difference between the sound value of the ship and the amount actually realised in resale, and whatever was spent by the assured for the repairs, and on this basis paid 245 consols into court. Lindley, J., as he then was, held that the plaintiff was not entitled to anything more, as the contract of insurance was one of indemnity, and that no damages beyond what the plaintiffs had in fact suffered could be awarded on a hypothetical basis of repairs which were not in fact made. The plaintiffs then appealed, and the Court of Appeal affirmed the judgment of Lindley, J., by a majority consisting of Jessel, M.R., and Cotton, L.J. Brett, L.J. dissented, observing that damages should be calculated on the basis of the estimated cost of repair, less the usual deductions, and that the principle adopted by Lindley, J. was a dangerous innovation. There has been some difference of opinion as to whether the value of the ship should, for the purpose of this rule, be calculated as on the date of the commencement of the risk or as at the time of the casualty.<sup>5</sup> But apart from

<sup>1</sup>*Vide* Halsbury's Laws of England, Vol. 22, p. 159, para. 308, and the cases cited in foot note 8. See also Arnould, (1954) Vol. 2, pages 1000-1001 Articles 1096 *et seq.*

<sup>2</sup>See Appendix I, clause 62(2).

<sup>3</sup>(1882) 9 Q.B.D. 192.

<sup>4</sup>The matter has been discussed in detail in Appendix II in Notes on clause 70.

<sup>5</sup>*Vide* Chalmers' Marine Insurance Act, 1906, 5th Edn., p. 108.

that, the rule laid down by Lindley, J., and affirmed by the majority of the Court of Appeal appears to be equitable and in accordance with the character of the insurance contract as one of indemnity, and we have accordingly adopted it and provided<sup>1</sup> that when a ship which has been damaged is sold in that condition, the assured is entitled to be indemnified for the reasonable cost of repairing the damage but not exceeding the depreciation in value as ascertained by the sale.

11. These are some of the more important points on *Other points,* which we have departed from the provisions of the English law. There are a few other points and they have been dealt with in the notes on clauses. We have also made some modifications of a formal character as regards the arrangement of the topics and clauses.

12. In order to give a concrete shape to our proposals, we *Appendices.* have in Appendix I put them in the form of a draft Bill.

Appendix II contains the notes on clauses, explaining with reference to each clause in Appendix I any point that may need elucidation.

Appendix III contains a comparative table showing the provision in the English Act, and the corresponding provision, if any, in Appendix I.

Appendix IV contains our suggestions in respect of other Acts.

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|-----------------------------|-------------|
| 1. T. L. VENKATARAMA AIYAR, |             |
|                             | (Chairman). |
| 2. P. SATYANARAYANA RAO.    | } Members.  |
| 3. L. S. MISRA.             |             |
| 4. G. R. RAJAGOPAUL.        |             |
| 5. S. CHAUDHURI.            |             |
| 6. N. A. PALKHIVALA.        |             |

D. BASU,  
*Joint Secretary.*

NEW DELHI;  
*The 29th July, 1961.*

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<sup>1</sup>Appendix I, clause 70.

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FORM OF POLICY.





(iii) any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property by reason of maritime perils;

*Cf. s. 3(2),  
Explanation  
English Act.*

(e) "maritime perils" means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints and detentions of princes and peoples, jettisons, barratry and any other perils which are either of the like kind or may be designated by the policy;

*Cf. s. 90,  
English Act.*

(f) "movables" means any movable tangible property, other than the ship, and includes money, valuable securities and other documents;

*Cf. s. 90,  
English Act.*

(g) "policy" means a marine policy;

(h) "ship" includes a sailing vessel; and

*Cf. s. 90,  
English Act.*

(i) "suit" includes counter-claim and set-off.

## CHAPTER II

### MARINE INSURANCE

#### *Contract of marine insurance*

*Marine insurance  
defined.*

*Cf. s. 1,  
English Act.*

3 A contract of marine insurance is *an agreement* whereby the insurer undertakes to indemnify the assured, in the manner and to the extent thereby agreed, against marine losses, that is to say, the losses incidental to marine adventure.

*Mixed sea  
and land  
risks.*

*Cf. s. 2,  
English Act.*

4. (1) A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage.

(2) Where a ship in course of building, or the launch of a ship, or any adventure analogous to a marine adventure, is covered by a policy in the form of a marine policy, the provisions of this Act, in so far as applicable, shall apply thereto; but, except as provided by this section, nothing in this Act shall alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurance as defined by this Act.

*Lawful  
marine ad-  
venture.*

*Cf. s. 3(1),  
English Act.*

5. Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.

*Insurable interest*

6. (1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure. Insurable interest defined.

(2) In particular, a person is interested in a marine adventure where he stands in legal ..... relation to the adventure, or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof. Cf. s. 5, English Act.

*Explanation.*—For the purposes of this section, a beneficiary under a trust shall be deemed to stand in legal relation to the trust-property at risk in a marine adventure.

7. Without prejudice to the generality of the provisions contained in section 6,— Interests which may, in particular, be insured.

(1) a defeasible interest is insurable, as also a contingent interest, and, in particular, where the buyer of goods has insured them, he has an insurable interest, notwithstanding that he might, at his election, have rejected the goods, or have treated them as at the seller's risk by reason of the latter's delay in making delivery or otherwise; Cf. s. 7, English Act.

(2) a partial interest of any nature is insurable; Cf. s. 8, English Act.

(3) the insurer under a contract of marine insurance has an insurable interest in his risk; Cf. s. 9(1), part, English Act.

(4) the lender of money on bottomry or respondentia has an insurable interest in respect of the loan; Cf. s. 10, English Act.

(5) the master or any member of the crew of a ship has an insurable interest in respect of his wages; Cf. s. 11, English Act.

(6) in the case of advance freight, the person advancing the freight has an insurable interest, in so far as such freight is not repayable in case of loss; Cf. s. 12, English Act.

(7) the assured has an insurable interest in the charges of any insurance which he may effect. Cf. s. 13, English Act.

8. (1) Where the subject-matter insured is mortgaged, the mortgagor has an insurable interest in the full value thereof, and the mortgagee has an insurable interest in respect of any sum due or to become due under the mortgage. Quantum of insurable interest in certain cases. Cf. s. 14(1) and 14(3), English Act.

(2) The owner of insurable property has an insurable interest in respect of the full value thereof, notwithstanding that some third person may have agreed, or be liable, to indemnify him in case of loss.

Avoidance  
of wagering  
contracts.

Cf. s. 4,  
English Act.

9. (1) Every contract of marine insurance by way of ..... wagering is void.

(2) A contract of marine insurance is deemed to be a ..... wagering contract—

(a) where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest; or

(b) where the policy is made “interest or no interest”, or “without further proof of interest than the policy itself”, or “without benefit of salvage to the insurer”, or subject to any other like term:

Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer.

When in-  
terest must  
attach.

Cf. s. 6,  
English Act.

10. (1) The assured must be interested in the subject-matter insured at the time of the loss, though he need not be interested when the insurance is effected:

Provided that, where the subject-matter is insured “lost or not lost”, the assured may recover although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance the assured was aware of the loss and the insurer was not.

(2) Where the assured has no interest at the time of the loss, he cannot acquire interest by any act or election after he is aware of the loss.

Right of  
mortgagee,  
consignee,  
etc. to in-  
sure on be-  
half of other  
persons  
interested.

Cf. s. 14(2),  
English Act.

11. A mortgagee, consignee or any other person having an interest in the subject-matter insured may insure on behalf and for the benefit of other persons interested as well as for his own benefit.

Reinsurance.

Cf. s. 9(1),  
part and  
9(2), Eng-  
lish Act.

12. The insurer under a contract of marine insurance may reinsure in respect of *his insurable interest in his risk*, but, unless the policy otherwise provides, the original assured has no right or interest in respect of such re-insurance.

*Insurable value*

13. Subject to any express provision or valuation in the policy, the insurable value of the subject-matter insured must be ascertained as follows:—

Measure of insurable value.

*Cf. s. 16, English Act.*

(1) In insurance on ship, the insurable value is the value, at the commencement of the risk, of the ship, including her out-fit, provisions and stores for the officers and crew, money advanced for seamen's wages, and other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, plus the charges of insurance upon the whole.

The insurable value, in the case of a steamship, includes also the machinery, boilers, and coals and engine stores, if owned by the assured; *in the case of a ship driven by power other than steam, includes also the machinery, and fuels and engine stores, if owned by the assured;* and in the case of a ship engaged in a special trade, *includes also the ordinary fittings requisite for that trade.*

(2) In insurance on freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at the risk of the assured, plus the charges of insurance.

(3) In insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole.

(4) In insurance on any other subject-matter, the insurable value is the amount at the risk of the assured when the policy attaches, plus the charges of insurance.

## CHAPTER III

## DISCLOSURES AND REPRESENTATIONS

14. A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

Marine insurance to be a contract of utmost good faith.

*Cf. s. 17, English Act.*

15. (1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known to him. If the assured fails to make such disclosure the insurer may avoid the contract.

Disclosure by assured

*Cf. s. 18, English Act.*

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) In the absence of inquiry, the following circumstances need not be disclosed, namely:—

- (a) any circumstance which diminishes the risk;
  - (b) any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;
  - (c) any circumstance as to which information is waived by the insurer;
  - (d) any circumstances which it is superfluous to disclose by reason of any express or implied warranty.
- (4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.
- (5) The term "circumstance" includes any communication made to, or information received by, the assured.

Disclosure by agent effecting insurance.  
Cf. s. 19, English Act.

16. Subject to the provisions of section 15 as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer—

- (a) every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to him; and
- (b) every material circumstance which the assured is bound to disclose, unless it comes to his knowledge too late to communicate it to the agent.

Representations pending negotiation of contract.

17. (1) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.

Cf. s. 20, English Act.

(2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) A representation may be either a representation as to a matter of fact, or a *representation* as to a matter of expectation or belief.

(4) A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.

(5) A representation as to a matter of expectation or belief is true if it be made in good faith.

(6) Whether a particular representation be material or not is, in each case, a question of fact.

18. A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract, although it be unstamped.

When contract is deemed to be concluded.  
Cf. s. 21, English Act.

## CHAPTER IV THE POLICY

19. A contract of marine insurance *shall not be admitted* in evidence unless it is embodied in a marine policy in accordance with this Act. The policy may be executed and issued either at the time when the contract is concluded, or afterwards.

Contract must be embodied in a policy.  
Cf. s. 22, English Act.

20. A marine policy must specify—

(1) the name of the assured, or of some person who effects the insurance on his behalf;

What policy must specify.  
Cf. s. 23, English Act.

(2) the subject-matter insured and the risk insured against;

(3) the voyage, or period of time, or both, as the case may be, covered by the insurance;

(4) the sum or sums insured;

(5) the name or names of the *insurer* or insurers.

21. (1) A marine policy must be signed by or on behalf of the insurer.<sup>1</sup>

Signature of insurer.

(2) Where a policy is subscribed by or on behalf of two or more insurers, each subscription, unless the contrary be expressed, constitutes a distinct contract with the assured.

Cf. s. 24, English Act.

22. (1) Where the contract is to insure the subject-matter "at and from", or from one place to another or others, the policy is called a "voyage policy", and where the contract is to insure the subject-matter for a definite period of time, the policy is called a "time policy". A contract for both voyage and time may be included in the same policy.

Voyage and time policy.

Cf. s. 25, English Act.

(2) A time policy which is made for any time exceeding twelve months is invalid.<sup>2</sup>

<sup>1</sup>No proviso relating to "seal" of a corporation appears to be necessary in India. Cf. s. 46, Companies Act, 1956 (1 of 1956) which will suffice.

<sup>2</sup>The English Act contains the words "Subject to the provisions of section eleven of the Finance Act, 1901". The 1901 Act deals with continuation clause, and there is no such provision in the Indian Statute Law (Stamp Act). Hence there is no point in mentioning the Indian Stamp Act in the clause.

Designation  
of subject-  
matter.

Cf. s. 26,  
English Act.

23. (1) The subject-matter insured must be designated in a marine policy with reasonable certainty.

(2) The nature and extent of the interest of the assured in the subject-matter insured need not be specified in the policy.

(3) Where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered.

(4) In the application of this section regard shall be had to any usage regulating the designation of the subject-matter insured.

Valued  
policy.  
Cf. s. 27,  
English Act.

24. (1) A policy may be either valued or unvalued.

(2) A valued policy is a policy which specifies the agreed value of the subject-matter insured.

(3) Subject to the provisions of this Act, and in the absence of fraud, the value fixed by the policy is, as between the insurer and the assured, conclusive of the insurable value of the subject intended to be insured, whether the loss be total or partial.

(4) Unless the policy otherwise provides, the value fixed by the policy is not conclusive for the purpose of determining whether there has been a constructive total loss.

Unvalued  
policy.  
Cf. s. 28,  
English Act.

25. An unvalued policy is a policy which does not specify the value of the subject-matter insured, but, subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained, in the manner hereinbefore explained.

Floating  
policy by  
ship or  
ships.  
Cf. s. 29,  
English Act.

26. (1) A floating policy is a policy which describes the insurance in general terms, and leaves the name or names of the ship or ships and other particulars to be defined by subsequent declaration.

(2) The subsequent declaration or declarations may be made by endorsement on the policy, or in other customary manner.

(3) Unless the policy otherwise provides, the declarations must be made in the order of despatch or shipment. They must, in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated; but an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith.

(4) Unless the policy otherwise provides, where a declaration of value is not made until after notice of loss or arrival, the policy must be treated as an unvalued policy as regards the subject-matter of that declaration.

27. (1) A policy may be in the form in the Schedule. Form of and construction of terms in, policy.

(2) Subject to the provisions of this Act, and unless the context of the policy otherwise requires, the terms and expressions mentioned in the Schedule shall be construed as having the scope and meaning assigned to them in the Schedule. Cf. s. 30, English Act.

28. (1) Where an insurance is effected at a premium to be arranged, and no arrangement is made, a reasonable premium is payable. Premium to be arranged. Cf. s. 31, English Act.

(2) Where an insurance is effected on the terms that an additional premium is to be arranged, in a given event, and that event happens but no arrangement is made, then a reasonable additional premium is payable.

29. (1) Where two or more policies are effected by or on behalf of the assured on the same adventure and interest or any part thereof, and the sums insured exceed the indemnity allowed by this Act, the assured is said to be over-insured by double-insurance. Double insurance. Cf. s. 32, English Act.

(2) Where the assured is over-insured by double-insurance.—

(a) the assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he may think fit, provided that he is not entitled to receive any sum in excess of the indemnity allowed by this Act;

(b) where the policy under which the assured claims is a valued policy, the assured must give credit, as against the valuation, for any sum received by him under any other policy, without regard to the actual value of the subject-matter insured;

(c) where the policy under which the assured claims is an unvalued policy, he must give credit, as against the full insurable value, for any sum received by him under any other policy;

(d) where the assured receives any sum in excess of the indemnity allowed by this Act, he is deemed to hold such sum in trust for the insurers, according to their right of contribution among themselves.



## CHAPTER V

## THE PREMIUM

When premium payable. Cf. s. 52, English Act. 30. Unless otherwise agreed, the duty of the assured or his agent to pay the premium, and the duty of the insurer to issue the policy to the assured or his agent, are concurrent conditions, and the insurer is not bound to issue the policy until payment or tender of the premium.

Policy effected through broker. Cf. s. 53, English Act. 31. (1) Unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may be payable in respect of losses, or in respect of returnable premium.

(2) Unless otherwise agreed, the broker has, as against the assured, a lien upon the policy for the amount of the premium and his charges in respect of effecting the policy; and, where he has dealt with the person who employs him as a principal, he has also a lien on the policy in respect of any balance on any insurance account which may be due to him from such person, unless he had, when the debt was incurred, reason to believe that such person was only an agent.

Effect of receipt on policy. Cf. s. 54, English Act. 32. Where a marine policy effected on behalf of the assured by a broker acknowledges the receipt of the premium, such acknowledgment is, in the absence of fraud, conclusive as between the insurer and the assured, but not as between the insurer and the broker.

## CHAPTER VI

## WARRANTIES

Nature of warranty. Cf. s. 33 (1)(2), English Act. 33. (1) A warranty, in sections 34 to 42, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of affairs.

(2) A warranty may be express or implied.

Express warranty. Cf. s. 35, English Act. 34. (1) An express warranty may be in any form of words from which the intention to warrant is to be inferred.

(2) An express warranty must be included in, or written upon the policy, or must be contained in some document incorporated by reference into the policy.

(3) An express warranty does not exclude an implied warranty, unless it be inconsistent therewith.

35. A warranty, as defined in section 33, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

Warranty must be complied with.  
Cf. s. 33(3),  
English Act.

36. (1) Non-compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law.

When breach of warranty excused.  
Cf. s. 34,  
English Act.

(2) Where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss.

(3) A breach of warranty may be waived by the insurer.

37. (1) Where insurable property, whether ship or goods, is expressly warranted neutral, there is an implied condition that the property shall have a neutral character at the commencement of the risk, and that, so far as the assured can control the matter, its neutral character shall be preserved during the risk.

Warranty of neutrality.  
Cf. s. 36,  
English Act.

(2) Where a ship is expressly warranted "neutral", there is also an implied condition that, so far as the assured can control the matter, she shall be properly documented, that is to say, that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress, her papers, or use simulated papers. If any loss occurs through breach of this condition, the insurer may avoid the contract.

38. There is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk.

No implied warranty of nationality.  
Cf. s. 37,  
English Act.

39. Where the subject-matter insured is warranted "well" or "in good safety" on a particular day, it is sufficient if it be safe at any time during that day.

Warranty of good safety.  
Cf. s. 38,  
English Act.

40. (1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.

Warranty of seaworthiness of ship.  
Cf. s. 39,  
English Act.

(2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.

(3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires

different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.

(4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.

(5) In a time policy there is no implied warranty that a ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

No implied warranty that goods are seaworthy.

*Cf. s. 40, English Act.*

41. (1) In a policy on goods or other movable there is no implied warranty that the goods or movables are seaworthy.

(2) In a voyage policy on goods or other movable there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other movable to the destination contemplated by the policy.

Warranty of legality.

*Cf. s. 41, English Act.*

42. There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.

## CHAPTER VII

### THE VOYAGE

Implied condition as to commencement of risk.

*Cf. s. 42, English Act.*

43. (1) Where the subject-matter is insured by a voyage policy "at and from" or "from" a particular place, it is not necessary that the ship should be at that place when the contract is concluded, but there is an implied condition that the adventure shall be commenced within a reasonable time, and that if the adventure be not so commenced the insurer may avoid the contract.

(2) The implied condition may be negated by showing that the delay was caused by circumstances known to the insurer before the contract was concluded, or by showing that he waived the condition.

Alteration of port of departure.

*Cf. s. 43, English Act.*

44. Where the place of departure is specified by the policy, and the ship, instead of sailing from that place, sails from any other place, the risk does not attach.

Sailing for different destination.

*Cf. s. 44, English Act.*

45. Where the destination is specified in the policy, and the ship, instead of sailing for that destination, sails for any other destination, the risk does not attach.

46. (1) Where after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy, there is said to be a change of voyage. Change of voyage. Cf. s. 45, English Act.

(2) Unless the policy otherwise provides, where there is a change of voyage, the insurer is discharged from liability as from the time of change, that is to say, as from the time when the determination to change it is manifested; and it is immaterial that the ship may not in fact have left the course of voyage contemplated by the policy when the loss occurs.

47. (1) Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs. Deviation. Cf. s. 46, English Act.

(2) There is a deviation from the voyage contemplated by the policy—

(a) where the course of the voyage is specifically designated by the policy, and the course is departed from; or

(b) where the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from.

(3) The intention to deviate is immaterial; there must be a deviation in fact to discharge the insurer from his liability under the contract.

48. (1) Where several ports of discharge are specified by the policy, the ship may proceed to all or any of them, but, in the absence of any usage or sufficient cause to the contrary, she must proceed to them, or such of them as she goes to, in the order designated by the policy. If she does not, there is a deviation. Several ports of discharge. Cf. s. 47, English Act.

(2) Where the policy is to "ports of discharge", within a given area, which are not named, the ship must, in the absence of any usage or sufficient cause to the contrary, proceed to them, or such of them as she goes to, in their geographical order. If she does not, there is a deviation.

49. In the case of a voyage policy, the adventure insured must be prosecuted throughout its course with reasonable despatch, and if without lawful excuse it is not so prosecuted, the insurer is discharged from liability as from the time when the delay becomes unreasonable. Delay in voyage. Cf. s. 48, English Act.

50. (1) Deviation or delay in prosecuting the voyage contemplated by the policy is excused—

(a) where authorised by any special term in the policy; or Excuses for deviation or delay. Cf. s. 49, English Act.

(b) where caused by circumstances beyond the control of the master and his employer; or

(c) where reasonably necessary in order to comply with an express or implied warranty; or

(d) where reasonably necessary for the safety of the ship or subject-matter insured; or

(e) for the purpose of saving or attempting to save life or property at sea; or

(f) where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship; or

(g) where caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against.

(2) When the cause excusing the deviation or delay ceases to operate, the ship must resume her course, and prosecute her voyage, with reasonable despatch.

Effect of  
transship-  
ment, etc.  
Cf. s. 59,  
English Act.

51. Where, by a peril insured against, the voyage is interrupted at an intermediate port or place, under such circumstances as, apart from any special stipulation in the contract of affreightment, to justify the master in landing and re-shipping the goods or other movables, or in transshipping them and sending them on to their destination the liability of the insurer continues, notwithstanding the landing or transhipment.

## CHAPTER VIII

### ASSIGNMENT

Transfer of  
policy of  
marine in-  
surance.  
Cf. s. 50(1)  
and s. 50(3),  
English Act  
and s. 130-A  
Transfer of  
Property Act.

52. (1) A policy of marine insurance may be transferred by assignment unless it contains terms expressly prohibiting assignment, and may be assigned either before or after loss.

(2) A policy of marine insurance may be assigned by endorsement thereon or in any other customary manner.

Assured  
having no  
interest  
cannot  
assign.  
Cf. s. 51,  
English Act  
and s. 130-A  
Transfer of  
Property Act.

53. Where the assured has parted with or lost his interest in the subject-matter insured and has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative:

Provided that nothing in this section affects the assignment of a policy after loss.

54. Where a policy of marine insurance has been assigned so as to pass the beneficial interest *therein*, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the *suit* had been brought in the name of the person by or on behalf of whom the policy was effected.

Assignment of rights under policy of marine insurance.

*Cf.* s. 50(2), English Act, and s. 135-A(1).

55. (1) Where the assured assigns or otherwise parts with his interest in the subject-matter insured, he does not thereby transfer to the assignee his rights under the contract of insurance, unless there be an express or implied agreement with the assignee to that effect.

Transfer of Property Act. Assignment of interest.

*Cf.* s. 15, English Act.

(2) The provisions of this section do not affect a transmission of interest by operation of law.

56. Nothing in clause (e) of section 6 of the Transfer of Property Act, 1882, shall affect the provisions of this section.

Overriding effect of Chapter.

*Cf.* s. 130-A, Transfer of Property Act. 4 of 1882.

## CHAPTER IX

### LOSS AND ABANDONMENT

57. (1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.

Included and excluded losses. *Cf.* s. 55, English Act.

(2) In particular,—

(a) the insured is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew;

(b) unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against;

(c) unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils.

58. (1) A loss may be either total or partial. Any loss other than a total loss, as hereinafter defined, is a partial loss.

Partial and total loss. *Cf.* s. 56, English Act.

(2) A total loss may be either an actual total loss, or a constructive total loss.

(3) Unless a different intention appears from the terms of the policy, an insurance against total loss includes a constructive, as well as an actual, total loss.

(4) Where the assured brings a *suit* for a total loss and the evidence proves only a partial loss, he may, unless the policy otherwise provides, recover for a partial loss.

(5) Where goods reach their destination in specie, but by reason of obliteration of marks or otherwise they are incapable of identification, the loss, if any, is partial and not total.

Actual total loss.

Cf. s. 57, English Act.

59. (1) Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.

(2) In the case of an actual total loss, no notice of abandonment need be given.

Missing ship.  
Cf. s. 58, English Act.

60. Where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed.

Constructive total loss defined.

Cf. s. 60, English Act.

61. (1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

(2) In particular, there is a constructive total loss—

(i) where the assured is deprived of the possession of his ship or goods by a peril insured against, and—

(a) it is unlikely that he can recover the ship or goods, as the case may be, or

(b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or

(ii) in the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired.

In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired; or

(iii) in the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival.

62. (1) Where there is a constructive total loss, the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss. Effect of constructive total loss. Cf. s. 61, English Act.

(2) *Where the assured has elected to treat the loss as if it were an actual total loss, he shall not be required to treat it as a partial loss merely by reason of any act of the insurer done after the exercise of such election or any event that might happen subsequent to such exercise.*

63. (1) Subject to the provisions of this section, where the assured elects to abandon the subject-matter insured to the insurer, he must give notice of abandonment. If he fails to do so, the loss can only be treated as a partial loss. Notice of abandonment. Cf. s. 62, English Act.

(2) Notice of abandonment may be given in writing, or by word of mouth, or partly in writing and partly by word of mouth, and may be given in any terms which indicate the intention of the assured to abandon his insured interest in the subject-matter insured unconditionally to the insurer.

(3) Notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, but where the information is of doubtful character the assured is entitled to a reasonable time to make inquiry.

(4) Where notice of abandonment is properly given, the rights of the assured are not prejudiced by the fact that the insurer refuses to accept the abandonment.

(5) The acceptance of an abandonment may either be express or implied from the conduct of the insurer. The mere silence of the insurer after notice is not an acceptance.

(6) Where notice of abandonment is accepted, the abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice.

(7) Notice of abandonment is unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him.

(8) Notice of abandonment may be waived by the insurer.

(9) Where an insurer has re-insured his risk, no notice of abandonment need be given by him.

64. (1) Where there is a valid abandonment, the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto. Effect of abandonment. Cf. s. 63, English Act.



(2) Upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty; and, where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss.

## CHAPTER X

### PARTIAL LOSSES (INCLUDING SALVAGE AND GENERAL AVERAGE AND PARTICULAR CHARGES)

Particular  
average  
loss.  
*Cf. s. 64,*  
English Act.

65. (1) A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss.

(2) Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average.

Salvage  
charges.  
*Cf. s. 65,*  
English Act.

66. (1) Subject to any express provision in the policy, salvage charges incurred in preventing a loss by perils insured against may be recovered as a loss by those perils.

(2) "Salvage charges" means the charges recoverable under maritime law by a salvor independently of contract. They do not include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them, for the purpose of averting a peril insured against. Such expenses, where properly incurred, may be recovered as particular charges or as a general average loss, according to the circumstances under which they were incurred.

General  
average loss.  
*Cf. s. 66,*  
English Act.

67. (1) A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.

(2) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.

(3) Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested, and such contribution is called a general average contribution.

(4) Subject to any express provision in the policy, where the assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him; and, in the case of a general average sacrifice, he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute.

(5) Subject to any express provision in the policy, where the assured has paid, or is liable to pay, a general average contribution in respect of the *interest* insured, he may recover therefor from the insurer.

(6) In the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connection with the avoidance of, a peril insured against.

(7) Where ship, freight and cargo, or any two of those interests, are owned by the same assured, the liability of the insurer in respect of general average losses or contributions is to be determined as if those *interests* were owned by different persons.

## CHAPTER XI

### MEASURE OF INDEMNITY

68. (1) The sum which the assured can recover in respect of a loss on a policy by which he is insured, in the case of an unvalued policy to the full extent of the insurable value, or, in the case of a valued policy to the full extent of the value fixed by the policy, is called the measure of indemnity. Extent of liability of the insurer for loss. Cf. s. 67, English Act.

(2) Where there is a loss recoverable under the policy, the insurer, or each insurer if there be more than one, is liable for such proportion of the measure of indemnity as the amount of his subscription bears to the value fixed by the policy in the case of a valued policy, or to the insurable value in the case of an unvalued policy.

69. Subject to the provisions of this Act and to any express provision in the policy, where there is a total loss of the subject-matter insured,— Total loss. Cf. s. 68, English Act.

(1) if the policy be a valued policy, the measure of indemnity is the sum fixed by the policy;

(2) if the policy be an unvalued policy, the measure of indemnity is the insurable value of the subject-matter insured.

70. Where a ship is damaged, but is not totally lost, the measure of indemnity, subject to any express provision in the policy, is as follows:— Partial loss of ship. Cf. s. 69, English Act.

(1) Where the ship has been repaired, the assured is entitled to the reasonable cost of the repairs, less the

customary deductions, but not exceeding the sum insured, in respect of any one casualty.

(2) Where the ship has been only partially repaired, the assured is entitled to the reasonable cost of such repairs, computed as above, and also to be indemnified for the reasonable depreciation, if any, arising from the unrepaired damage, provided that the aggregate amount shall not exceed the cost of repairing the whole damage computed as above.

(3) Where the ship has not been repaired, and has not been sold in her damaged state during the risk, the assured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage, computed as above.

(4) Where the ship has not been repaired, and has been sold in her damaged state during the risk, the assured is entitled to be indemnified for the reasonable cost of repairing the damage, computed as above, but not exceeding the depreciation in value as ascertained by the sale.

Partial loss  
of freight.  
Cf. s. 70,  
English Act.

71. Subject to any express provision in the policy, where there is a partial loss of freight, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight at the risk of the assured under the policy.

Partial loss  
of goods,  
merchandise,  
etc.

Cf. s. 71,  
English Act.

72. Where there is a partial loss of goods, merchandise or other movables, the measure of indemnity, subject to any express provision in the policy, is as follows:—

(1) Where part of the goods, merchandise or other movables insured by a valued policy is totally lost, the measure of indemnity is such proportion of the sum fixed by the policy as the insurable value of the part lost bears to the insurable value of the whole, ascertained as in the case of an unvalued policy:

(2) Where part of the goods, merchandise or other movables insured by an unvalued policy is totally lost, the measure of indemnity is the insurable value of the part lost, ascertained as in the case of total loss:

(3) Where the whole or any part of the goods or merchandise insured has been delivered damaged at its destination, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the difference between the gross

sound and damaged values at the place of arrival bears to the gross sound value;

(4) "Gross value" means the wholesale price or, if there be no such price, the estimated value, with, in either case, freight, landing charges and duty paid beforehand; provided that, in the case of goods or merchandise customarily sold in bond, the bonded price is deemed to be the gross value. "Gross proceeds" means the actual price obtained at a sale where all charges on sale are paid by the sellers.

73. (1) Where different species of property are insured under a single valuation, the valuation must be apportioned over the different species in proportion to their respective insurable values, as in the case of an unvalued policy. The insured value of any part of a species is such proportion of the total insured value of the same as the insurable value of the part bears to the insurable value of the whole, ascertained in both cases as provided by this Act. Apportionment of valuation.  
Cf. s. 72,  
English Act.

(2) Where a valuation has to be apportioned, and particulars of the prime cost of each separate species, quality or description of goods cannot be ascertained, the division of the valuation may be made over the net arrived sound values of the different species, qualities or description of goods.

74. (1) Subject to any express provision in the policy, where the assured has paid, or is liable for, any general average contribution, the measure of indemnity is the full amount of such contribution, if the subject-matter liable to contribution is insured for its full contributory value; but, if such subject-matter be not insured for its full contributory value, or if only part of it be insured, the indemnity payable by the insurer must be reduced in proportion to the under-insurance, and where there has been a particular average loss which constitutes a deduction from the contributory value, and for which the insurer is liable, that amount must be deducted from the insured value in order to ascertain what the insurer is liable to contribute. General average contributions and salvaga charges.  
Cf. s. 73,  
English Act.

(2) Where the insurer is liable for salvage charges, the extent of his liability must be determined on the like principle.

75. Where the assured has effected an insurance in express terms against any liability to a third party, the measure of indemnity, subject to any express provision in the policy, is the amount paid or payable by him to such third party in respect of such liability. Liabilities to third parties.  
Cf. s. 74,  
English Act.

76. (1) Where there has been a loss in respect of any subject-matter not expressly provided for in the foregoing provisions of this Act, the measure of indemnity shall be ascertained, as nearly as may be, in accordance with those provisions, in so far as applicable to the particular case. General provisions as to measure of indemnity.  
Cf. s. 75,  
English Act.

(2) Nothing in the provisions of this Act relating to the measure of indemnity shall affect the rules relating to double insurance, or prohibit the insurer from disproving interest wholly or in part, or from showing that at the time of the loss the whole or any part of the subject-matter insured was not at risk under the policy.

Particular  
average  
warranties.  
Cf. s. 76,  
English Act.

77. (1) Where the subject-matter insured is warranted free from particular average, the assured cannot recover for a loss of part, other than a loss incurred by a general average sacrifice, unless the contract contained in the policy be apportionable; but, if the contract be apportionable, the assured may recover for a total loss of any apportionable part.

(2) Where the subject-matter insured is warranted free from particular average, either wholly or under a certain percentage, the insurer is nevertheless liable for salvage charges, and for particular charges and other expenses properly incurred pursuant to the provisions of the suing and labouring clause in order to avert a loss insured against.

(3) Unless the policy otherwise provides, where the subject-matter insured is warranted free from particular average under a specified percentage, a general average loss cannot be added to a particular average loss to make up the specified percentage.

(4) For the purpose of ascertaining whether the specified percentage has been reached, regard shall be had only to the actual loss suffered by the subject-matter insured. Particular charges and the expenses of and incidental to ascertaining and proving the loss must be excluded.

Successive  
losses.  
Cf. s. 77,  
English Act.

78. (1) Unless the policy otherwise provides, and subject to the provisions of this Act, the insurer is liable for successive losses, even though the total amount of such losses may exceed the sum insured.

(2) Where, under the same policy, a partial loss, which has not been repaired or otherwise made good, is followed by a total loss, the assured can only recover in respect of the total loss:

Provided that nothing in this section shall affect the liability of the insurer under the suing and labouring clause.

Suing and  
labouring  
clause.  
Cf. s. 78,  
English Act.

79. (1) Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss or that the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage.

(2) General average losses and contributions and salvage charges, as defined by this Act, are not recoverable under the suing and labouring clause.

(3) Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause.

(4) It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss.

## CHAPTER XII

### RIGHTS OF INSURER ON PAYMENT

80. (1) Where the insurer pays for a total loss, either of the whole, or, in the case of goods, of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss.

Right of subrogation.  
Cf. s. 79, English Act, and s. 135-A Transfer of Property Act.

(2) Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment of the loss.

(3) *Nothing in clause (e) of section 6 of the Transfer of Property Act, 1882, shall affect the provisions of this section.* 4 of 1882.

81. (1) Where the assured is over-insured by double-insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract.

Right of contribution.  
Cf. s. 80, English Act.

(2) If any insurer pays more than his proportion of the loss, he is entitled to maintain a suit for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt.

82. Where the assured is insured for an amount less than the insurable value, or, in the case of a valued policy, for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance.

Effect of under-insurance.  
Cf. s. 81, English Act.

CHAPTER XIII  
RETURN OF PREMIUM

**Enforcement of return.** 83. Where the premium, or a proportionate part thereof, is, by this Act, declared to be returnable,—  
*Cf. s. 82, English Act.*

(a) if already paid, it may be recovered by the assured from the insurer; and

(b) if unpaid, it may be retained by the assured or his agent.

**Return by agreement.** 84. Where the policy contains a stipulation for the return of the premium, or a proportionate part thereof, on the happening of a certain event, and that event happens, the premium, or, as the case may be, the proportionate part thereof, is thereupon returnable to the assured.  
*Cf. s. 83, English Act.*

**Return for failure of consideration.** 85. (1) Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured.  
*Cf. s. 84, English Act.*

(2) Where the consideration for the payment of the premium is apportionable and there is a total failure of any apportionable part of the consideration, a proportionate part of the premium is, under the like conditions, thereupon returnable to the assured.

(3) In particular,—

(a) where the policy is void, or is avoided by the insurer as from the commencement of the risk, the premium is returnable provided that there has been no fraud or illegality on the part of the assured; but if the risk is not apportionable, and has once attached, the premium is not returnable;

(b) where the subject-matter insured, or part thereof, has never been imperilled, the premium, or as the case may be, a proportionate part thereof, is returnable;

Provided that, where the subject-matter has been insured "lost or not lost" and has arrived in safety at the time when the contract is concluded, the premium is not returnable unless, at such time, the insurer knew of the safe arrival;

(c) where the assured has no insurable interest throughout the currency of the risk, the premium is returnable, provided that this rule does not apply to a policy effected by way of . . . . .wagering;

(d) where the assured has a defeasible interest which is terminated during the currency of the risk, the premium is not returnable;

(e) where the assured has over-insured under an unvalued policy, a proportionate part of the premium is returnable;

(f) subject to the foregoing provisions, where the assured has over-insured by double insurance, a proportionate part of the several premiums is returnable:

Provided that, if the policies are effected at different times, and any earlier policy has at any time borne the entire risk, or if a claim has been paid on the policy in respect of the full sum insured thereby, no premium is returnable in respect of that policy, and when the double insurance is effected knowingly by the assured no premium is returnable.

## CHAPTER XIV

### MUTUAL INSURANCE

86. (1) Where two or more persons mutually agree to insure each other against marine losses, there is said to be a mutual insurance. Modification of Act in case of mutual insurance.

(2) The provisions of this Act relating to the premium do not apply to mutual insurance; but a guarantee, or such other arrangement as may be agreed upon, may be substituted for the premium. Cf. s. 85, English Act.

(3) The provisions of this Act, in so far as they may be modified by the agreement of the parties, may in the case of mutual insurance be modified by the terms of the policies issued by the association, or by the rules and regulations of the association.

(4) Subject to the exceptions mentioned in this section, the provisions of this Act apply to a mutual insurance.

## CHAPTER XV

### MISCELLANEOUS

87. Where a contract of marine insurance is in good faith effected by one person on behalf of another, the person on whose behalf it is effected may ratify the contract even after he is aware of a loss. Ratification by assured. Cf. s. 26, English Act.

88. (1) Where any right, duty or liability would arise under a contract of marine insurance by implication of law, it may be negatived or varied by express agreement, or by usage, if the usage be such as to bind both parties to the contract. Implied obligations varied by agreement or usage. Cf. s. 87, English Act.

(2) The provisions of this section extend to any right, duty or liability declared by this Act which may be lawfully modified by agreement.



Reasonable time, etc., a question of fact.

*Cf.* s. 88, English Act

Slip as evidence.

*Cf.* s. 89, English Act.

Savings.

88. Where by this Act any reference is made to reasonable time, reasonable premium or reasonable diligence, the question what is reasonable is a question of fact.

89. Where there is a duly stamped policy, reference may be made, as heretofore, to the slip or covering note in any legal proceeding.

90. The rules of . . . . . law, including the law merchant, which applied to contracts of marine insurance immediately before the commencement of this Act, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance.

## THE SCHEDULE

(See section 27)

### FORM OF POLICY

Lloyd's S.G. Policy.

BE IT KNOWN THAT . . . . . as well in . . . . . own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all doth make assurance and cause . . . . . and them, and every of them, to be insured, lost or not lost, and from . . . . . Upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the . . . . . whereof is master,<sup>1</sup> for this present voyage, . . . . . or whosoever else shall go for master in the said ship, or by whatsoever other name or names the said ship, or the master thereof, is or shall be named or called; beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship, . . . . . upon the said ship, &c. . . . . and so shall continue and endure, during her abode there, upon the said ship, &c. And further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, shall be arrived at . . . . . upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety; and upon the goods and merchandises, until the same be there discharged and safely landed. And it shall be lawful for the said ship, &c., in this voyage, to proceed and sail to and touch and stay at any ports or places whatsoever . . . . . without prejudice to this insurance. The said ship &c., goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy, are and shall be valued at . . . . . Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage: they are of the seas, men of war, fire, enemeis, pirates, rovers, thieves,

<sup>1</sup>The words "under God" have been omitted as unnecessary.

jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detentions of all kings, princess, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment or damage of the said goods and merchandises, and ship &c., or any part thereof.

And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assigns, to sue, labour, and travel for, in and about the defence, safeguards, and recovery of the said goods and merchandises, and ship, Etc., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured. Sue and labour clause.

And it is especially declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver, or acceptance of abandonment. Waiver clause.

\* \* \* \*

And so we, the assurers, are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured, at and after the rate of .....

IN WITNESS whereof we, the assurers, have subscribed our names and sums assured in .....

N.B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded—Memorandum.  
sugar, tobacco, hemp, flax, hides and skins are warranted free from average, under five per cent., and all other goods, also the ship and freight, are warranted free from average, under three per cent., unless general, or the ship be stranded.

#### RULES FOR CONSTRUCTION OF POLICY

*The following are the rules referred to by this Act for the construction of a policy in the above or other like form, where the context does not otherwise require:—*

1. Where the subject-matter is insured "Lost or not lost", and the loss has occurred before the contract is concluded, the risk attaches unless, at such time, the assured was aware of the loss, and the insurer was not. Lost or not lost.
2. Where the subject-matter is insured "from" a particular place, the risk does not attach until the ship starts on the voyage insured. From.

- At and from Ship.** 3. (a) Where a ship is insured "at and from" a particular place, and she is at that place in good safety when the contract is concluded, the risk attaches immediately.
- (b) If she be not at that place when the contract is concluded, the risk attaches as soon as she arrives there in good safety, and, unless the policy otherwise provides, it is immaterial that she is covered by another policy for a specified time after arrival.
- Freight.** (c) Where chartered freight is insured "at and from" a particular place, and the ship is at that place in good safety when the contract is concluded, the risk attaches immediately. If she be not there when the contract is concluded, the risk attaches as soon as she arrives there in good safety.
- (d) Where freight, other than chartered freight, is payable without special conditions and is insured "at and from" a particular place, the risk attaches *pro rata* as the goods or merchandise are shipped:
- Provided that if there be cargo in readiness which belongs to the shipowner, or which some other person has contracted with him to ship, the risk attaches as soon as the ship is ready to receive such cargo.
- From the loading thereof.** 4. Where goods or other movables are insured "from the loading thereof", the risk does not attach until such goods or movables are actually on board, and the insurer is not liable for them while in transit from the shore to the ship.
- Safely landed.** 5. Where the risk on goods or other movables continues until they are "safely landed", they must be landed in the customary manner and within a reasonable time after arrival at the port of discharge, and if they are not so landed the risk ceases.
- Touch and stay.** 6. In the absence of any further license or usage, the liberty to touch and stay "at any port or place whatsoever" does not authorise the ship to depart from the course of her voyage from the port of departure to the port of destination.
- Perils of the seas.** 7. The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves.
- Pirates.** 8. The term "pirates" includes passengers who mutiny and rioters who attack the ship from the shore.
- Thieves.** 9. The term "thieves" does not cover clandestine theft or theft committed by any one of the ship's company, whether crew or passengers.
- Restraints of princes.** 10. The term "arrests, &c., of kings, princes and people" refers to political or executive acts, and does not include a loss caused by riot or by ordinary judicial process.

11. The term "barratry" includes every wrongful act willfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer. **Barratry.**

12. The term "all other perils" includes only perils similar in kind to the perils specifically mentioned in the policy. **All other perils.**

13. The term "average unless general" means a partial loss of the subject-matter insured other than a general average loss, and does not include "particular charges". **Average unless general.**

14. Where the ship has stranded, the insurer is liable for the excepted losses, although the loss is not attributable to the stranding, provided that when the stranding takes place the risk has attached and, if the policy be on goods, that the damaged goods are on board. **Stranded.**

15. The term "ship" includes the hull, materials and outfit, stores and provisions for the officers and crew, and, in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade, and also, in the case of a steamship, the machinery, boilers, and coals and engine stores, if owned by the assured, and also, in the case of a ship driven by power other than steam, the machinery and fuels and engine stores, if owned by the assured. **Ship.**

16. The term "freight" includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or movables, as well as freight payable by a third party, but does not include passage money. **Freight.**

17. The term "goods" means goods in the nature of merchandise, and does not include personal effects or provisions and stores for use on board. **Goods.**

In the absence of any usage to the contrary, deck cargo and living animals must be insured specifically, and not under the general denomination of goods.

*Explanation of abbreviations used in Notes on Clauses :*

Chalmers . . . .	Chalmers, Marine Insurance, 1956 edition
Dover . . . . or Dover, Handbook.	Dover, Handbook to Marine Insurance, Fifth edition (1957)
Keate . . . .	Keate, Guide to Marine Insurance Twelfth Edition (1958).

## APPENDIX II

### NOTES ON CLAUSES

#### *Existing law in India*

Some provisions relevant to the law of marine insurance are at present contained in—

(a) section 2 (20), s.7,<sup>1</sup> and s.66 of the Indian Stamp Act, 1899 and Article 47, sub-divisions A and E, of the Schedule to the Act;

(b) the Insurance Act, 1938 (4 of 1938), which mainly deals with the working of insurance concerns and not with *contracts* of insurance;

(c) the Merchant Shipping Act, 1958 (44 of 1958), sections 345-352 and sections 402-404;

(d) section 130, Exception and s.130-A and s.135-A, Transfer of Property Act, 1882;

(e) The Commercial Documents Evidence Act, 1939 (30 of 1939), entry 9 in the Schedule, Part I.

#### *Existing law in England*

The existing law in England is contained in—

(i) the Marine Insurance Act, 1906 (6 Edw. VIII, ch. 41);

(ii) The Marine Insurance (Gambling Policies) Act, 1909 (9 Edw. VII, ch. 12);

(iii) The Law Reform (Contributory Negligence) Act, 1945 (8 & 9 Geo. VI, ch. 28);

(iv) The Stamp Act, 1891 (54 & 55 Vict. ch. 39), sections 92, 93, 94, 95 and 97;

(v) The Finance Act, 1901 (1 Edw. VII, ch. 7), section 11;

(vi) The Revenue Act, 1903 (3 Edw. VII, ch. 46), section 8;

(vii) The Finance Act, 1912, section 8;

(viii) The Finance Act, 1920 (10 and 11, Geo. 5, ch. 18)—section 41, for scales of stamp duties.

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<sup>1</sup> Construed in *Tricombji Dambji & Co. vs. Virji Kanji*, (1922) A.I.R. 1923 Bom. 142 (question being whether the document was a "policy" or a mere letter of cover to issue a policy and *Surajmal vs. Triton Insurance Co.*, 1925) I.L.R. 52 Cal. 408 — A.I.R. 1925 P.C. 83, 84 (The provisions of section 7 are mandatory).

*Clause 1.—Legislative competence*

The subject-matter of the Bill falls in the Union list (see entries 25 and 47). No extent clause is considered necessary, as the nature of the subject matter is such that it has to do more with international transactions and extra-territorial events than with internal ones. Compare the Merchant Shipping Act, 1958.

*Clause 2.—“Contract of marine insurance”*

This is a formal definition, inserted to make the definition clause exhaustive. Departure from the English Act.

*Clause 2.—“freight”*

Needs no comments, except that the word “other” has been inserted before “movables” though not found in section 90, English Act. Compare section 3(2) (a) of the English Act. Departure from the English Act.

*Clause 2.—“insurable property”*

This has been put in the definition clause, for comprehensiveness.

*Clause 2.—“marine adventure” and “marine perils”*

These have been put in the definition clause, to make the clause exhaustive—

(i) The importance of the concept of marine adventure lies in the fact that under section 5(1) of the English Act, only a person who is interested in the marine adventure has an insurable interest. A person who has no interest in the *ship* may still be able to insure the *venture* under which the ship is engaged. For example, a person may be interested financially in laying an Atlantic cable through a ship, though he has no interest in the ship or cable as such. Marine adventure.

(ii) There may be cases where the cargo is not damaged, but the adventure is frustrated by the operation of the insured perils. This is usually discussed in the text-books under the doctrine of “frustration”. Frustration.

(iii) The adventure must be lawful. As to the warranty of legality, see section 41 of the English Act.

(iv) Section 506 of the (English) Merchant Shipping Act, 1894, provides that an insurance effected against the happening, without the owner’s actual fault or privity, of those ship-owner’s liabilities in respect of which a statutory limit of liability is effective, that is to say, roughly, liability for collisions etc. shall not, by reason

of the nature of the risk insured, be invalid. This section has been referred to in s.7 of the Indian Stamp Act also.<sup>1-3-4</sup>

(v) As to "perils of the sea", see the "*Inchmaree case*".<sup>4</sup>

The *Inchmaree case*.

Lord Herschell in the *Inchmaree Case*<sup>5</sup> attempted to put forth a number of definitions of the expression "perils of the sea". He thought that the following definition given by Lord Ellenbrough was right:—

"All cases of marine damage of the like kind with those specially enumerated, and occasioned by similar causes".

The following definition given by Lopes L.J. in *Pandorf v. Hamilton*,<sup>6</sup> was considered "very good":—

"In a sea-worthy ship damage to goods by the action of the sea during transit, not attributable to the fault of any body, is a damage from a peril of the sea."

Lord Herschell himself thought that the following definition might suffice:—

"All perils, losses and misfortunes of a marine character or of a character incident to a ship as such".

The case, of course, arose before the Act. The facts were, that a steamer was insured by a policy in the ordinary form on the ship and her machinery including the donkey engine. For the purposes of navigation, the donkey engine was being used for pumping water into the boilers, when, owing to a valve being closed which ought to have been kept open, water was forced into and split the air-chamber of the donkey pump. The closing of the valve was either accidental or due to the negligence of an engineer, and was not due to ordinary wear and tear. It was held by the House of Lords, reversing the decision of the Court of Appeal, that the injury was

<sup>1</sup>Construed in *A Reference* (1903) I.L.R. 30 Cal. 565.

<sup>2</sup>See also s. 352, Merchant Shipping Act, 1958.

<sup>3</sup>See note at the end entitled "Suggestion regarding s. 7 (1) of the Indian Stamp Act" for a detailed discussion.

<sup>4</sup>*The Thames and Mersey Marine Insurance Co. v. Hamilton, Fraser and Co.*, (1887) A.C. 484, particularly Lord Halsbury at p. 490, 491.

<sup>5</sup>*Thames and Mersey Marine Insurance Co., v. Hamilton, Fraser and Co.* (1887) A.C. 484, 492, 493.

<sup>6</sup>16 Q.B.D. 629, 633.

not covered by the policy, because such a loss did not fall under "perils of the seas", nor under the general words "all other perils, losses and misfortunes that have or shall come to the detriment or damage" (of the subject-matter of the insurance). A long line of cases was cited by the House of Lords (Lord Halsbury, Lord Bramwell, Lord Herschell and Lord Macnaghten) to show that the general words had to be limited to the perils etc. similar in nature to those specifically enumerated.

It was as a result of this decision that the "Inchmaree Clause" came to be inserted in marine policies for adding certain perils which are not, strictly speaking, marine perils. The clause<sup>1</sup> specially covers loss or damage caused by—

Inchmaree Clause, or Additional Perils Clause.

- (i) accident in loading, discharging or shifting cargo or fuel;
- (ii) explosions on ship on board or elsewhere;
- (iii) bursting of boilers, breakage of shafts or latent defect in the machinery or hull;
- (iv) contact with aircraft (This was added in 1938);
- (v) negligence of masters, officers, crew or pilots:

Provided such loss or damage has not resulted from want of due diligence by the assured, owners or managers.

Masters, officers, crew or pilots are not to be considered as part owners within the meaning of this clause, even if they hold shares in the vessel.

In a recent case<sup>2</sup> the Madras High Court held, that where goods are shipped on a particular ship and are not delivered at the destination, the insurance company is liable under the expression "misfortune" used in the policy even if the cause of the loss is not known. In that case four drums of English sodium sulphite and five drums of sodium hydro-sulphite were shipped from Bombay to Madras. When the ship arrived at Madras and the clearing agents of the plaintiff (purchasers) went to clear the goods, the goods had not been landed. The shipping company was informed and made search to find out if the goods had been over-carried to Colombo or Calcutta; but nothing tangible resulted from the search. The plaintiffs claimed for the value of the goods (about Rs. 2,000) against the shipping company as well as against the insurers. The defence

Meaning of "misfortune".  
Indian Case.

<sup>1</sup>The clause will be found reproduced in *Dover, Handbook*, page 247 and page 182.

<sup>2</sup>*Home Insurance Company Limited v. Ram Nosh*, (1955) A.I.R. 1955 Mad. 602 (Basheer Ahmed Sayeed, J.).



of the shipping company, namely, that they were exempted from a certain clause excluding liability, was negatived. The defence of the insurers, that the goods were excluded by the "Free from particular average" clause was negatived, because the clause was not relevant to a case of total loss. The further defence of the insurers, that they were not liable unless the peril, etc was of the particular type referred to in the insurance policy, was negatived in these words: "The term 'misfortunes' after having mentioned all the other perils of the sea, is found in the relevant clause in the insurance policy. It is difficult to say how the loss of the total goods on board the ship when once it is proved that they were put on board could be excluded from the scope and meaning of the word 'misfortune'. I do not think the rule of *ejusdem generis* will apply in the present case when almost all the kinds of the perils of the sea have been exhaustively given in the list and when in addition to that the word 'misfortune' is also included ..... Merchants insure the goods with the company to cover any risk in their being safely landed in the port of destination, and if the goods are not so landed, when once they were put on board and if the loss of the goods has arisen, then certainly it is a loss and a misfortune which is covered by the terms of the policy".

In the absence of a statutory provision, the Court had interpreted the word "misfortune" according to its ordinary meaning on general principles. But under English Law the general words come to bear a restricted connotation—see Rule 12 of the Rules of Construction in the Schedule to the English Act.<sup>1</sup> The position under this Bill would be the same as in England.

Clause 2.—"Moveables"

Needs no comments.

Clause 2.—"policy"

Needs no comments.

Clause 2.—"ship"

Departure  
from the  
English  
Act—definition  
of  
"ship".

A definition of "ship" as including sailing vessels has been added in order to cover ships propelled by oars.<sup>2</sup>

Clause 2.—"suit"

Departure  
from Eng-  
lish Act.—  
use of word  
"suit".

This follows section 90 of the English Act. The definition of "action" has been replaced by the definition of "suit"; the English Act uses the word "action" in the substantive sections—section 50(2), section 56(4) and section 80. In

<sup>1</sup>For a discussion on rule 12, see Dover, page 246.

<sup>2</sup>For reasons see the body of the Report. para. 5.

India, however, the word "suit" is used and has, therefore, been defined here.

### Clause 3

This defines a "contract of marine insurance". The following points may be noted:—

1. This definition stresses three elements, viz. (i) indemnity, (ii) marine losses, and (iii) insurance "in the manner and to the extent agreed".

The rule that insurance is a contract of indemnity can be said to be an unbroken thread which runs through the Marine Insurance Act from the beginning to the end. This rule has its positive as well as negative aspects. By its *positive* aspect, what is meant is that the assured must be enabled to recover the full loss (within the limits of the policy). Section 77(1) of the English Act, under which successive losses can be recovered, is an illustration of the positive aspect; because, under that section, the insurer is liable for successive losses even though the total amount of such losses may exceed the sum insured. Section 84 of the English Act, enabling the assured to return of the premium, also provides illustration of the indemnity aspect; see section 84(3)(b), (c), (d), etc.

The *negative* aspect of the indemnity is amply illustrated by section 33 (over-insurance), section 61 (effect of constructive total loss), section 67 (measure of indemnity), and section 77(2) (merger of partial loss in a subsequent total loss); and section 79 (subrogation) and section 80 (contribution between co-insurers) emphasise the indemnity element *beyond any doubt*.

2. An elaborate definition of "marine aviation and transit insurance" has been given in the (English) Assurance Companies Act, 1946.<sup>1</sup> It need not be considered, since it does not define marine insurance as a concept, but merely enumerates the various properties which can be insured. The definition of "marine insurance business" in section 2(13A), (Indian) Insurance Act, 1938 (4 of 1938) also merely enumerates the various interests which can be insured.

3. The definition in the (English) Stamp Act,<sup>2</sup> 1891, section 92 and the Indian Stamp Act, 1899, section 2(20) may be compared. The definition of "policy of sea-insurance" in section 2(20) of the Indian Stamp Act is wide enough to cover any insurance made upon any ship or vessel, whether for marine or inland navigation. The definition adopted in the clause under discussion

<sup>1</sup>9 and 10 Geo. 6 ch. 28.

<sup>2</sup>54 and 55 Vict. c. 39.

(which follows section 1 of the English Act) stresses the concept of "marine losses" and "marine adventures"; but, as expressly provided elsewhere,<sup>1</sup> a contract of marine insurance may by express terms or usage be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage. Since the primary concept of marine insurance is concerned with the sea and not with inland waters, it has been considered desirable not to refer expressly to inland navigation in the definition. There is nothing to prevent an insurer from utilizing the marine insurance policy for inland navigation. In fact, the form is capable of being used with suitable modifications for insurance in respect of other modes of transport. A statute on marine insurance, however, must primarily confine itself to marine adventures

4. The word "assured" has been used in the definition, instead of "insured". The expressions do not appear to have different meanings.

5. "Premium" has not been mentioned in the definition, because of section 85 of the English Act relating to mutual insurance, whereby a guarantee etc. may be substituted for premium.

Departure  
from the  
English Act.

In the opening portion the word "agreement" has been used instead of "contract" appearing in the English Act. The Indian Contract Act makes a distinction between the two. It is only an agreement which is enforceable by law which is a contract. In consonance with that distinction, "agreement" is preferable.

#### Clause 4

General.

This deals with "mixed sea and land" risks.

"Warehouse  
to ware-  
house".

The words "by its express terms" enable the contract to extend to non-marine risks also, what is called,—“warehouse to warehouse” coverage, that is to say, the goods are covered as soon as they leave the warehouse even though the journey from warehouse to the sea is on land.

Craft Clause  
(for crafts,  
lighters,  
etc.).

In cargo policies, a *craft clause* is inserted to bring in craft risk at the port of *shipment*. (Customary craft risk at the port of *discharge* would, it has been stated,<sup>2</sup> be covered by the printed form). The Institute form of the clause is as follows:—

"Including transit by craft, raft, and/or lighter to and from the vessel. Each craft, raft and/or lighter to be deemed a separate insurance. The assured are not to be prejudiced by any agreement exempting lighter-man from liability".

<sup>1</sup>See clause 4.

<sup>2</sup>Dover, Handbook, page 224.

The last sentence of the clause is explained<sup>1</sup> in this manner. Lighter-men are common carriers. They are, however, not covered by the Carriage of Goods by Sea Act. Hence they often insert a clause *relieving* themselves from the bulk of the common law liabilities. These clauses reduce the effect of the principle of subrogation,<sup>2</sup> and consequently prejudice the rights of the insurers. Marine underwriters, however, accept the position as it is, and undertake not to plead against the insurer that they have surrendered certain rights which would otherwise have accrued to the insurers.

Sub-Section (2) covers construction, building, and launching risks. There is one anomaly, namely, that while such insurances are treated as analogous to marine insurances, the policies themselves are stamped with the duty applicable to non-marine insurances. In England, builders' risks policies are under the Revenue Act, 1903 (3 Edw. VII, Ch. 46), section 8, to be stamped as if for a "voyage" and not deemed to be policies for time, *even if made for more than a year*. Other policies on adventures "analogous to marine adventures" would presumably be liable to stamp only as non-marine policies.<sup>3</sup> In India there is no express provision, but entry 47 of the First Schedule to the Indian Stamp Act, sub-division A relating to "sea insurance", would not in terms apply and a *fixed* duty under sub-division B would be leviable, because such policies would not be "sea-insurance policies" as defined in s. 2(20) of the Indian Stamp Act. Anomaly in Stamp Act.

The position is anomalous. It is desirable that at least a provision requiring all policies governed by sub-section (2) to be stamped as voyage policies, be inserted in the Indian Stamp Act.

#### Clause 5

Needs no comments.<sup>4</sup>

#### Clause 6

[Section 5 of the English Act].

(i) The importance of the concept of insurable interest lies in this, that under section 4(2)(a) of the English Act, if the assured has no insurable interest, the contract is deemed to be a wagering contract.

(ii) The amplification in sub-section (2) is said to be based on the observations of Lawrence J.<sup>5</sup> to the effect that

<sup>1</sup>Cf. Dover, page 298.

<sup>2</sup>Cf. Dover, page 224.

<sup>3</sup>See section 79, English Act Clause 80.

<sup>4</sup>As to "marine adventure" and "marine perils", see notes to clause 2.

<sup>5</sup>*Lucena v. Crawford*, (1906) 2 Kos & P.N.R. 269, 302.

"Interest does not necessarily imply a right to the whole or part of the thing, nor necessarily or exclusively that which may be the subject of privation ..... 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".

(iii) Shareholders of a shipping company cannot be said to have an interest, because what section 5(2) requires is, not merely that a person may benefit by the safe arrival of the property, but also that he must stand in legal or equitable relation to the adventure, etc.<sup>1</sup>

Mortgagees, charterers and bailees of ships stand in such relationship. Similarly, trustees and beneficiaries in England.

(iv) What is required is an interest in the adventure and not in the ship. A person interested financially in the laying of cables in the Atlantic has no interest in the ship, but has an interest in the adventure.

(v) An agent to whom goods are despatched for sale on commission can also insure, because loss of the goods would mean loss of the commission to him.<sup>2</sup> Similarly, a person who is at a risk in the freight has an interest in the freight.

(vi) As to the time when the interest must exist, see section 6 of the English Act. As to contingent interests, etc., see section 7 and as to partial interest, see section 8 of the Act.

Departure  
from the  
English Act.

The English Act contains the words "or equitable". These have been omitted, because it would not be accurate to speak in India of "equitable" relations. An Explanation has, however, been added to deal specifically with the case of a beneficiary's interest in trust-property.

*Clause 7(1)*

General.

This provides that "defeasible" or a "contingent" interest is insurable.

Buyer's  
interest.

It also gives a good example of a defeasible interest. While a buyer of goods to whom the goods are shipped acquires the property as soon as the goods are shipped on board,<sup>3</sup> he has still a right to reject the goods if they are not of merchantable quality. His interest is, therefore, "defeasible", because it is liable to be defeated during the currency of the agreement by the option of rejection.

<sup>1</sup>Lord Chorley, *Shipping Law*, 3rd edition, page 275.

<sup>2</sup>*Thames and Mersey Marine Insurance Co. v. Gunford Shipping Co.*, (1911) A.C. 529.

<sup>3</sup>See section 23 of the Indian Sale of Goods Act, 1930 and section 18 (5) of the (English) Sale of Goods Act, 1893.

Nevertheless, his "defeasible" interest is insurable. The significance of section 7 of the English Act lies in making that clear.

Another example is a buyer's interest which is liable to be defeated by stoppage in transit. See sections 44—46 of the (English) Sale of Goods Act, 1893 and sections 50—52 of the Indian Sale of Goods Act, 1930.

Where the buyer has a defeasible interest, the seller has a corresponding contingent interest, because, unless the buyer exercises the option to reject the goods, that is to say, unless that "contingency" occurs, the seller's interest does not arise.

It has been stated<sup>1</sup> that what is called "duty contingency" or "freight contingency" are also relevant to the subject of section 7. Such insurances are necessary where, during the course of transit, either the freight or the duty becomes payable so that the value of the subject-matter is likely to be enhanced by the amount of such freight or duty. In such cases, in the event of a total loss the risk is excluded, so that if there should be no arrival of ships the duty or freight payable at destination would not be collected.

#### Clause 7(2)

A partial interest can be insured. It has been held<sup>2</sup> that even an undivided interest in a parcel of goods is insurable, so that the exact extent of the interest need not be determinable. It has also been held<sup>3</sup> that a shareholder in a cable company can effect insurance on an adventure for laying cable from Ireland to New Foundland. But this decision has been criticised.<sup>4</sup>

This deals with re-insurance.

General.

At one time, re-insurance was illegal as a wager policy.<sup>5</sup>

Re-insurance, it is said, need not be described as such on the face of the policy.

There are two kinds of re-insurance:—

Kinds of re-insurance.

(a) where the re-insurer accepts liability to pay only the amount which is lawfully payable by the original insurer to the assured, and

<sup>1</sup>Dover, page 308 and page 185.

<sup>2</sup>*Inglis v. Stock*, (1885) 100 App. Cas. 263, 274.

<sup>3</sup>*Wilson v. Jones*, (1867) L.R. 2 Ex. 139.

<sup>4</sup>Lord Chorley, Shipping Law, 3 edition, page 277, and Arnould, Marine Insurance, para. 249.

<sup>5</sup>Marine Insurance Act, 1745 (19 Geo. 2 Ch. 37, section 4) referred to in Shipping Law by Lord Chorley, 3rd edition, page 295.

(b) where the re-insurer binds himself expressly to accept any terms between the parties to the original insurance.

"To pay as may be paid."

Ordinarily, the contract "to pay as may be paid thereon", though apparently not falling under the first category, has been held to be so falling.

#### Clause 7(4)

"Bottomry" or "respondentia".

This relates to insurance by a person who lends money on what is called "bottomry" or "respondentia". Bottomry is an advance of money, in time of dire necessity, to a master of a vessel for the purpose of the adventure and arranged after all other means of obtaining funds have failed. The money is advanced on the security of the ship or of the ship with the freight or cargo added. Bottomry bonds are taxable.<sup>1</sup> Respondentia is a similar advance, but is secured on cargo only. Such a loan is repayable even though the ship is lost, provided the cargo is saved. Such bonds are also taxable.<sup>2</sup>

Bottomry bonds rank in priority in reverse, that is, the later ones rank before the earlier ones. "Loan" presumably includes interest on the loan, also, under this section.

Query.

One query which arises is whether after the execution of the bond, the owner of the subject-matter loses his insurable interest to the extent of the loan. In other words, whether, after such bond, the owner's interest is limited to the difference between the amount of the advance and the value of the subject-matter. In modern times, because of the development of communications the occasions for the bottomry bonds are rare. Hence, the provision need not be elaborated.

#### Clause 7(5)

This deals with insurance of wages. Prior to the Act, sailors were not allowed to insure their wages, for reasons of public policy. In fact, at one time, they were not entitled to wages unless the freight was actually earned. This was intended to secure that they would fully exert their efforts in time of peril.<sup>3</sup>

#### Clause 7(6)

This deals with advance freights.

As to the meaning of the word "freight", see the rules of construction in the First Schedule to the English Act, rule 16. Out of the various forms of freight,<sup>4</sup> only advance

<sup>1</sup>See the Indian Stamp Act, 1899, First Schedule, Entry No. 16.

<sup>2</sup>See the Indian Stamp Act, 1899, First Schedule, Entry No. 56.

<sup>3</sup>See Dover, page 311.

<sup>4</sup>See Dover, pages 231-233.

freight has been mentioned in this section. Normally, freight does not become payable until the completion of the voyage, and it is until then at the ship-owner's risk. But where the advance freight is stipulated for and the understanding is that the freight will not be refunded if the voyage fails, the shipper of the goods is the proper person to insure. Presumably, it is for this reason that only advance freight has been dealt with specifically in this section. The other kinds of freight would be taken care of by the ship-owner himself and not by the owner of the cargo.

#### Clause 7(7)

The reason for allowing the assured to insure the insurance charges themselves is as follows:—

Insurance of  
Insurance  
charges.

Premiums of insurance in marine insurance are high. The ship-owner, while calculating his freight, usually includes insurance premium as an element in costing. He expects that his vessel will be utilised throughout the year, and assumes that the profits of the ship for the year will cover the cost of insurance. In other words, he takes it that the ship will earn freight enough to cover the corresponding proportion of the annual premium. If this expectation is not realised, he stands to suffer, and it is *that risk* which is allowed to be insured under the section.

By the "disbursement warranty", the ship-owner is permitted to insure upto the total amount of the actual annual premiums. But the amount is reduced monthly by a proportionate amount of the whole. As to return of premium, see section 83 of the Act.

Disburse-  
ment  
Warranty—  
pro rata  
diminishing.  
Return of  
premium.

Where the policy is for a period of twelve months, the sum insured on account of premium usually represents the full twelve months' amount. Where, however, the policy is for a shorter period, the insurance of the ship is often arranged on "full premium if lost" terms.<sup>7</sup> Here, if there is a total loss by an insured peril or otherwise, the balance of the twelve months' premium is payable to the insurers. In these circumstances, the total loss increases the premium liability of the ship-owner, and he has an insurable interest in the full *twelve months'* premium, subject to *pro rata* diminishing as above.

" Full  
premium if  
lost".

Non-return of premium—that is, in cases where a "On arrival of premium is negated by "on arrival" provisions,—is also insurable.<sup>8</sup> The return clause provides

<sup>1</sup>See Dover, pages 152, 154, 158 Keate, page 102.

<sup>2</sup>Dover, page 313.

<sup>3</sup>Cf. Section 83 of the English Act, clause 84.



for a *pro rata* monthly return of each commenced month if the policy is cancelled by agreement. The return, is, however, "on arrival", in the sense that the refund of premium is not claimable unless the period covered by the policy runs off without total loss. In such cases, the premium is not returnable—and that risk of non-return itself can be insured.

#### Clause 8

**General.**

This deals with the quantum of interest, in certain cases.

**Mortgagors  
Query.**

Sub-section (1) which allows insurance both by the mortgagors and by the mortgagee, it has been said, is theoretically open to objection. The interests of the two are distinct and, therefore, contribution on the basis of double insurance (section 32 of the English Act) may not apply. Both can recover simultaneously. Further, the mortgagee (if the vessel is lost) can still realise his debt as an unsecured debt.

That is, however, only in theory, because in practice it is the mortgagor who effects insurance both on his own account and on behalf of the mortgagee, and then charges the policy in favour of the mortgagee.

**Subrogation.**

Where both the interests are insured by separate policies, subrogation would apply (section 79 of the English Act). Presumably, the mortgagor also would have the benefit of subrogation. As regards sub-section (3), an illustration of a case where it could apply would be where the ship-owner has accepted a certain liability in respect of the cargo, but the owner of the cargo can nevertheless effect insurance against the very loss for which he can hold the ship-owner liable. [Of course, in such cases, the principle of subrogation (section 79 of the English Act) will apply]. What the section stresses is, that the fact that the owner of the cargo has a right of action against a third party (shipowner) does not prevent the cargo-owner from insuring the cargo.

**Indemnity  
by third  
party.**

#### Clause 9

**General.**

(i) This section makes wagering agreements void for the purposes of civil law. Compare section 30 of the Indian Contract Act. See also the recommendation made in the report on the Contract Act<sup>1</sup> to extend section 30 to collateral agreements. In England, the Marine Insurance (Gambling Policies) Act, 1909 imposes criminal liabilities in certain cases, with the result that even collateral transactions would be avoided and the broker effecting such policies cannot claim commission.

<sup>1</sup>13th Report of the Law Commission (Contract Act), page 28, paragraph 60.

For an example of a wager, see the case of *Gedge v. Royal Exchange Assurance*.<sup>1</sup>

(ii) The result of this section is that what is called the "Policy of interest" clause or "full interest admitted" clause cannot create any rights.<sup>2</sup> "Policy proof of interest."

(iii) For a definition of "insurable interest" see section 5 of the English Act.

(iv) The provisions of the Marine insurance (Gambling Policies) Act, 1909 of England, relating to insurable interest are worded slightly differently. Section 1(1) (a) speaks of "bona fide interest direct or indirect, either in the safe arrival of the ship.....or in the safety or preservation of the subject-matter insured or a bona fide expectation of acquiring such interest." English Act of 1909.

(v) Section 1(1) (b) of the 1909 Act provides that an *employee of the ship owner* effecting a contract of marine insurance in the terms "interest or no interest" or "without further proof of interest than the policy itself" or "without benefit of the salvage to the insurers" or similar terms is deemed to have entered into a gambling contract and is punishable. Similarly, section 1(5) of the 1909 Act raises a rebuttable presumption that contracts in such terms entered into by *non-employees* are deemed to be gambling contracts unless the contrary is proved. "No interest" policies.

(It appears that so far no prosecution has been instituted under this Act.)

The word "gaming" has been omitted, as the practice in India is to speak of wagering agreements only. Departure from the English Act.

[Section 4, Proviso, English Act].

The proviso says that if there is no possibility of salvage, a policy may be effected without benefit of salvage. An example of such a contract would be an insurance on increased value of cargo. Where cargo is the subject of increase in value (because of rise in market values during the transit), the original policy no longer affords sufficient cover, and it becomes necessary to take out an increased value policy. Under such a policy, the insured amount will increase if the prices rise, that is to say, as soon as the further insurance to cover the increase in value is taken by the owner of the goods, the owner of the goods can recover under the increased value policy the same percentage of loss as he may recover under the original insurance. The policy would be without benefit of salvage to the "increased Without benefit of salvage.

<sup>1</sup>(1900) 2 Q.B. 214 (Arrival of ship at Yokohama was the subject-matter of the insurance, but assured had no interest in such arrival and hence could not recover).

<sup>2</sup>See discussion below, under s. 4, proviso, English Act.

value" underwriter; the increased value underwriters would not be allowed to participate in the salvage, and the original insurers, on payment of the amount undertaken by them, would be entitled to the whole salvage. See the undermentioned case<sup>1</sup>, where general average contributions recovered by the original insurer were held to be exclusively theirs. The topic is linked up with that of subrogation (see section 79 of the English Act). If there is a possibility of salvage, such policies would be wagering policies and void at law though honoured in practice.

Increase in  
value  
policies.  
P.P.I.  
Policy proof  
of interest  
or F.I.A.

These have been already discussed.<sup>2</sup> It has been the practice for the insurer and the assured to bargain on the basis that the assured shall not be required to produce proof of his interest in the subject-matter beyond production of the policy. These are called P.P.I. (policy proof of interest). Similar are F.I.A. policies ("Full interest in the assured"). Underwriters are bound on such policies only in honour; in the eye of the law, they are wagers. It has been pointed out<sup>3</sup>, that in section 4(2) (b) of the English Act, the word "deemed" raises a conclusive presumption. "Deemed" does not mean that the contract is *prima facie* deemed to be a gambling and wagering contract, or that the inference may be rebutted by showing that the insurer had, or expected to acquire, an insurable interest.

#### Clause 10

Interest at  
the time of  
loss.

(i) The effect of section 6(1) is that an expectancy is insurable. The reason for this relaxation can be found in the exigencies of business. Modern business practice, it is stated, necessitates the taking out of insurance long before the goods become the property of the assured, and hence section 6(1) is complied with if the assured has an interest at the time of the loss. This concession saves the time which would otherwise lapse between the acquisition of interest and the taking out of the policy. For example, carriers of goods may take out policies "as interest may appear". At the time of the insurance they may be carrying no goods, but the moment the goods are loaded, the policy comes into play. Similarly, a purchaser of a cargo of wheat may, under the agreement to sell, undertake the risk when the wheat is loaded on board. Now, the loading may take some days. As soon as such parcel of wheat is loaded, the risk passes to him, but not before. The law, however, enables him to insure the whole cargo so that he need not take insurance every time when a parcel is loaded.

"as interest  
may appear".

<sup>1</sup>*Boag v. Standard Marine Insurance Co. Ltd.*, (1936) 2 K.B. 121, 127 affirmed in (1937) 2 K.B. 113 = (1937) 1 A.E.R. 714 C.A.

<sup>2</sup>See above "without benefit of salvage".

<sup>3</sup>*Cheshire and Co. v. Vaughan Brothers*, (1920) 3 K.B. 240, 254, Scrutton L.J.

(ii) It must, however, be noted that he cannot acquire <sup>Interest</sup> an interest after a loss has occurred.<sup>1</sup> <sub>after loss.</sub>

(iii) The proviso to section 6(1) makes a special provision whereby interest can be acquired even after the loss, <sup>Lost or</sup> provided that the assured had, at the time of effecting the insurance, no knowledge of the loss. See also rule 1 of the First Schedule to the English Act, as to "lost or not lost". <sub>not lost.</sub>

(iv) One result of the rule that there must be interest at the time of loss is, that if the ship-owner insures a ship for a certain period and sells the ship before that period expires, he cannot recover.

#### Clause 11

Needs no comments.

#### Clause 12

Needs no comments. The subject of re-insurance has been dealt with separately.<sup>2</sup>

#### Clause 13

This deals with the measure of insurable value. As to <sup>General</sup> valuations, see also sections 27—29 of the English Act.

The words "subject to any express provision or valuation" imply that the rules given in section may be applied (generally) *only* in respect of unvalued policies.

Policies of marine insurance are usually "valued", <sup>Valued</sup> because after the destruction of ship proof of value will be <sub>policies.</sub> difficult and expensive. Usually, therefore, an agreed figure is inserted in the contract and the policy is called a "valued policy".<sup>3</sup>

In the case of goods or freight, it is not so difficult to <sup>Unvalued</sup> prove the value, and both valued and unvalued policies are <sub>policies.</sub> common.

In a sense, a "valued policy" is not strictly one of indemnity, because the value of the ship is fixed artificially and the figures put by the parties may sometimes be above the market value. Gross over-valuation may be evidence of bad faith,<sup>4</sup> but otherwise the valuation is conclusive between the insurer and the assured, and enables the total loss to be speedily settled and partial loss to be easily adjusted. (The valuation is, of course, conclusive, even

<sup>1</sup>Except as provided by section 6 (1), proviso, English Act,=Clause 10 (1) proviso.

<sup>2</sup>See notes to clause 7(3).

<sup>3</sup>See also notes on section 27 (2) of the English Act,—clause 24(2).

<sup>4</sup>*Thames and Mersey Marine Insurance Co., v. Gunford Shipping Co.*, (1911) A.C. 529.

between the parties, for the purpose of the *insurance* only and not for any other purpose). Moreover, under section 27(4) of the English Act, the valuation can be re-opened in the case of a constructive total loss.

"Open" policies.

Unvalued policies were previously called "open" policies, because the assured had the opportunity of proving the value. The expression "unvalued", policy is, however, the correct expression (see section 28 of the English Act), and the expression "open policy" should really be used for what are called "floating policies." Large shippers of small parcels of goods do not find it convenient to take out a policy on each shipment, but insure all their shipments during a certain period. The policy is for a round sum and every shipment reduces the insurer's liability. These are called "floating policies".<sup>1</sup>

Floating policies.

Departure from the English Act.

The English Act provides that insurable value in the case of a steamship includes also the machinery etc. if owned by the assured. The case of a ship driven by power other than steam is not covered. Since ships are sometimes propelled by other power also, it is desirable to cover their cases, and the necessary change has accordingly been made.<sup>2,3</sup>

#### Clause 14

General.

This provides that a contract of marine insurance is one of utmost good faith. In fact, all insurance contracts are contracts of utmost good faith. Bad faith does not render the contract void, but only voidable. A person about to make out a policy must therefore—

Duty of assured.

- (i) make no active misrepresentation, and
- (ii) disclose every material circumstance as defined in s. 18(2) of the English Act.

#### Clause 15

Time of disclosure.

The disclosure must be made before the contract is made, under s. 18(1); as to the time when the contract is deemed to be effected, see s. 21 of the English Act.

What should be disclosed.

S. 18(1) imposes a duty to disclose not only facts actually known, but also facts which, the section says, "ought to be known" by the assured. S. 18(3) gives a list of circumstances which need *not* be disclosed. Thus, if petrol is a usual cargo from America to France, that fact need not be disclosed.<sup>4</sup>

<sup>1</sup>See also section 29 of the English Act, clause 26, and notes thereto.

<sup>2</sup>*Cf.* The First Schedule, rule 15 of the English Act, and the change proposed therein.

<sup>3</sup>For a detailed discussion see the body of the Report, para. 6.

<sup>4</sup>*Mann, etc. & Co. v. General Marine Underwriters Ltd.*, (1922) 2 K.B. 300.

### Clause 15

It may be mentioned here that the fact that another insurer had refused to insure the cargo or ship previously is not a material fact in marine insurance.<sup>1</sup> Further, opinions need not be disclosed. Thus, the original insurer coming to the conclusion that he has insured a bad risk and getting it re-insured at a higher premium is not guilty of bad faith.<sup>2</sup>

It has been suggested<sup>3</sup> that in s. 18(2), to make it more complete, the words "or in fixing the line which he will accept" should be added, because it is a well-established principle of underwriting to accept a smaller line on speculative business than on risks the past experience with which has been relatively favourable. It appears, however, unnecessary to make any such change. The section is comprehensive for all practical purposes.

Suggestion to add reference about "line" Rejected.

Lastly, as regards s. 18(3) (d), relating to circumstances covered by a warranty, it may be noted that if a warranty is broken, the insurance is nevertheless valid upto the time of the breach of the warranty, while in case of departure from good faith it is not so.

Warranties.

### Clause 16

This deals with disclosures by an agent effecting insurance. The importance of this clause lies in the fact that most of the contracts of marine insurance are placed through brokers. The broker is the agent of the assured and not of the insurer. If the broker himself is guilty of non-disclosure or misrepresentation and the assured is innocent, the contract is still voidable. (Of course, in such cases, the assured can sue the broker for negligence).

### Clause 17

This deals with representations made pending negotiation of the contract.

General.

As regards sub-section (2), the comments on another section<sup>4</sup> of the English Act may also be seen for adding the words "the line he will accept".

Suggestion.

Representations as to future may cause some difficulty. For example, a representation that a ship is to sail on a particular date is representation on a matter of fact, and if the ship is lost on some other date the insurer may avoid

Representations as to future.

<sup>1</sup>*Glasgow Assurance Corporation v. Symondson* (1911), 16 *Commercials Cases*, 109, 119 = 104 L.T. 254 = 27 T.L.R. 245, quoted in *Shipping Law* by Lord Chorley, 3rd edition, page 288.

<sup>2</sup>*Glasgow Assurance Corporation's Case*, already cited.

<sup>3</sup>*Dover*, page 322.

<sup>4</sup>See notes to section 18 of the English Act—clause 15.

the contract.<sup>1</sup> But a representation in the form that "it is intended that the ship will sail 'on a certain date' would not affect the contract if it is a mere matter of expectation".

### Clause 18

**General.** This deals with the time when the contract is deemed to be concluded.

Virtually, this section defines the meaning of "acceptance". The contract is concluded when the 'slip' is signed, whether the policy be then issued or not.

**Slip.** A slip (according to the English practice) is a piece of paper on which the broker writes down the name of the ship, the proposed voyage, the sum assured, etc. The slip is taken to the underwriting room of Lloyd's. There he approaches the underwriters and tries to "place" portions of the sum with them. The first underwriter may underwrite for say, one thousand pounds and the next for ten thousand pounds and so on. Each underwriter initials the slip, and writes down the amount to which he will be liable. Until, however, the policy is issued, the slip binds the underwriter only in honour, because of section 95 of the English Stamp Act, 1891 and section 22 of the (English) Marine Insurance Act.

**Unenforceable contracts.** Until the policy is issued, the contract is, presumably, "unenforceable".

**Open slip.** Sometimes a merchant has knowledge in general of shipments but does not know the precise details. In such cases, the risk is submitted to the insurer by 'open slip'. It is made out to cover the amount adequate to meet the circumstances, and expressed by the words "steamer. . . . and/or the steamer approved or held covered". When the details become known, these will be incorporated in the "closing instructions".<sup>2</sup>

**Fleet slips.** "Fleet" slips are those by which the whole of the vessels of one fleet are covered by means of one slip.

**Open cover.** In modern times, instead of insuring individual shipments as isolated transactions, "open covers" are used. These may be in respect of a limited period or a permanent "open" cover,—"open" until terminated by cancellation. The open cover would effect insurance on "conveyances and parcel post and air and steamer" or in other suitable terms.

<sup>1</sup>*Anderson v. Thornton*, (1853) 8 Exch. 425=20 L.T.O.S. 250, cited in *Dover*, page 328.

<sup>2</sup>For "closing instructions", see below.

Though they serve similar purpose as "floating policies"<sup>1</sup> open covers are not the same as floating policies, because—

(i) the open cover is merely an honourable undertaking to issue policies within its terms and has no greater significance than that of a slip;<sup>2</sup>

"A floating policy is an enforceable contract of marine insurance; an open cover is not";<sup>3</sup>

(ii) the amount for which cover is made is generally the maximum amount contemplated by any one sailing, and that amount is always open during the currency of the cover irrespective of how many "declarations" are made;

(iii) premiums are paid as policies are issued and not in one lump sum.

When the broker has completed the risk, he forwards to his client (the assured) a cover note giving the details of the insurance. Most brokers use printed forms with spaces in which the details are inserted. The cover note can, therefore, be described as a communication by the broker to the assured informing the latter that in accordance with his instructions "cover" against the specified risk has been effected with a specified insurer, and also intimating that the policy is in preparation and would be forwarded in due course. Cover note.

Where the original instructions of the assured to his broker were provisional, the broker by his cover note requests the assured to forward closing instructions as soon as possible. Closing instructions.

A "closing" slip or "forward" slip is prepared by the broker, who enters therein at length the definite particulars of the insurance and attaching thereto any special clauses to be inserted in the policy. It is from this slip that the marine insurance company prepares the policy. The system is not much in vogue now. Closing slip or Forward slip.

#### Clause 19

This embodies the general principle that a contract of marine insurance must be embodied in a marine policy. General.

It may be noted that section 93 of the Stamp Act, 1891 (English) and section 7 of the Indian Stamp Act, 1899, are also relevant on the subject. Both of them provide that Stamp Act.

<sup>1</sup>As to "floating policies", see s. 29, English Act—clause 26.

<sup>2</sup>Keate, page 18.

<sup>3</sup>Dover, Analysis of Marine Insurance Clauses 1960 Edn. page 163.



a contract of sea insurance (with a minor exception)<sup>1</sup> shall not be "valid" unless the same is "expressed" in a policy of sea insurance. While section 22 of the Marine Insurance Act speaks of the contract being "inadmissible in evidence", the Stamp Act speaks of its not being valid. Thus the provisions of the Stamp Act are more stringent.

Suggestion regarding stamp.

It may also be added here that there are certain provisions in the English Stamp Law, namely, section 11 of the Finance Act, 1901, (regarding policies with a continuation clause), section 8 of the Revenue Act, 1903 (for builders' etc. risks) and section 8 of the Finance Act, 1912 (for increase in premium), which are relevant and important on the subject to stamp in marine insurance. The necessity of making similar provisions in the Indian Stamp Law may have to be considered.<sup>2</sup>

### *Departure from the English Act*

Departure from English Act—"Subject to" the provisions of any statute "omitted".

The significance of the words "subject to" in the English Act is that the provisions regarding stamping are also to be complied with.<sup>3</sup> It appears, however, unnecessary to make this clarification. The result would be the same even without those words. Hence they have not been used.

"In accordance with this Act."

These words refer to detailed provisions in sections 23, 24, 25, 26, 27, 28 and 29 in the English Act.

"May be executed".

Execution of policy simultaneously with the conclusion of the contract is not frequent, because usually the contract is concluded by the "slip" (see section 21 of the English Act) while the policy takes some time. The word "may" is permissive only.

Conflict between policy and slip.

See, on this subject, discussion in the usual textbooks.<sup>4</sup>

### *Clause 20*

This requires that the marine policy must specify certain particulars. The name of the ship or the losses covered (precise specifications) are not, required to be entered.

Stamp Act.

It may be noted that section 93(3) of the (English) Stamp Act, 1891 and section 7(3) of the Indian Stamp Act, 1899, provide that no sea policy shall be valid unless it specified the particular risk or venture or the time for

<sup>1</sup>As to the exception, see note at the end entitled, "Suggestion regarding section 7 of the Indian Stamp Act" etc.

<sup>2</sup>See also notes on section 25, English Act—clause 22. The provisions are discussed in Dover, Handbook, pp. 133—135, and Keate, pp. 99—101.

<sup>3</sup>Cf. Chalmers, p. 34, footnote 5.

<sup>4</sup>See, for example, Dover, Handbook, p. 332.

which it is made, the names of the subscribers or underwriters and the amount or amounts insured. Thus, the provisions of the Stamp Law and the section under discussion overlap. Section 7(3) of the Indian Stamp Act should therefore be deleted, after this Bill is passed.

#### Clause 21

This lays down who should sign a marine policy. Exe- General. cution by the assured is not necessary.

Sub-section (2) is intended to deal with the cases where more than one company subscribe to policies on the same form. In England, the policies of Lloyd and those issued by the Institute of London Underwriters' Policy Signing Office (on "Companies Combined Form") would be covered by this sub-section. The liability would ordinarily, under the sub-section, be several and not joint.

It appears, however, that in England for stamp purposes the whole policy is treated as one contract.<sup>1</sup>

#### Clause 22

This deals with the topic of "voyage" and "time" General. policies. Time policies cover the subject-matter of the insurance for a period of time. Voyage policies insure the subject-matter from one place to another or others.

The section requires that a definite period of time Time should be mentioned. policies.

Under section 7(2) of the Indian Stamp Act, 1899, and Stamp Act— section 93(2) of the (English) Stamp Act, 1891, a policy of marine insurance cannot be made for any time exceeding twelve months. The object behind this stringent provision was to ensure a regular revenue from the marine insurance business. Section 25(2) of the (English) Marine Insurance Act also makes the same provision in substance, and says that a time policy for more than twelve months is invalid. Section 7(2) of the Stamp Act should be omitted on the passing of this Bill to prevent overlapping with the clause under discussion. suggested omission of sec. 7 (2).

In actual practice, in England, this restriction regarding time was found to cause difficulty, particularly in cases where the vessel had some casualty or encountered heavy weather. In such cases, it was difficult to arrive at the actual date of the loss, that is, whether the date fell within the time or outside it. To meet such difficulties, a "continuation clause" was usually attached to a policy as an honour agreement. Section 11 of the (English) Finance Act, 1901 afforded statutory recognition to the practice of attaching the continuation clause. That section provides that a marine insurance policy for a time may contain a Continuation clause—suggestion regarding addition in Stamp Act.

<sup>1</sup>Dover, page 334.

continuation clause and shall not be invalid merely on the ground that by the continuation clause it becomes available for a period of more than twelve months. The standard form taken by the continuation clause is as follows<sup>1</sup>:—

“Should the vessel at the expiration of this policy be at sea or in distress at a port of refuge or of call, the interest hereby insured shall, provided previous notice be given to the underwriters, be held covered at a *pro-rata* monthly premium to her port of destination.”

(There are minor provisions in this section regarding continuation clause, which need not be considered here).

The necessity of making a similar provision in our Stamp Law may be considered,<sup>2</sup> if section 7(2) is retained.

Voyage  
policies.

“Voyage” policies expressly describe the voyage covered. One of several voyages may be covered in such policies. Questions of deviation from the voyage, change of voyage and different voyage arise in such policies; but they need not be considered here.<sup>3</sup>

Combined  
policies.

Very often, voyage policies also contain an element of time. Section 7(4) of the (Indian) Stamp Act, 1899, and section 94 of the (English) Stamp Act, 1891, contain provisions regarding the charging of stamp duties on combined policies. So long as the voyage policy merely provides that the insurance continues to attach until the expiry of 24 hours after the ship has arrived in good safety at the destination, it is still a voyage policy, since this is the usual form of the clause. Even if the period after arrival at the destination is extended up to 30 days, the stamp duty is single. Sometimes a combined voyage and time policy may cause difficulty. For example in an English case<sup>4</sup> a ship was insured “at and from the port of Pomaron to New Castle and for 15 days whilst there after arrival”. The vessel arrived at the destination and discharged the cargo. But before the 15 days expired, a new cargo was being loaded for a new outward voyage. Then the ship was damaged. The contention of the insurers was, that the 15 days mentioned in the policy were intended only as a maximum period for the discharge of the cargo (meaning, in effect, that the policy was a voyage policy, and once the voyage was over, the policy ceased). The

<sup>1</sup>See Dover, page 133.

<sup>2</sup>See also notes to section 22, English Act—clause 19.

<sup>3</sup>For deviations etc. see sections 43 to 45 of the English Act,—clauses 44 to 46.

<sup>4</sup>*Gambles v. Ocean Marine Insurance Co. of Bombay*, (1876) 1 K.B. 141.

Court, however, held that even after the expiry of the first voyage, the policy continued as a time policy for the 15 days in question, and the insurers were liable for any loss or damage occurring during those 15 days. In effect, therefore, the policy was held not to be a time policy with reference to a voyage, but a voyage policy initially with an independent time policy.

#### Clause 23

This provides that the subject-matter must be designated with reasonable certainty. The "subject-matter" is not the same thing as the "interest of the assured", as is made clear by sub-section (2). Further, regard must be had to usage as is made clear by sub-section (4). Thus, "cargo" would not include live animals and "goods" would not include passengers' luggage.

#### Clause 24

This deals with the topic of valued and unvalued General policies.

Valued policies are invariably used on insurance of ships because, after destruction, it is difficult to prove the value of the ships. In the case of goods or freight, both valued and unvalued policies are used.<sup>1</sup>

Sub-section (3) provides that "subject to the provisions of the Act" and in the absence of fraud, the value fixed by the policies as between the insurer and the assured is conclusive. Reference may be made to section 27(4), section 29(4) and similar provisions which have a bearing on the subject. Statement of valuation to be conclusive.

The assured is at liberty to fix his values as he chooses, if they are acceptable to the underwriter. Once the value is fixed, it governs the measure of indemnity.<sup>2</sup> Even if there is a decline in the actual value after the policy is effected and before the risk arises, the assured can claim on the basis of the value. Conversely even if there is a rise in the actual value, the assured cannot claim any thing more than the value. In this respect, the strict doctrine of indemnity has been departed from, to meet practical necessities. Arbitrary valuation.

The assured is estopped from saying that the value is more than that stated in the policy. Thus, in an English case,<sup>3</sup> where a ship worth £9,000 was valued at £6,000 Estoppel.

<sup>1</sup>See also notes to section 16, English Act—clause 13.

<sup>2</sup>See section 67 of the English Act—clause 68.

<sup>3</sup>*North of England Iron Steamship Association v. Armstrong* (1876) L.R. 5 Q.B. 244.

and after £ 6,000 had been paid for a total loss, the ship-owner recovered £ 5,000 from the guilty vessel (which had caused the collision that led to the loss), it was held that the ship-owner could claim no part of this £ 5,000 and the whole sum should go to the insurer.<sup>1</sup> The reason was, that the owner was by his under-valuation estopped from denying the real value.

Increased value policies—Re-opening clause.

“Increased value policies”, that is to say, policies taken out to cover an increase in the market value of the subject-matter insured,<sup>2</sup> sometimes present difficulties, particularly when the original amount is insured with one insurer and only the increased value is insured with another insurer. The difficulties arise when both the insurers claim “subrogation”.<sup>3</sup>

Very often, in such cases a clause is inserted in the original policies to the effect that the agreed value of the subject-matter is to be re-opened if policies are effected on the increased value. In other words, if the assured places an additional insurance on the cargo insured, the value of the cargo shall (in the event of loss or claim) be deemed to be increased to the total amount insured at the time of loss or accident. It is unnecessary to consider the effect of such clauses.<sup>4-5</sup>

Determination of constructive total loss.

In determining whether there has been a constructive total loss or not,<sup>6</sup> section 27(4) of the English Act provides that the value fixed by the policy is not conclusive. As was observed in an English case,<sup>7</sup> the question of total loss is to be determined just as if there was no policy at all. It is section 60(1) of the English Act which section 27(4) has in mind. Taking the facts in *Irving v. Manning*,<sup>7</sup> if a ship is valued at £ 17,500 and insured for £ 3,000, and if the ship is damaged and repairs are estimated to cost £ 10,500 but the value of the ship when repaired would be only £ 9,000, the question is, whether the expenditure is such as would “exceed its value” within the meaning of section 60(1) of the English Act if the expenditure is

<sup>1</sup>Under the doctrine of subrogation,—see section 79 of the English Act—clause 80.

<sup>2</sup>See notes under section 4, English Act—clause 9.

<sup>3</sup>See Lord Chorley, *Shipping Law*, 3rd edition, page 284, for a full discussion.

<sup>4</sup>For a fuller treatment, see *Dover*, pages 303 and 338.

<sup>5</sup>See also, as to the effect of such clause, observations in *Boag v. Standard Marine Insurance Co.*, (1937), 1 All. E.R. 714, 719, C.A., per Lord Wright, M.R.

<sup>6</sup>For the meaning of ‘constructive total loss’, see section 60 of the English Act clause 61.

<sup>7</sup>*Irving v. Manning*, (1847), 1 H.L.C. 287.

incurred. In this case, the expenditure—£ 10,500—would not exceed its “value”—if the value of £ 17,500 stated in the policy is taken as the real value. But if the value of the ship when repaired—£ 9,000—is to be taken into account, the expenditure would obviously exceed the value and the case is one of constructive total loss. The effect of section 27(4) is that in such case the value stated in the policy—£ 17,500—is not taken as conclusive, and the case can be regarded as one of constructive total loss.

Where the ship is insured under more than one policy, some difficulties arise as follows:— Several policies.

(i) If the values in all the policies tally, it is obvious that the assured cannot recover more than the agreed value, because the contract is one of indemnity.

(ii) Where the values do not tally, but the total of the sums assured under each policy does not exceed the agreed value, there are no serious difficulties because the case is not one of over-insurance.<sup>1</sup> The only point to be noted in such cases is, that it would be in the interest of the assured to claim first under that policy in which a lower value has been agreed. If, for example, a ship is insured for £ 500 and valued at £ 700 under one policy and insured for £ 600 and valued at £ 1,200 on another policy, and the insured chooses to recover first under the £ 1,200 policy, and recovers £ 600, if again he claims from the insurer for the policy of £ 700, all that he can recover is £ 100 (700 minus 600) on the principle that insurance is indemnity only. In other words, the assured is entitled upto the difference between the amount already obtained and the value inserted in the policy.<sup>2</sup>

(iii) Where, however, the assured takes out several policies and their combined value exceeds the value of the subject-matter insured, it is a clear case of over-insurance by double-insurance.<sup>3</sup> In such case (provided the policies are claimed in the correct order), the assured—can recover upto the higher value, but no more.

(iv) As regards contribution between the insurers themselves, section 80 of the English Act will govern the matter in all such cases.

There can be two values fixed in the policy—e.g. Dual Valuation Clause. one for total loss purposes and other for other purposes. An example of this is the “Dual Valuation Clause”. This is not, however, much in vogue now.<sup>4</sup>

<sup>1</sup>As to double-insurance, see section 32 of the English Act—clause 90.

<sup>2</sup>*Bruce v. Jones*, (1863) 32 L.J. Ex. 132-1 H.L.C. 769 ; 7 L.T. 748.

<sup>3</sup>See section 32 of the English Act—clause 29 and notes thereto.

<sup>4</sup>See Keate, page 103, and *Dover*, page—160-161.

*Clause 25*

**General.** This deals with unvalued policies and leaves the insurable value to be subsequently ascertained. The words "in the manner hereinbefore specified" refer obviously to section 16 of the English Act. If the sum so ascertained exceeds the sum insured, there is under-insurance. If it is less than the sum insured, there is over-insurance which leads to a rateable return of the premium in respect of the amount of the over-insurance [see section 84(3)(e) of the English Act]. Even in the case of unvalued policies, the assured has to give credit for sums received under any other policy, as provided by section 32(2)(c) of the English Act.

*Clause 26*

**'Floating Policy'.** This deals with the topic of floating policy. A floating policy is sometimes also called an "open" policy. It is usually employed by large shippers of small parcels of goods. The inconvenience felt in taking out a policy on each shipment is avoided by this policy, under which all shipments during a certain period are insured. The policy is for a round sum, and every shipment reduces the underwriter's liability under the policy. Usually, the insured is supplied with a book of "declaration forms" on which he can "declare" the shipments as and when they are made. The declarations are "taken out" in the office of the insurer after being endorsed on the policy. One more advantage of a floating policy is, that the merchant is "automatically covered immediately each shipment becomes at his risk", that is, even if an accident (of which he is unaware) has happened, he is covered, because it is not necessary that the declaration should precede the loss.<sup>1</sup>

A disadvantage of the floating policy is the necessity of stamping and the payment of the basic premium at the outset.

**Some practical questions.** It is a question whether a breach of the duty of the assured to declare the destination simply discharges the insurer from liability in respect of the shipment in question, or whether it avoids the whole policy.

Another question is whether the name of the ship by which the cargo will be carried must be disclosed. An opinion has been expressed<sup>2</sup> that there is no such duty, as the insurer must be taken to agree to shipment on any seaworthy ship. The case is different where the owner of the goods knew, for example, that the ship was to be cast away.

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<sup>1</sup>Keate, page 19, second para.

<sup>2</sup>Lord Chorley, *Shipping Law*, 3rd edition, page 302.

The declaration must be made within the agreed time. **Declaration.**  
 The policy, however, attaches immediately on loading,<sup>1</sup> so that if the goods are destroyed by fire before sailing (i.e. before the time fixed for declaration) the insurers are liable.

There is a distinction between "open cover" and "floating policy", though the two apparently resembles each other. An open cover is an agreement binding the parties in honour only. It is not a policy and does not express the sum or sums insured. It is really an intimation by the broker to the owner of the goods that an open cover has been effected. It would appear that the usual practice is to effect a 12 month open cover and take out floating policies as required.<sup>2,3</sup> **Open cover.**

Floating policies are often issued one after the other in succession. The necessity for this can be illustrated thus:— **"To follow and succeed".**

Supposing a floating policy for £ 10,000 is issued, and the "declarations" made thereunder are for goods of the value of £ 3,000 and £ 5,000 respectively, then, by the time a third shipment of goods of the value of, say, £ 5,000 is to be made, the amount covered—i.e. the balance of 2,000 (sum insured minus value of the two shipments) would be inadequate. Therefore, as regards the third shipment (of £ 5,000) £ 2,000 would be covered by the first floating policy and a second floating policy will be obtained to cover (i) a part of the third shipment and (ii) also future shipments. This second policy, thus, "follows and succeeds" the first policy. That fact is usually mentioned in the second policy.

#### Clause 27

This is a formal section merely saying that the rules of construction contained in the Schedule will apply and that a policy "may be" in the form given in the Schedule. **General.**

#### Clause 28

Sub-section (1) provides that where insurance is effected at a premium "to be arranged" and no arrangement is made, a reasonable premium is payable. At first sight, it may appear strange that such an essential factor as the amount of premium is not entered in the policy. The explanation, however, is that very often the assured may desire to obtain immediate cover but may not be in a position to give all the particulars to the insurance company. In such cases, the premium is left to be agreed subsequently. It may be noted that section 23 of the English Act, which gives a list of the particulars to be specified in a policy, does not require that the premium must be noted. **Sub-section (1) "To be arranged".**

<sup>1</sup>*Union Insurance Society of Canton v. Wills*, (1916) 1 A.C. 281, 287.

<sup>2</sup>*Dover*, Handbook page 342.

<sup>3</sup>See also notes under Section 21, English Act—clause 18.



**Sub-section (2)**  
**"Held covered".** Sub-section (2) deals with a case where an additional premium is to be arranged in a certain event and the event happens but no arrangement is made. Usually, "held covered" provisions are there in many policies. A specimen of such a clause is—"Held covered in case of any breach of warranty as to cargo, trade, locality.....date of sailing, provided notice be given immediately after receipt of advice and any additional premium required be agreed".

Another example is the Deviation Clause<sup>1</sup> included in voyage policy, the material part of which is often as follows:—

*"Held covered at a premium to be arranged in case of deviation or change of voyage."*

#### Clause 29

**General.** This deals with the important topic of double insurance.

**Meaning of double insurance.** Where the assured takes out several policies on the same subject-matter, the combined value of the several policies may or may not exceed the value of the subject-matter. If it does not exceed the value of the subject-matter, there is not much difficulty as there is no over-insurance and the section does not come into play.<sup>2</sup> Where it exceeds the value of the subject-matter, there is "over-insurance" by double insurance. In such a case, the section provides that the assured cannot receive more than the indemnity allowed by the Act. Thus, if cargo worth £ 5,000 is insured on two policies, one for £ 3,000 and the other for £ 2,500, not more than £ 5,000 is recoverable under both the policies together. The assured may—

- (i) claim first under the higher policy and then under the lower policy; or
- (ii) claim first under the lower policy and then under the higher policy; or
- (iii) claim simultaneously under both the policies.

In the situation at Nos. (i) and (ii) above, he has to give credit for what he has received from the first insurance. In the situation at No. (iii) above, he cannot recover more than the value of the subject-matter.

**Contribution and return of premium.** As to contribution, see section 80 of the English Act. As to return of premium, see section 84 of the English Act.

**Double insurance—essentials of.** Over-insurance by double insurance requires that the policies must have been effected—

- (i) on the same adventure;
- (ii) against the same risk;

<sup>1</sup>As to deviation, see section 46 of the English Act,—clause 47.

<sup>2</sup>See also section 27 of the English Act,—clause 24 and notes thereto.

(iii) in respect of the same interest in the same subject-matter; and

(iv) for sums exceeding the indemnity allowed by the law.

Therefore, there is no double insurance where different subject-matters or different interests in the same subject-matter are recovered by the policies. For example, as pointed out by Dover,<sup>1</sup> where the buyer of goods insures them and so does the seller, their interests are distinct, because the policy effected by one will not protect the interest of the other (unless so expressly provided), and there is no question of double-insurance.

Double insurance is effected advertently where, for example, the assured has some doubt as to the financial standing of the first insurer. It can arise inadvertently, for example, where the consignor of goods insures them *on behalf of* the consignee but the consignee is already covered by a floating policy. Double-insurance—advertent and in-advertent.

#### Clause 30

This deals with the time when premium is payable. The words "unless otherwise agreed" are important, because in practice policies are usually issued prior to the tender of the premium. General.

#### Clause 31

This deals with policies effected through brokers. General.

According to the general principles of the law of contracts, the insurer can directly claim his premium from the assured. But, in practice, the broker not only makes this contract with the insurer but "does so regularly for various assured who are often not even known to the underwriter",<sup>2</sup> and that is how the usage developed of making the broker directly responsible for the premium—a usage which has become law now. This system has the advantage of— Importance of broker.

(i) avoiding cash payments between the insurer and the broker; and

(ii) enabling the broker to bring pressure to bear on the assured if he fails to pay the premium.<sup>3</sup>

<sup>1</sup>Dover, page 345.

<sup>2</sup>Lord Chorley, Shipping Law, 3rd edition, page 337.

<sup>3</sup>See the lien under section 53 (2) of the English Act,—Clause 31 (2).

Liability of  
the various  
parties.

It would be seen, that the insurer, the assured and the broker—the three persons concerned—have their liabilities defined as follows in the Act:—

(i) *As between the insurer and the assured—*

As regards payment of the premium, though the assured is, speaking in the abstract, liable to the insurer (section 52), the acknowledgment of the receipt of the premium contained in the policy effected through a broker is conclusive as between the insurer and the assured (Section 54). It has been stated<sup>1</sup> that even where the policy does not acknowledge such payment, by custom every policy is regarded as a receipt for the premium and the assured cannot be sued by the insurer for the premium if the policy is effected through a broker.

As regards liability under the policy, the insurer is directly responsible to the assured for the amount payable in respect of losses. As regards return of premium also, he is directly responsible to the assured—[section 53(1)].<sup>2</sup>

(ii) *As between the broker and the assured—*

In the event of the non-payment of the premium by the assured, the broker can recover it as a commercial debt.<sup>1</sup>

As regards liability under the policy, the question does not arise. The broker does not bear the losses.

As regards return of the premium also, he is not liable.

(iii) *As between the insurer and the broker—*

As regards payment of premium, the broker is directly responsible to the insurer under section 53(1).

As regards liability under the policy, the question does not arise. The insurer is not liable to the broker.

As regards return of premium also the insurer is not liable to the broker.

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<sup>1</sup>Dover, page 377.

<sup>2</sup>As to return of premium, see sections 83 and 84 read with section 82 of the English Act,—Clauses 85 and 84 read with clause 83.

### Clause 32

This deals with the effect of receipt on the policy. Notes General  
to an earlier section may also be seen.<sup>1</sup>

The usual form of acknowledgement is: "Paid the con- Form of  
sideration due unto him (the underwriter) for this insur- acknow-  
ance by the assured at and after the rate....." The ledgement.  
reason why it is not conclusive between the assured and  
the broker is, that it is the *broker* who has an action against  
the assured, and hence an estoppel between the insurer and  
the assured cannot operate between the assured and the  
broker.<sup>2</sup>

### Clause 33

This deals with the topic of warranties. General.

In marine insurance, it has been said, the so-called Nature of  
warranties correspond to "conditions" in the Sale of Goods warranty  
Act. In the Sale of Goods Act, breach of a warranty may in marine  
give rise to damages and breach of a condition may give insurance.  
rise to a right to avoid the contract. In marine insurance,  
the breach of warranties discharges the insurer from liabi-  
lity, as provided by section 33(3) of the English Act, from  
the date of the breach. To that extent, it is more akin to a  
condition.

A representation as to fact may or may not be embodied Representation when  
as a warranty. If it is not embodied, the insurer can avoid amounts to  
the policy only if the misrepresentation is material. But if warranty.  
it is so embodied, and turns out to be false, then *whether or  
not the fact is material to the risk*, the insurer is discharged,  
as section 33(3), first sentence, last 9 words, make it clear.

No particular form of words is necessary. The word Words used  
"warranty" is not necessary, and a policy expressed to be to indicate  
on the "American Ship Mount Vernon" was held to embody warranty.  
a warranty as to nationality of a vessel.<sup>3</sup>

It is usual to have a clause to the effect that in case of a Held  
breach of warranty, the assured shall be held covered (in covered.  
spite of the breach) at a premium to be arranged.<sup>4</sup>

Where the assured fails to comply with the warranty, Time of  
the insurer is discharged only from the date of the breach, discharge.  
if the warranty is as to a future event. If, however, the  
warranty is as to the existence of a particular state of fact,  
for instance, where the special equipment of ship is  
warranted and the facts differ from the warranty, then the  
policy never attaches.<sup>5</sup>

<sup>1</sup>See notes under section 53 of the English Act,—Clause 31.

<sup>2</sup>Lord Chorley, *Law of Shipping*, 3rd edition, page 338.

<sup>3</sup>*Baring v. Claggett*, (1802), cited in *Dover*, page 348.

<sup>4</sup>As to premium "to be arranged", see section 31 of the English Act,—  
clause 28 and notes thereto.

<sup>5</sup>See Lord Chorley, *Shipping Law*, 3rd edition page 309.

Intention to break not sufficient—difference between voyage and time policy.

Mere intention to break the warranty is not sufficient, because intention is revocable. This principle leads to different results when applied to a voyage policy and when applied to a time policy. In the case of a time policy, the mere intention to proceed to a port in violation of a warranty on the subject does not amount to a breach so long as the ship has not proceeded to that port. In the case of a voyage policy, however, if from the very beginning the voyage is different from the voyage insured, the policy never attaches and no liability arises. This is so even if the goods are lost at a place which would, at all events, have been travelled through even on the authorised voyage.

“Warranted”.

It must be noted, however, that the mere use of the expression “warranted” does not give rise to a warranty. Sometimes these words are used merely to exclude a particular period or a particular place from the operation of the policy. For example, the use of the word “warranted not in the Bay of St. Lawrence during the month of April” merely means that the ship is not insured while it is in the prohibited area during April.<sup>1</sup>

#### Clause 34

This deals with express warranties. No detailed comments are needed.

Implied warranty not excluded.

The proposition embodied in section 35 (3) of the English Act, that an express warranty does not exclude an implied warranty (unless inconsistent therewith) is accepted in the United States of America also.<sup>2</sup>

#### Clause 35

Needs no comments. The effect of warranties is already discussed.<sup>3</sup>

#### Clause 36

General.

This deals with the cases where breach of a warranty is excused. The excuse may arise from the following:—

Cases where breach of warranty excused.

(a) change of circumstances;

(b) subsequent law;

(c) waiver by the insurer;

(d) provision in the policy itself to the effect that the right to avoid the policy will not be exercised by the insurer.

<sup>1</sup>See Lord Chorley, Shipping Law, 3rd edition page 314.

<sup>2</sup>See 45 Corpus Juris Secundum, Insurance, page 561, para. 652, right-hand column.

<sup>3</sup>See notes to clause 33.

As to (a), the usual example is the warranty "warranted armed" inserted during the war, which becomes obsolete if peace is declared.

As to (b), it merely embodied the general principle that if the performance of the contract becomes illegal, it need not be performed.

As to (c), see section 34(3) of the English Act.

As to (d), it is usual to insert a clause in the Disbursement warranty which ordinarily provides that "a breach of this warranty shall not afford underwriters any defence to a claim by owners, mortgagees or other parties who may have accepted this policy without notice of such breach and are not parties or privy thereto."<sup>1</sup>

#### Clause 37

This deals with the warranty of neutrality. No detailed comments are needed.

#### Clause 38

This provides that there is no implied warranty of nationality. There may, however, be an express warranty of nationality, which may be—

(a) positive, for example, when the ship is described as of a particular nation;

(b) negative, for example, "Warranted no American war time built vessel".<sup>2</sup>

#### Clause 39

This deals with the warranty of "good safety", and no detailed comments are needed.

#### Clause 40

This deals with the warranty of seaworthiness. The General section deals separately with voyage policies and time policies.

So far as voyage policies are concerned, sub-section (1) Voyage to (4) prescribe an implied warranty. The warranty is policies. absolute, that is to say, irrespective of any fault of negligence of the assured.<sup>3</sup>

<sup>1</sup>For an explanation of the Disbursements Warranty, see Dover, page 152, bottom and succeeding pages. See also notes under section 13, English Act,—clause 7(7).

<sup>2</sup>Cf. Dover, page 353.

<sup>3</sup>For the meaning of "seaworthiness", see Lord Chorley, Shipping Law, 3rd edition, page 107, and Carver, Carriage by Sea, 9th edn., p. 80 *et seq.*

Qualifications  
for the  
warranty.  
"seaworthi-  
ness  
admitted".

The warranty can be abrogated, or modified by agreement, as is usually done when the clause "seaworthiness admitted" is used. The effect of this is that the underwriter promises to pay in spite of unseaworthiness. Owners of cargo would particularly benefit by such a clause, because they have no hand in the management of the ship.<sup>1</sup>

"Time  
policies".

In a time policy, there is no implied warranty of seaworthiness; but if the ship is sent out *with the privity of the assured* in an unseaworthy state the insurer is not liable for any loss *attributable* to the unseaworthiness. There is no total *discharge* of the insurer. The reason why there is no implied warranty is,<sup>2</sup> that the ship may be at sea and the assured may not know about the seaworthiness of the ship.

Suggestion  
regarding  
risk in the  
case of time  
policy—  
rejected.

It has been suggested that section 39(2) of the English Act, (which provides that where a policy attaches while the ship is in port, there is an implied warranty that the ship is able to encounter the perils of that port) should be embodied also in section 39(5). In other words, when a time policy attaches while a ship is in port, the ship should (according to the suggestion) be fit to encounter the perils of that port. After careful consideration, the suggestion has not been accepted. A time policy is a policy for a particular *period*, and has no connection with a voyage as such (unless it is a combined policy). Its commencing point is not *necessarily* linked up with the ship's starting from a particular port. For this reason, section 39(2)—port-worthiness—would not have much significance for a time policy. Secondly, in the few cases in which the commencement of a time policy synchronises with the ship's being in a particular port, the parties can provide by an express warranty for the perils of the port.

In the United States of America, authorities differ as to whether a warranty of seaworthiness is implied in a time policy. But the weight of authority is to the effect that if the vessel is in port at the time of the commencement of the risk, there is an implied warranty that the vessel is seaworthy for the risk and will, before sailing, be made seaworthy for the voyage.<sup>3</sup>

#### Clauses 41 to 43

No detailed comments are needed.<sup>4</sup>

<sup>1</sup>See Halsbury, 3rd edn. Vol. 22, p. 26, para. 37.

<sup>2</sup>*Cf.* Lord Chorley, Shipping Law, 4th edition, page 317.

<sup>3</sup>45 Corpus Juris Secundum, Insurance, page 563, para. 652, sub-para (1).

<sup>4</sup>For a discussion of the various kinds of alterations in a voyage, see notes under section 43, English Act,—clause 42.

### Clause 44

This deals with the subject of alteration of the port of General departure.

It would be convenient here to classify the various alterations in the voyage, dealt with in the Act. An alteration in the voyage may occur by—

Various kinds of alterations in the voyage.

- |                            |   |
|----------------------------|---|
| Different voyage . . . . . | (i) change of the starting point—(section 43) ; or  |
|                            | (ii) change of the destination before commencement of the risk—(section 44) ; or  |
| Change of voyage . . . . . | (iii) "change of voyage", i.e. change of the destination after commencement of the risk—(section 45) ;                    |
| Deviation . . . . .        | (iv) deviation from the voyage—(section 46)—that is to say, departure from the contemplated <i>course</i> of the voyage ; |
| Delay . . . . .            | (v) delay in the voyage—(section 48).   |

In (i) and (ii) above, the policy never attaches. In (iii) above, the policy attaches but the insurer is discharged when a breach occurs. In (iv) above, the insurer is discharged from the time of deviation, unless the deviation is excused under section 49. In (v) above, the insurer is discharged from the time when the delay becomes unreasonable, unless the delay is excused under section 49.

As to delay in the commencement of the voyage, see an earlier section.<sup>1</sup>

A clause in a policy covering a change of voyage cannot operate to protect a different voyage. Sections 43 and 44 of the English Act deal with "different voyage". The substitution of a new voyage prevents the risk from attaching and "held covered" clause would be of no use.

### Clause 45

This deals with change of destination before commencement of the risk. The distinction between this section and section 44 is, that while this section contemplates a decision to alter the destination before the commencement of the voyage, section 44 seems to contemplate such change after commencement of the voyage.<sup>2</sup> General.

<sup>1</sup>Section 42 of the English Act,—Clause 41.

<sup>2</sup>See also notes under section 43, English Act,—clause 44.



### Clause 46

#### General.

This deals with "change of voyage". (As to the classification of the various kinds of changes in voyages, see the notes to an earlier section).<sup>1</sup>

#### When excused.

It may be that in very exceptional circumstances, a change of voyage may be excused. For example, if a British ship is bound for a port which becomes during the voyage an enemy port, the continuance of the voyage would be illegal and a change of voyage is justified.<sup>2</sup> In fact, any other course would be out of harmony with the warranty of legality,<sup>3</sup> *vide* the word—"lawful manner" there.

#### Intention to change destination.

It would appear that a mere intention to abandon the original destination and substitute a new one would suffice to bring the section into operation. Thus, if while loading operations are going on it is decided to change the destination, the risk ceases to attach even though the loss occurs while the loading is not completed.<sup>4</sup>

#### "Lawful excuse".

The words "lawful excuse" occur in section 46 but not in this section.

#### "Change of voyage and deviation."

The distinction between "change of voyage" under this section and "deviation" under section 46, is explained elsewhere.<sup>5</sup>

### Clause 47

#### General.

This deals with deviation. (As to classification of various kinds of voyage, see notes under an earlier section).<sup>1</sup>

#### Essentials of deviation.

Deviation is a departure from the contemplated course of the voyage. Deviation, in order that it may discharge the insurer from liability, should be without lawful excuse. As to the excuses for deviation, see section 49 of the English Act. The deviation must be from the "voyage contemplated by the policy" as explained in section 46(2). Further, there must be a deviation in fact and not a mere intention.

#### Deviation distinguished from change of voyage.

In deviation, the ship does proceed to the agreed destination, whereas "change of voyage" implies complete abandonment of the contemplated voyage. It must be noted that in the former case, mere intention is immaterial, while in the latter case it is material as already pointed out.<sup>6</sup>

<sup>1</sup>Notes under section 43 of the English Act,—Clause 44.

<sup>2</sup>*British and Foreign Marine Insurance Co. v. Sanday (Samuel) and Co.* (1916) 1 A.C. 650.

<sup>3</sup>Section 41 of the English Act,—Clause 42.

<sup>4</sup>*Tasler v. Cumming Hame*, (1819) 1 Bli H.L. 87, cited in *Dover*, page 364, and *Chalmers*, page 62.

<sup>5</sup>See notes under section 46, English Act,—Clause 47.

<sup>6</sup>See notes under section 45 of the English Act,—Clause 46.

There is an Institute clause to the effect that the ship will be "held covered . . . . . in case of deviation or change of voyage provided notice be given . . . . . and an additional premium required be agreed".<sup>1</sup> Deviation clause.

It would appear that so far as time policies are concerned, the provisions regarding deviation would not ordinarily apply, since the *voyage* is not specified in the policy. Usually, however, there are express provisions in the policy regarding "trading limits", departure from which is not allowed unless permitted by "held covered" clause. Time policies.

#### Clause 48

This relates to change in the port of discharge.

A change in the port of discharge may arise from—

- (i) omission to visit a port of discharge; or
- (ii) visiting an additional port of discharge mentioned in the policy; or
- (iii) change in the order in which the ports of discharge are to be visited.

As to (i) above, it would seem that there is no deviation in such a case.<sup>2</sup> General.  
Classification of changes in the port of discharge.

As to (ii) above, it will amount to deviation under sections 46 and 47 of the English Act, because the voyage contemplated by the policy did not envisage the additional port.

As to (iii) above, the section provides that—

(a) if several ports of discharge are specified by the policy, the order designated by the policy must be followed;

(b) where ports are not named but are given within a given area, the ship must go to them in their "geographical" order.

Where ports A, B and C are to be touched and cargo for port B is not discharged at port B, but is taken to port C and again brought back to port B and then discharged, the policy would be void from the time of sailing from the intermediate port on the outward voyage (unless the Deviation Clause protects it).<sup>3</sup> Over-carriage.

#### Clause 49

This deals with delay in voyage.

It is only unreasonable delay that brings the section into operation; further, the policy is not avoided *ab initio* but the insurer is discharged from liability as from the time the delay becomes unreasonable. General.  
Unreasonable delay.

<sup>1</sup>Cited in Dover, page 368.

<sup>2</sup>See Dover, pages 369, 370.

<sup>3</sup>Dover, page 370.

When delay excused. Where entry to a port is delayed because of weather conditions (for example, cyclonic storms), the delay would not be "unreasonable". See also section 49 of the English Act for other excuses for delay.

#### Clause 50

General. This deals with excuses for deviation and delay.

Sub-section (1). *Clause (a)*—excuses deviation etc. authorised by any special terms in the policy.

*Clause (b)*—deals with circumstances beyond the control of the master and the employer. This includes a vessel being forced out of its course by heavy weather.<sup>1</sup>

*Clause (c)*—applies where delay is reasonably necessary for complying with a warranty. An example of this would be delay occasioned by action taken to make the ship seaworthy.<sup>2</sup>

*Clause (d)*—excuses delay for the safety of the ship (whether the policy is on ship or on cargo) or for the safety of the subject-matter insured. The result is, that where cargo A is insured, deviation for the safety of cargo B would not be protected. Similarly, where the ship is insured, deviation for the safety of any cargo would not be protected.

*Clause (e)*—deals with deviation etc. for saving human life etc.

Departure from the English Act. It would be noted that deviation for saving *property* is not excused in the English Act.

For reasons already given this rule of the English Act has been departed from, so as to cover deviation to save property at sea.<sup>3</sup>

#### Clause 51

General. This deals with the effect of transhipment.

Analysis of the position. Transhipment may arise either by operation of a peril insured against or by other causes. The section is confined to the former. The latter is not covered unless the policy otherwise provides. The rule embodied in the section is, that if the circumstances are such as to justify the losses in landing and re-shipping the goods or transhipping them, the insurer continues to be liable, notwithstanding the landing or transhipment.

<sup>1</sup>*Delany v. Stoddart*, (1776) 1 Term Rep. 22, cited in Dover, page 372, and Chalmers, pp. 66-67.

<sup>2</sup>As to warranty of seaworthiness, see section 39 of the English Act—Clause 40.

<sup>3</sup>See the body of the Report, para. 7.

It has been stated<sup>1</sup> that in practice, in cargo policies, the policy provides for other transshipment also, (i) without additional premium, *if customary*;— or (ii) with additional premium if the transshipment is not customary. Further, “extended cover clause” may cover all transshipments without notice and without additional premium.

Clause (f) needs no comments.

Clause (g) deals with deviation caused by barratry if barratry is a peril insured against. The term “barratry” includes every wrongful act committed by the master or crew to the prejudice of the owner of charterer.<sup>2</sup>

This provides that when the cause excusing the deviation has ceased to operate, the ship must resume her course, etc. That is to say, it has to take the normal course of the destination from the point to which it has deviated.

The placing of this section in the English Act is not very happy. Logically, it comes after deviation—(sections 46 and 49). Hence it has been placed here.

Sub-section (2)  
Departure from the English Act. (Placing).

### Clauses 52 and 53

This deals with the assignment of a marine policy.

General.

The subject-matter of assignment of marine policy has been dealt with to some extent in the Transfer of Property Act, 1882. Section 130, Exception, in that Act first provides that the general provision regarding formalities of assignment of actionable claims does not apply to transfer of marine policies. The next section, section 130A, then proceeds to lay down certain special rules for assignment of marine policies. Section 135A deals with assignment of rights under marine policies. The following comparative table will show the provisions in the English Act and the corresponding provisions in the Transfer of Property Act:—

Corresponding provision in Indian Law.

(English) Marine Insurance Act.	(Indian) Transfer of Property Act.
Section 50 (1)	Section 130A (1)
Section 50 (2)	Section 135A (1)
Section 50 (3)	Section 130A (2)
Section 51	Section 130A (3)

.....Section 130A(4) which provides that the provisions of section 6 (e) of the Transfer of Property Act do not

<sup>1</sup>Dover, page 400.

<sup>2</sup>Cf. the First Schedule to the English Act, rule 11.

apply to assignment of marine policies. The result is, that the general rule that a mere right to sue cannot be transferred, does not apply to marine policies.

State of  
assignment.

By the combined effect of sections 15, 50 and 51 of the English Act, the position regarding the stage at which a policy of marine insurance can be assigned (with reference to the assignment of the interest) is as follows:—

(i) the mere assignment of the interest of the owner does not transfer the policy—(section 15);

(ii) the owner of the goods may, however, assign the policy if there is no prohibition against assignment in the policy—(section 50);

(iii) such assignment may be made—

(a) before or at the time of parting with the subject-matter (section 51, main paragraph) whether or not loss has occurred—[section 50 (1)] or

(b) after the loss has occurred (section 51, proviso);

(c) but not in between his parting with the subject-matter and the date of the loss—(section 51 main paragraph).

The principle appears to be, that to make a valid assignment, the assured must still be *entitled* to the insurance. When he loses the subject-matter, that is, the insurable interest, his title to insurance is also gone, and therefore he cannot subsequently assign it. But it must be noted that where the goods have been lost, what remains is merely the right of indemnity—which can always be assigned. Thus, in an English case<sup>1</sup> goods insured under a marine policy were lost and after the loss the policy was assigned. It was held that the assignee could maintain an action against the insurer. The reason for prohibiting assignment without the subject-matter is that the person must be prejudiced by the loss before he can recover on the policy. But, as Blackburn J. observed: “after the loss has happened.....the risk ceases at once.....the right to indemnity no longer depends on the right to property in the *subject-matter*.....but on the right of property in the thing.....lost”.

Buyer and  
Seller of  
goods—  
C.I.F.  
contract.

In a C.I.F. contract (cost, insurance and freight), it is the seller's duty to effect insurance, because the price includes the items of cost, insurance, and freight. In a F.O.B. (free on board) contract, it is for the buyer to insure the goods. Section 39 of the Indian Sale of Goods Act [corresponding to section 33 of the (English) Sale of Goods Act] provides that unless otherwise agreed, where goods are sent

<sup>1</sup>*Lloyd v. Fleming* (1872) L.R. 7 Q.R. 299, 302—41 L.J. Q.B. 93.

by a seller to a buyer by a route involving sea transit in circumstances in which it is usual to insure, the seller should give notice to the buyer to enable him to insure, failing which the goods are deemed to be at the seller's risk during the transit.

The assignee can sue the insurer in his own name, irrespective of the fact that he was not interested in the subject-matter when the damage occurred. Effect of assignment.

The insurer is entitled to make any defence "arising out of the contract" which he would have had against the person by whom the policy was effected. Thus, an insurer may avoid the policy on the ground of non-disclosure of a fact by the assignor even though the assignee is innocent. But the defence must arise out of the "contract"—out of the very contract on which the assignee sues. As has been pointed out,<sup>1</sup> if an insurer is liable under two policies, A and B, to the same assured, and he pays on policy A under a mistake of fact, he can claim a refund. If the assured sues him under policy B, he can set off (against the claim for the policy B) the claim for refund under policy A. But if policy B has been assigned in the meantime, the refund under policy A cannot thus be set off. The reason is, that the claim for refund does not arise out of the policy sued upon. Defences available.

Sections 130A and 135A(1) of the Transfer of Property Act, 1882, should be deleted, since their substance is being incorporated in the clause under discussion. Deletion of sections 130A and 135A (1), Transfer of Property Act.

It appears that the need for passing the Transfer of Property (Amendment) Act, 1944, which inserted the provisions regarding marine policies arose in this way. Section 135 of the Transfer of Property Act, as it stood then, ran as follows:— Transfer of Property (Amendment) Act, 1944—History of.

"135. Every assignee, by endorsement or other writing, of a policy of marine insurance or of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself."

The words "property.....shall be absolutely vested" implied that at the time of the assignment the assignee must have become the owner of the goods. It was realised, however, that while this requirement would be all right for fire insurance, it was difficult to comply with it in marine insurance. Frequently, it is difficult to determine whether at a given time the property in the goods which are the subject-matter of a contract of sale has passed. Loss is very

<sup>1</sup>Lord Chorley, Shipping Law, 3rd edition, page 307.

often unknown either to the shipper or to the consignee, and it is possible that after the policy is assigned it is discovered that goods had been lost and the property had not yet passed to the consignee. Further, often the assignee would be a person who has only a limited interest in the subject insured (e.g. a pledgee). Section 50 of the (English) Marine Insurance Act, which is much wider should, it was felt, be adopted. To make the matter complete, section 51 of the English Act was also adopted. (Section 15 of the English Act, however, was regarded as standing on a different footing and as not proper for inclusion in the framework of the Transfer of Property Act).

It had also been pointed out by commercial bodies that section 79 of the (English) Marine Insurance Act did not (at that time) find a place in the Transfer of Property Act, with the result that grave doubts were felt as to whether the doctrine of subrogation applied in India and whether an insurer could, availing of this doctrine, sue in his own name without making the assured a party. It was, therefore, felt that section 79 of the Marine Insurance Act should also find a place in the Transfer of Property Act. As a consequential change, it was decided to exclude section 6(e) of the Transfer of Property Act from its application to any right to sue under the proposed provisions. An amendment Bill on these lines was therefore, introduced at the instance of commercial bodies. The Statement of Objects and Reasons appended to that Bill is given below:—

“The rules and principles governing a marine insurance policy being materially different from those governing a fire insurance policy, it is very unsatisfactory to accord the same treatment in the matter of assignment to both categories of policies. To take but one instance, a fire insurance policy is not assignable after loss, but the nature of a marine insurance contract is such as to require that marine insurance policies should be assignable even after loss. In the United Kingdom, assignability of marine insurance policies after loss is placed beyond doubt by section 50 of the Marine Insurance Act. But in the absence of a similar provision here, it is doubtful if Courts in British India would hold that they are so assignable. It is proposed, therefore, to amend the Transfer of Property Act by—

“(I) omitting from section 135 thereof the reference to marine insurance policy; and

(ii) inserting a new section reproducing the provisions of section 50 of the Marine Insurance Act”.

“Provincial Governments, High Courts, and commercial bodies in the Provinces have been consulted and they are almost unanimously in favour of legislation on these lines. As assignability of marine insurance policies is dealt with in the United Kingdom in sections 50 and 51 of the Marine

Insurance Act, it is, as suggested by the Calcutta High Court, also necessary, for the sake of completeness, to reproduce the provisions of section 51 of that Act which preclude assignments where the insured has no subsisting interest in the property insured.

"The need for the enactment of provisions corresponding to section 79 of the Marine Insurance Act and for amending section 6(e) of the Transfer of Property Act has also been represented to Government. On consideration of the opinions expressed by the Provincial Governments, High Courts, and leading commercial bodies Government has now reached the conclusion that this is desirable.

"It is recognised that, while legislation on the above lines would clarify the law of assignment and subrogation of marine insurance policies, the whole law of marine insurance will not be put on a satisfactory basis, unless comprehensive legislation on the lines of the Marine Insurance Act, 1906 is enacted for British India. Such a project, however, must necessarily await the termination of the war".

#### Clause 54

See notes on earlier clauses.<sup>1</sup>

#### Clause 55

This section deals with assignment of the "interest", and provides that the mere assignment of the property insured does not carry with it an assignment of the policy thereon. As to assignment of the *policy*, see sections 50 and 51 of the English Act. The effect of the section is that in the absence of an agreement to the contrary, where the interest of the assured is transferred to another person, the protection given by the policy would end on the determination of the interest of the assured.

As regards transmission by operation of law, the executor, administrator or receiver of the interest of the assured is entitled to have the benefit of the policy on behalf of those who are beneficially entitled to the property insured.<sup>2</sup>

#### Clause 56

Needs no comments.

#### Clause 57

This deals with the topic of "included" and "excluded" losses. General.  
"Included"  
and "Ex-  
cluded"  
losses.

The section enacts two propositions—one positive, defining the liability of the insurer, and the other negative, Analysis of  
the section.

<sup>1</sup>See notes to clauses 52 and 53.

<sup>2</sup>Dover, page 316.



excluding the liability of the insurer. Its provisions are "subject to" other provisions. Further, the positive proposition about liability operates "unless the policy otherwise provides".

Sub-section (1) states the general proposition, while sub-section (2) deals particularly with certain kinds of losses. In sub-section (2), clause (a) again contains both a negative and a positive proposition, while clauses (b) and (c) contain negative propositions only, that is to say, "non-liability".

Principle of the section.

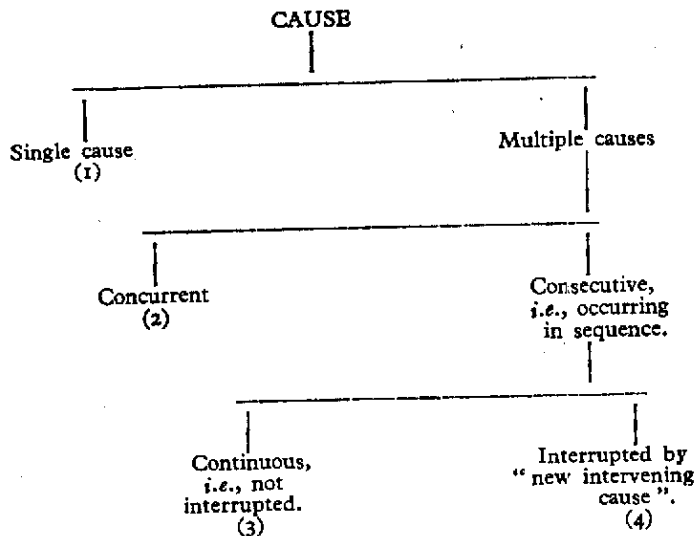
The main principle behind the section is, that if the loss is caused by a peril insured against and the peril is the proximate cause of the loss, the insurer is liable, but not otherwise. As to "proximate cause", it has been said that "the terminology of causation in English law is by no means ideal. It would be better for a little plain English.

"Direct cause" would be better expression than *causa proxima*. Logically, the antithesis of proximate cause is not "real cause", but "remote cause".<sup>1</sup>

The object behind the rule is to draw a line of demarcation at some stage. The rule is based on the maxim: *causa proxima non remota spectatur* (regard the proximate and not the remote cause).

Analysis of causes.

The connection between a cause and the resulting loss can be analysed as follows:—



<sup>1</sup>*Becker Gray & Co. Ltd. v. London Assurance Corporation, (1918) A.C. 101, 114—117 L.T. 609 per, Lord Justice Sumner. The judgment of Lord Sumner makes some candid observations on "proximate cause".*

Situation No. (1) above—single cause—does not call for the application of the section. If the loss is caused by a peril insured against, the insurer is liable.

Situation at (2) above—a number of causes acting together—sometimes calls for the application of the section.

Situations at (3) and (4) are the main situations where the doctrine of proximate cause has always got to be applied.

It is not always possible to put a cause under situation No. (2), (3) or (4) *exclusively*. As has been observed by Lord Shaw,<sup>1</sup> "Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain but—if this metaphysical topic has to be referred to—it is not wholly so..... Causation is not a chain but a net. At each point influences, forces, events—precedent and simultaneous—meet; and the radiation from each point extends indefinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause".

"To treat proximate cause as if it was the cause which is proximate in time is.....out of the question. The cause which is truly proximate is that which is proximate in efficiency. The efficiency may have been preserved although other causes meantime have sprung up which have not yet destroyed it or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed."

Meaning of "proximate cause".

The fact in that case were that a ship insured against perils of the sea was torpedoed by enemy submarine 25 miles from Havre. (There was a warranty against all consequences of hostilities). The torpedo struck her well forward, and she began to settle down by the head but with the aid of tugs she reached Havre and was taken alongside a quay in the outer-harbour. A gale sprung up: after 2 days her bulkhead gave way and she sank and became a total loss. It was held, that the torpedoing was the proximate cause of the loss, and the grounding was not a *novus actus interveniens*. The underwriters were therefore not liable because the loss was a consequence of hostilities.

The doctrine of proximate cause merely gives effect to intention of the parties. "Cause and effect are the same for underwriters as for other people. Proximate cause is not a device to avoid the trouble of discovering the real intention of parties."

Doctrine based on intention of parties.

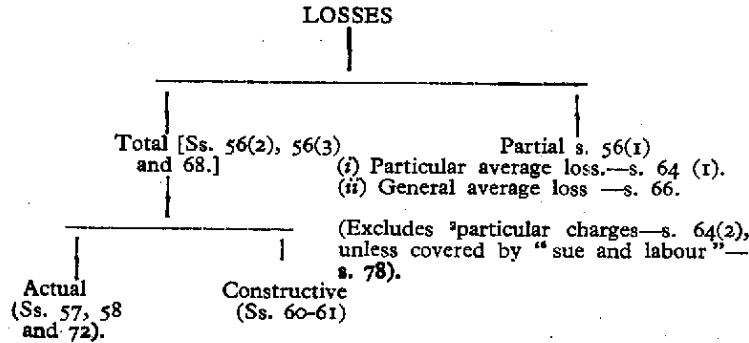
<sup>1</sup>*Leyland Shipping Co. v. Norwich Union Fire Insurance Society* (1918) A.C. 350, 369, per Lord Shaw of Dunfermlane.

cause or the common sense. Indemnity involves it apart from decisions."<sup>1</sup>

### Clause 58

**General.** This deals with partial and total losses.

**Analysis of losses.** The following classification of losses will explain the scheme of the Act—



**Importance of the distinction.**

The classification of losses into total and partial is important for this reason, that only a loss which has been insured can be recovered; and each policy provides how far a *total* loss will be recoverable and how far a *partial* loss will be recoverable. Further, the *amount* to be recovered would differ in each case; contrast section 68 on the one hand with sections 69 to 71 on the other.

**Meaning of "total" loss and "partial" loss.**

Total loss as such has not been defined in the Act. Its species, namely actual loss and constructive loss have, however, been explained.

So far as partial loss is concerned, section 56(1) provides that any loss other than a total loss is a partial loss. In addition to this general provision, section 56(4), section 56(5), etc. deal with partial losses in some aspects thereof. Where a partial loss is followed by a total loss before the partial loss is made good, the assured can recover only in respect of total loss.<sup>2</sup>

### Clause 59

**General.** This deals with actual total loss.

**Analysis.** Actual total loss arises in the following cases—

- (i) where the subject-matter is destroyed; or
- (ii) where the subject-matter is damaged so as to cease to be of the kind insured; or

<sup>1</sup>*Becher Gray & Co. v. London Assurance Corporation* (1918) A.C. 101, 113, per Lord Sumner.

<sup>2</sup>See also notes under section 64, English Act.—Clause 65.

<sup>3</sup>Section 77 (2) of the English Act.—Clause 78 (2).

(iii) where the assured is *irretrievably deprived* of the subject-matter.

An example of the first would be—physical destruction of the ship or cargo.

An example of the second would be a consignment of dates which remains sunk for a number of days and is found to be contaminated by sewage.<sup>1</sup> The dates in this case had a certain value for distilling purposes, but no longer answered the description of dates. (This was a case of insurance of freight; the charterer having chartered the ship for a lump sum, issued bills of lading to shippers. As a result of the damage, he lost his freight on the cargo in question, and was therefore entitled to recover the profit which he would have made from the transaction.)

As an example of the third may be cited the case where a ship deserted in a sinking condition is towed into port by salvors and sold under an order of the Admiralty Court for less than the salvage charges.<sup>2</sup>

The distinction between the first two and the third is that in the third the subject-matter may be in existence, but the assured does not get it.

#### Clause 60

This deals with the case of a missing ship. What the section embodies is a *presumption* that where the ship is missing and after reasonable time<sup>3</sup> no news is received, an actual total loss may be presumed. General.

The section does not raise any presumption as to the cause of the total loss. This depends on the balance of probabilities. The question may become important, because it is only if the ship is lost by a peril insured against that the ship-owner can recover from the insurer. Cause of loss.

As has been pointed out,<sup>4</sup> the question how the loss was caused becomes important in war time because of the F.C. and S. clause (free of capture and seizure), usually inserted in the policy to exclude risk from "capture, seizure, arrest, restraint or detainment. . . . consequences of hostilities or warlike operations" etc. When the ship is lost, the question naturally arises whether the ship was not lost by a war risk (in war-time, war risks are usually insured by the Government). The decision in such case depends on collateral circumstances, for example, the weather, the amount of enemy activity, the experience of other vessels, etc. "Free of capture and seizure".

<sup>1</sup>*Asfar & Company v. Blundell*, (1895) 2 Q.B. 198, approved (1896) 1 Q.B. 123—73 L.T. 648 C.A.

<sup>2</sup>*Cosmen v. West*, (1887) 13 App. Cas. 160, P.C.

<sup>3</sup>As to "reasonable time", see s. 88 of the English Act,—Clause 89.

<sup>4</sup>Lord Chorley, *Shipping Law*, 3rd edition, page 327.

Coxwold  
Cases.

The wide form of the old F.C. & S. clause created unexpected consequences. Casualties such as stranding were held to be due to war risks in a case before the House of Lords.<sup>1</sup> There, the ship was engaged in warlike operations at the time of loss, but the loss was actually due to stranding. The House of Lords held that the stranding was a consequence of the operations on which the ship was engaged, and therefore the ship was lost by a war peril, stressing the words "consequences of warlike operations". The new F.C. & S. clause provides that the warranty (*i.e.* the exclusion from risk of warlike operations) does not exclude "collision, contact with any fixed or floating object, stranding, heavy weather or fire unless . . . . . caused directly by a hostile act . . . . ."

### Clause 61

General.

This defines constructive total loss. The concept of constructive total loss is peculiar to marine insurance. For a discussion of its origin, see the undermentioned case.<sup>2</sup>

Analysis.

Constructive total loss arises where the subject-matter is—

(i) reasonably abandoned on account of its actual total loss appearing to be unavoidable; or

(ii) where the abandonment is due to the fact that it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure has been incurred.

First class  
of cases.

As regards the first class of cases, it must be noted that recovery of the goods must be "unlikely" and not merely "uncertain",<sup>3,4</sup> under section 60 (2) (i).

"Uncertain"  
and "un-  
likely".

The distinction between "uncertain" and "unlikely" has been clearly explained in a judgment of Lord Wright.<sup>5</sup> He observes:

"There is a real difference in logic between saying that a future happening is uncertain and saying that it is unlikely. In the former, the balance is even. No one can say one way or the other. In the latter, there is some balance against the event. It is true that there

<sup>1</sup>*Yorkshire Dale S. S. Co. v. Minister of War Transport (The Coxwold)* 1942 A.C. 691—(1942) 2 All. E.R. 6.

<sup>2</sup>*Moore v. Evans*, (1918) A.C. 185, 194 H.L.

<sup>3</sup>See the illustration in Lord Chorley's *Shipping Law*, 3rd edition, page 331. See also *Polurrian S. S. Co. v. Young*, (1915) 1 K.B. 992, C.A.

<sup>4</sup>The word "unlikely" was substituted at the suggestion of the Lord Chancellor's Committee. See Chalmers, page 83, foot-note 7.

<sup>5</sup>*Rickward v. Forestal Land Co.*, (1941) 3 A.E.R. 62, 81.

is nothing in the Act to show what degree of unlikelihood is required. If, on the test of uncertainty, the scales are at level, any degree of unlikelihood would seem to shift the balance, however slightly. It is not required that the scale should spring up and kick the beam."

The word "unlikely" used in the Act marks a departure from the common law. Before the Act, the ship-owner was entitled to recover as for a total loss if it was uncertain that he could recover the goods (or ship, as the case may be). This is not so after the Act. The point came into prominence in a case before the Court of Appeal.<sup>1</sup> There, a ship carrying a cargo of coal and insured against the consequences of war-like operations was captured by a belligerent, deprived of her cargo and detained for about six weeks, after which the ship was released. The owners of the steamship claimed from the insurer for a constructive total loss, on the ground that they had given notice of abandonment and that it was at that time "uncertain" that the ship would be recovered. The insurers admitted that the ship was detained, but denied that she was captured, and contended that at no material time was it *unlikely* that the plaintiff could recover. It was held by the Court of Appeal that the Marine Insurance Act had substituted the test of unlikelihood for the test of uncertainty, and that the assured had failed to show that there was more likelihood that they would not recover than that they would recover. The claim was, accordingly, dismissed.

As was pointed out by Lord Porter,<sup>2</sup> s. 60 is intended to be a complete definition of total loss (because of the words "as hereinafter defined" appearing in s. 56); but it does not follow that the first sub-section lays down the general rule and the second lays down merely the instances already covered by sub-section (1). Sub-section (2) which gives particular instances does not merely illustrate; it adds to the terms of the definition given as a general rule in sub-section (1). Relationship of s. 60(1) and s.60(2).

As to the relationship between section 60(1) and section 60(2), it has been pointed out that sub-section (2) gives an objective criterion which is more precise than, and substantially different from, the criterion in section 60(1); and therefore sub-section (2), as compared with sub-section (1) is "additional and not merely illustrative".<sup>3</sup> Section 60(2) is additional.

As to the second class of cases, the well-known case of *Irving v. Manning*<sup>4</sup> illustrates its application. In such cases, Second class of cases.

<sup>1</sup>*Pollurrian Steamship Co., Ltd. v. Young*, (1915) 1 K.B. 922 C.A.

<sup>2</sup>*Robertson v. Nomikos Ltd.*, (1939) 2 All. E.R. 723, 734, H.L.

<sup>3</sup>*Richard v. Forestal Land Co.*, (1941) 3 A.E.F. 62, 79.

<sup>4</sup>(1847) 1 H.L.C. 287, discussed under section 27 of the English Act,— clause 29.

the cost of recovery or reconditioning of the property is prohibitive, in the sense that the expenditure on the ship would exceed the post-repair value of the ship. For example, if a ship is damaged and the repairs are estimated to cost £ 10,000 and after repair the value of the ship would be £ 9,000 while the actual value of the ship when insured is, say, £ 8,000, there is a constructive total loss.<sup>1</sup>

Valuation  
Clause.

The repaired value is usually estimated by a ship's surveyor in the case of ships. Sometimes however, a Valuation Clause<sup>2</sup> is inserted as follows:—

“In ascertaining whether the vessel is a constructive total loss, the insured value in the policies on hull and machinery shall be taken as the repaired value.....”

The significance of this clause lies in this, that by a fiction agreed to by the parties, the insured value is always taken as the repaired value. To put it in other form, the assured will never be able to claim a constructive total loss (where such a clause is inserted) except where the cost of the repair exceeds the *insured value*. The clause comes in handy where the vessel is insured on a higher value than its actual value. To take a hypothetical case, if a ship is insured on £ 10,000 and the damage caused will cost, say, £ 7,000 to repair and after repair its value (*actual*) will be £ 6,000 then—

(a) if the Valuation Clause is *not* there, then the ship would be a total loss. The insurer would be liable to pay the full amount of the policy;

(b) if the Valuation Clause is there, then, by the fiction agreed to by the parties, its value on repair will be *taken* as £ 10,000 (insured value) and not £ 6,000 (actual post-repair value).

(In actual practice, when this clause is there, settlement is made by compromise, so that the ship-owner may not be compelled to spend more in repairs than the ship would be *actually* worth to him when repaired. The reason is, that after all, the Valuation Clause provides a legal fiction which may not be in conformity with realities in some cases).<sup>3,4</sup>

<sup>1</sup>The value fixed by the policy is not conclusive for determining whether there is a constructive total loss ; see section 27 (4) English Act,—Clause 29 (4).

<sup>2</sup>This is not the same thing as “Dual Valuation Clause”—discussed under clause 24.

<sup>3</sup>Such compromises would fall under “Compromised total loss”.

<sup>4</sup>Cf. Dover, page 401.

How the absence of a Valuation Clause may lead to an anomaly can be illustrated by the following example:—

Anomaly in the absence of Valuation Clause.

(Valuation Clause absent in both cases)

Case A	Case B
Insured Value £ 5,000	£ 5,000
Cost of repair £ 4,700	£ 4,590
Value after repair £ 4,600	£ 4,600

In the Case A mentioned above, the insurer will be liable to pay the full amount of £ 5,000, (because there will be a total loss) while in the Case B mentioned above there will be no total loss as the cost of repair is less than the value after repair and the insurer will pay only the actual cost of the repair. Thus, a slight difference in the amount of the cost of repair affects considerably the insurer's liability—a position which is certainly anomalous. (If the Valuation Clause were there, neither of the cases would be a total loss and in both cases the insurer will pay only the actual cost of repairs.)

Sometimes, to avoid disputes, the insurer may compromise the total loss. This will be a "compromised total loss". Sometimes the parties may agree that a total loss has occurred. This would be an "arranged total loss". The importance of these two concepts arises in re-insurance, where the original insurer, having paid a compromised total loss or arranged total loss, claims the amount which he has paid from the re-insurer. Often, re-insurance against total loss of ship is effected against "constructive and/or compromised and/or arranged total loss only", to make the matter clear. An explanation of the words "compromised" and "arranged" has been given by Lawrence L.J.<sup>1</sup> as follows:—

Arranged or compromised total loss.

"Compromised assumes that a mutual concession has been made by both parties and that each party has got something less than he claimed".

As to "arranged", His Lordship said:—

"The word arranged to my mind is a wider word altogether than compromised. In certain cases, and in my judgment in this case, it is equivalent to agreed".

In the United States, there is a constructive total loss if the damage to a ship or cargo exceeds 50% of the value.<sup>2</sup> But even in the U.S.A. the rule is subject to any express agreement to the contrary. The English rule is well established, and has been adopted; parties can, where they so choose, adopt a different rule.

American rule.

<sup>1</sup>*Gurney v. Grimmer*, (1932) 38 Comm. Cases 7 cited in *Dover*, page 472. See also Lord Chorley, *Shipping Law*, page 296.

<sup>2</sup>45 *Corpus Juris Secundum*, Insurance, page 1150, para. 956, right-hand column.



"Future Salvage Operations" and "Future General Average Contributions".

Section 60(2) (ii), second paragraph, which provides that account is to be taken (in estimating the cost of repairs) of the expenses of future salvage operations and future general average contributions to which the ship would be liable if repaired, is to be applied from the date of the casualty. The word "future" would include all post-casualty salvage operations or general average contributions. (Contributions or operations prior to the casualty are not relevant for the purpose of the section).

#### Clause 62

General.

This deals with the effect of constructive total loss

Right to treat total loss as partial.

Option to treat the loss as partial has been given to the assured. The question will naturally arise, how, treating the loss as a partial one would benefit the assured. The answer is this—

(i) Even a partial loss can be claimed upto 100 per cent of the insured value.<sup>1</sup> The amount claimable under a total loss cannot, obviously, also exceed 100 per cent of the insured value. Thus, the assured is not in a worse position in all cases by treating it as a partial loss only.

(ii) As a matter of fact, in a partial loss, the insurer may, in addition, be liable for "sue and labour" or "salvage charges"<sup>2</sup>. In the case of total loss, however, the doctrine of "abandonment" transfers to the insurer the rights of the assured in what remained of the subject-matter.<sup>3</sup>

(iii) Further, a partial loss does not *terminate* the policy as such, and, therefore, if the policy is a time policy, the assured continues to enjoy the benefit of the policy after the partial loss, until the expiry of the specified period.

(iv) Lastly, where the subject-matter is greatly under-insured, claiming for constructive total loss would not, obviously, benefit the assured, because all that he would get is the amount insured (which would be lower than the value of the subject-matter).

Departure from the English Act—Events subsequent to election.

Two questions have arisen in connection with abandonment. The first is, whether, after the assured has elected to treat a loss as a total loss, can the insurer *by his act* affect prejudicially the right of the assured? The second is, whether after the assured exercises his election, can events happening subsequently affect his rights so as to enable the insurer to insist on the assured taking back the ship and claiming only for a partial loss?

<sup>1</sup>On the principle of indemnity.

<sup>2</sup>See sections 65 and 78, respectively of the English Act,—Clauses 66 and 79.

<sup>3</sup>See section 63 of the English Act,—Clause 64.

As regards the first question, the law in England is well-settled that the insurer cannot require the assured to take possession of the ship merely on the ground that the suit has not yet been filed and the ship has been salvaged in the meantime. See in this connection the following case<sup>1</sup> and the discussion in the text books.<sup>2</sup>

As regards the second question, the rule in England would appear to be that the circumstances as they existed on the date of the action have to be looked at. On this view, a total loss is said to be "adeemed" if the loss did not continue to be total at the commencement of the action. Thus, if a ship is captured and due notice of abandonment given, still if the property is re-captured the assured can recover only for a partial loss. See the decision cited below<sup>3</sup> and the discussion in the text-book.<sup>4</sup> This rule is peculiar to England and is not recognised in Scotland, United States, or the Continental systems.

It is considered that such subsequent events should not affect the right of the assured. The validity of the election made by the assured should be judged with reference to the state of affairs existing on the date of election; the doctrine of "ademtion" should not be adopted and the view recognised in Scotland, United States, and the Continents should be followed here also. Necessary provision has been made.

Thus, the clause under discussion—

- (i) embodies the English rule on the first point and
- (ii) departs from the English law, on the second point.<sup>5</sup>

Course  
adopted.

[It will be of some interest to note that an attempt was made to codify the English rule at the time when the Marine Insurance Act was on the anvil. The following sub-clause was there in the original Bill:

"Where the assured has given a notice of abandonment which has not been accepted, the validity of the abandonment must be determined with reference to the state of affairs at the time of action brought".

<sup>1</sup>*Blairmore Sailing Ship Co. v. Macredie* (1898) A.C. 593, 607.

<sup>2</sup>Halsbury, 3rd Edn. Vol. 22, page 156, para. 302, and Arnould, Vol. 2, 1954 Edn. Art. 1126.

<sup>3</sup>*Bainbridge v. Neilson*, (1808) 10 East 329.

<sup>4</sup>Halsbury, 3rd Edn. Vol. 22, page 159, paragraph 308 ; and Arnould Vol. 2, pages 1000—1001, Arts. 1096 *et seq* ; and Keate, p. 93, discussion under "Waiver Clause".

<sup>5</sup>See also the body of the Report paras. 8 and 9.

The clause was, however, struck out in consequence of objections taken to it by Scottish Members.<sup>1</sup>

It will also be interesting to note that some controversy did prevail as to whether the Act has altered the English Common Law rule; but the decision of the Court of Appeal<sup>2</sup> laid down that in deciding upon the validity of claims of this nature the matter must be considered "as they stood on the date of the commencement of the action".

This view was approved by Lord Wright in—*Rickward v. Forestal etc. Co.*<sup>3</sup> observing that "The old rule is, I think, still the law".

### Clause 63

**General.** This deals with notice of abandonment.

**Object.** The object behind the provisions as to giving notice of abandonment immediately is "to preclude the assured from waiting on developments to decide in what form to present his claim".<sup>4</sup> As has been observed,<sup>5</sup> the assured "is not allowed to await events to see how things turn out or to decide what may best suit his interests".

### Clause 64

**General.** This deals with the effect of abandonment.

On abandonment, the interest of the assured in whatever remains of the subject-matter is transferred to the insurer, including all proprietary rights incidental thereto. Further, he is entitled to any freight in the course of being earned (less certain expenses). Lastly, he is entitled to a reasonable remuneration for the carriage of the goods subsequent to the casualty causing the loss.

**Abandonment and subrogation.** The distinction between abandonment and subrogation can be understood by a reference to the provisions of the section relating to subrogation.<sup>6</sup>

**"Is entitled."** Where there is valid abandonment, then under the English Act, the insurer "is entitled" to take over the interest of the assured. He is, however, not bound to do so. The question has arisen in England whether the ship or other subject-matter insured becomes *res-nullius* on abandonment if the insurer does not take over the property.<sup>7</sup> It

<sup>1</sup>See Arnould, Vol. 2, page 1001, Art. 1097a. and Chalmers 5th edn. pages 94-95.

<sup>2</sup>*Polurrian Steamship Co. Ltd. v. Young*, (1915) 1 K.B. 922.

<sup>3</sup>(1942) A.C. 50, 85.

<sup>4</sup>Dover, page 411.

<sup>5</sup>*Richards v. Forestal etc. Co.*, (1942) A.C. 50, 84, per Lord Wright.

<sup>6</sup>See section 79 of the English Act,—Clause 80 and notes thereto.

<sup>7</sup>See Chalmers, p. 97.

is considered that the insurer should have an *option* to take over; he should not be placed under a legal *obligation* to do so. Hence no departure from the English Act is necessary. The change proposed will make the position clear.

[It appears that in the United States of America,<sup>1</sup> if the underwriter after the abandonment takes possession of the vessel and repairs her and returns her to the insured, it constitutes an acceptance of abandonment; but it has also been held that the underwriter may, without accepting an abandonment take and repair a vessel and return her to the insured if the expenses of the repair are not sufficient to constitute a constructive total loss. But if the expenses exceed such amount, the insured cannot be required to re-take the property. If the insured does not accept the return of the vessel and thereafter finds the repairs insufficient, he can recover the cost of additional repairs. The insured may impose reasonable conditions to be complied with before he can be required to accept the vessel.

It has been held in the U.S.A.<sup>2</sup> that abandonment when made relates back to the time of the loss and the underwriters become vested as from that date.] Passing of title.

#### Clause 65

This deals with particular average loss.

General.

A particular average loss must be—

Analysis.

- (i) a partial loss,
- (ii) caused by peril insured against, and
- (iii) not a general average loss.<sup>3</sup>

The distinction between a particular average and a general average is that—

- (a) general average is voluntary, while particular average is accidental;
- (b) general average is undertaken to save property imperilled in a common adventure. Particular average is a loss pure and simple.

Damage by sea water when not amounting to total loss, or damage by fire or collision, are examples of particular averages.

Charges incurred by the assured for the safety or preservation of the subject-matter insured are called particular charges and are not included in particular average. This is provided by sub-section (2). Examples of particular

<sup>1</sup>45 Corpus Juris Secundum, Insurance, page 115, para. 965, left-hand column.

<sup>2</sup>45 Corpus Juris Secundum, Insurance, page 116, para. 965, left-hand column,—“Relation back.”

<sup>3</sup>As to general average loss, see section 66 of the English Act,—Clause 47.

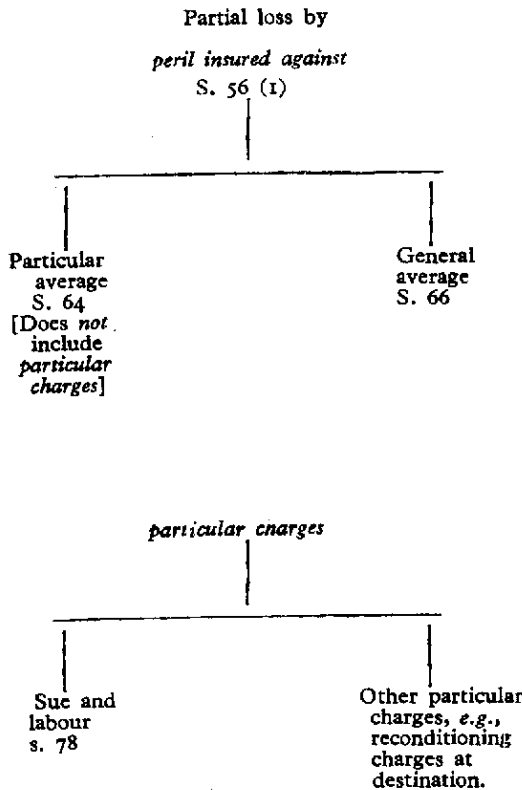
charges would be as stated by Dover,<sup>1</sup> the cost of picking sound cotton from damaged cotton, the cost of "skimming" cocoa, and other re-conditioning charges.<sup>2</sup> These are particulars in the sense that they are applicable to a particular interest.

**Classification** Particular average may be classified as—

- (a) damage to ship, for example, by forcible impact;
- (b) loss of freight, for example, by reason of partial loss of cargo by particular average; and
- (c) damage to cargo.

**Particular average and allied concepts.**

The following chart may be of some help in understanding the relationship between particular average and allied concepts:—



<sup>1</sup>Dover, page 417.

<sup>2</sup>As for other provisions as to particular charges, see section 65 (2), 76 and Sch. I, rule 14 of the English Act, "Sue and labour" charges are examples of "particular charges". See section 78 of the English Act.—Clause 79.

### Clause 66

This deals with salvage charges.

General.

Even apart from marine insurance, salvage is a concept of importance in maritime law. As provided by section 6 of the (English) Maritime Conventions Act,<sup>1</sup> 1911 (1 and 2 Geo. 5, c. 57), the master of a vessel shall, so far as he can do so without serious danger to his own vessel etc. render assistance to every person, even if such a person be a subject of a foreign State at war with His Majesty, who is found at sea in danger of being lost and if he fails to do so, he shall be guilty of misdemeanour. When such assistance is given, the right to reward for the rescue of the maritime *property*<sup>2</sup> has been recognised since the time of Rome. Colliding vessels are also bound to stand by each other under section 422 of the (English) Merchant Shipping Act, 1894. Further, ships receiving a wireless distress call are bound to render assistance under section 22 of the (English) Merchant Shipping (Safety Conventions) Act, 1949. For corresponding provisions in India, see sections 402 and 348 of the Merchant Shipping Act, 1958 (44 of 1958) and also section 355 of that Act regarding signals of distress.

Salvage.

The significance of the section lies in providing that salvage charges incurred in preventing a loss by perils insured against will be recovered as a loss. This is, of course, subject to any contrary provisions in the policy. The section makes an express reference to "Maritime Law", meaning thereby the Common Law rules relating to salvage, now partly embodied in the statutory provisions quoted above.<sup>3</sup> As the *measure* of liability for salvage charges, see a separate provision.<sup>4</sup>

Significance of the section.

### Clause 67

This deals with general average loss.

General.

Some amount of confusion results from the fact that the expression "general average" is used in several senses, which though related to each other, are not the same. First, there is a general average *act*; next, there is a general average *loss*; lastly, there is a general average *contribution*. The expression "general average" is used to cover all these three, which are explained below:—

Explanation of the various concepts of general average (i) act, (ii) loss, (iii) contribution.

In the topic of "general average", a general average *act* comes first. In time of peril, for the purpose of preserving

<sup>1</sup>See Temperley Merchant Shipping Acts, 5th edn., page 565.

<sup>2</sup>As to saving of life, see s. 544 (English), Merchant Shipping Act, 1894.

<sup>3</sup>For a full discussion of the subject of salvage see—

(i) Dover, page 671—680;

(ii) Kennedy, Law of Civil salvage.

<sup>4</sup>Clause 74(2).

property imperilled in common adventure, where extraordinary sacrifice or expenditure is incurred voluntarily and reasonably, there arises a general average act. The act thus denotes such—

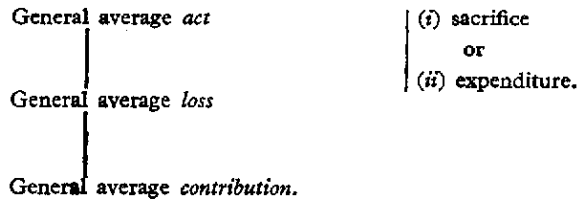
- (i) sacrifice, or
- (ii) expenditure.

When such an act is done, naturally, a loss is caused as a result thereof. If the loss is caused by or directly consequential on a general average act, the loss is called a general average loss.

Where such a loss arises, the question that naturally comes to mind is, who will pay for it? Section 66(3) of the English Act provides that the party on whom such loss falls is entitled to rateable contribution from the other parties interested; this contribution is called a general average contribution.

The chronological order of the various steps can be shown in the form of a chart as follows:—

CHART (General Average)



Recovery from insurer.

So far, we have been dealing with the assured and his rights to contribution from others. Marine insurance, however, also steps in by providing that if the general average loss was incurred in connection with a peril insured against, the assured can recover from the insurer the loss caused to him, subject to any express provision in the policy. Now, here the right to recovery can be dealt with under two heads:

- (i) where the loss has itself occurred to the assured; and
- (ii) where the loss has occurred to others and the assured has contributed as a contributory.

Further, in the first case there is some distinction if the loss is caused by "expenditure" as distinct from a loss caused by "sacrifice".

The following chart will illustrate the topic of recovery from the insurer:—

CHART—(Recovery for general average from the insurer)

(a) General average expenditure.—Proportion of the loss which falls upon the assured can be recovered from the insurer—s. 66(4), earlier part.

Loss that has occurred to the assured.

(b) *General average sacrifice*.—Whole loss may be recovered from insurer, without enforcing contribution from others—s. 66(4), latter part.

May be recovered from the insurer—s. 66(5).

Contribution paid or payable by the assured to others.

A general average loss is voluntary and is “deliberately designed to prevent greater losses”.<sup>1</sup> That is how it differs from other losses, which are caused purely by accident. A loss caused by accident lies where it falls, that is to say, it is borne by the owner whose cargo is lost. But a general average loss is effected purposely for the benefit of all persons interested, and hence other interests which have been saved must contribute to make good the loss. The doctrine “springs from a rule of law applicable to all who chance to have interests on board a ship at sea exposed to some common danger threatening the whole; it is founded upon justice, public policy and convenience”.<sup>2</sup>

How general average loss differs from other losses—reasons behind the rule.

Since the working out of contribution under general average—what is called “average adjustment”—may have to be effected between persons belonging to different countries, and may give rise to problems of conflict of laws, ship-owners have evolved a standard set of rules relating to general average, known as York-Antwerp Rules. The Rules are incorporated in charter-parties and bills of lading, and differ on some points from the provisions in the Marine Insurance Act. It is not, however, necessary here to discuss the Rules in detail.<sup>3</sup>

York-Antwerp Rules.

Section 66(2) of the English Act gives a definition of a general average act, and on analysis the definition will be found to yield the following ingredients:—

Ingredients of general average Act.

(i) Existence of *actual danger*, expressed by the words “in time of peril”. Thus, a sacrifice made at a time when the master of the ship believes that there was fire on the hold while actually there was no danger, would not be a general average act.<sup>4-5</sup>

It has been said that a mistaken belief in the existence of the danger, if reasonable, may turn the act into a general average act under the York-Antwerp Rules.<sup>5-6</sup>

Departure from the English Act—in York-Antwerp Rules—Discussed.

<sup>1</sup>Lord Chorley, *Law of Shipping*, 3rd edition, page 173.

<sup>2</sup>*Fire v. Middle Dock Co.*, (1881) 44 L.T. 426 cited in *Dover Handbook to Marine Insurance*, 1957 edition, page 419.

<sup>3</sup>For the text of the rules, see—

(i) *Dover*, page 743 *et seq.*

(ii) *Keate*, page 171 *et seq.*

<sup>4</sup>*Watson (Joseph) & Co. v. Firemen's Fund Insurance Co.*, (1922) 2 K.B. 355—92 L.J.K. B. 31.

<sup>5</sup>See *Halsbury*, 3rd edition, Vol. 22, page 122 and page 125.

<sup>6</sup>The relevant rule is Rule A, York-Antwerp Rules, 1950 reproduced in *Chalmers* page 214, and *Dover*, page 750.



The position, however, is by no means clear and conflicting opinions have been expressed. In the U.S.A. a reasonable apprehension of danger is sufficient.<sup>1</sup> In view of the doubt existing on the subject even in England as to whether the York-Antwerp Rules strike a departure from the English Act, it is considered unnecessary to depart from the language of the section on this point.

(ii) There must be some extraordinary sacrifice or expenditure. The sacrifice or expenditure must not fall "within the compass of the ordinary duties of the shipowner". If, for example, a sailing ship having an auxiliary engine loses her sailing power and has to use steam, thereby increasing the expenses, the increased expenditure is not extraordinary.<sup>2</sup>

The "sacrifice" may consist of "jettison", that is, throwing away of the cargo to lighten the ship, or it may consist of burning the cargo and spars as additional fuel for pumping water by the donkey engine where the coal runs short and the ship has sprung a leak.

(iii) The act must be *voluntary*. It must not be—

(a) an act of God, for example, a storm which washes out the cargo but preserves the other property;

(b) an act of other person, for example, that of a mob which takes away the cargo of corn where the vessel is stranded.<sup>3</sup>

**Query.**

The York-Antwerp Rules, Rule A, speaks of a sacrifice or expenditure which is "intentionally" made or incurred. The question has been raised whether this means a departure from the statutory expression "voluntary". The expression "intentionally" is also used in Rule V of those Rules, though the marginal note to those rules is, curiously, "voluntary stranding".

(iv) The act must be *reasonable* in the circumstances of the case.

(v) The act must have been done for the purpose of preserving the property imperilled in the adventure. In Rule A of the York-Antwerp Rules, the words "for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure" are used.

**Success of the adventure.**

It has been said, that both at Common Law and under the York-Antwerp Rules, contribution can be demanded only if the general average act is successful,

<sup>1</sup>See Lord Chorley, *Law of Shipping*, 4th edition, page 182.

<sup>2</sup>*Wilson v. Bank of Victoria* (1867), L.R. 2 Q.B. 203.

<sup>3</sup>Lord Chorley, *Law of Shipping*, 3rd edition, page 182.

that is to say, if the adventure as a whole has been saved.<sup>1</sup> If no property escapes the dangers from which the sacrifice was intended to save it, there is no general average.

It has been suggested that in section 66 (5), (of the English Act) the word "subject" should be "subject-matter" or "interest" and in section 66 (7), it should be "interest".<sup>2</sup> The suggestion appears to be reasonable and has been adopted.

#### Clause 68

This deals with the extent of liability of the insurer for the loss. General.

The sum which the assured can recover is restricted—

- (a) in the case of a valued policy,<sup>3</sup> to the full extent of the value fixed by the policy; Distinction between valued and unvalued policies.
- (b) in the case of an unvalued policy, to the full extent of the insurable value.

#### Clause 69

This section, which at first sight appears to be a repetition of section 67 of the English Act, is not actually so. Section 67 deals *generally* with the measure of indemnity, while section 68 deals *particularly* with that measure in the case of a total loss. While section 67 gives the maximum limit for all cases, section 68 has the effect of enabling the assured to recover that from the insurer in the case of a total loss. General.

#### Clause 70

1. This deals with partial loss of ship. General.
2. All partial losses, including general and particular averages, are recovered. But the section is subject to any other express provision in the policy. Application of the section.
3. The section uses the expression "reasonable cost" and "reasonable depreciation". Section 88 of the English Act dealing with "reasonable time", etc. does not specifically mention reasonable "cost" and reasonable "depreciation". But obviously the question will be decided by the court in each case. "Reasonable".
4. Where it is intended to repair the ship, the insurer has right to exercise control over the cost of repairs under what is known as the "Tender clause".<sup>4</sup> Tender clause.

<sup>1</sup>Lord Chorley, *Law of Shipping*, 3rd edition, page 185.

<sup>2</sup>See Chalmers, page 102, foot-notes 1 and 3.

<sup>3</sup>See section 27 of the English Act,—Clause 24.

<sup>4</sup>The clause is cited in *Dover*, page 424.

“Depreciation”.

Sub-sections (2) and (3) speak of “depreciation”. The following questions, namely,—

(i) whether depreciation should be taken to mean the estimated cost of repairs, and, if so,

(ii) what is the date with reference to which the repairs are to be estimated—is it the date of arrival at destination—are matters which need not be discussed, because in practice, most cases are settled by compromise.<sup>1</sup>

“Customary deduction—“New for old””.

For deductions under “New for old”, see rule XIII of the York-Antwerp Rules, 1950.<sup>2</sup>

Suggestion to substitute cost of repairs considered.

5. It has been suggested that when the damage is only partly repaired or not repaired at all, the measure of indemnity of the assured (for the unrepaired damage) should be  $\frac{3}{4}$ th of the reasonable cost of the unrepaired damage, to be ascertained at the ship's *home port on the last date of the expiry of the policy*. This test differs from the test adopted in the English Act. The English Act puts it as the reasonable *depreciation* arising from the unrepaired damage (subject to certain maximum with which we are not concerned in this connection). After giving careful consideration to the question, it appears that the test adopted in the English Act is the logical and the correct one. The contract of insurance is one of indemnity only, and the thing for which the insurer promises to indemnify the assured is the loss caused by the casualty. Reasonable depreciation reflects this “loss” aspect correctly.

6. It is true that it is not always easy to evaluate depreciation.<sup>3</sup> But that difficulty applies even to the test suggested; because the process of fixing the hypothetical cost of repairing damage which has not been actually repaired cannot yield very accurate and precise results.<sup>4</sup>

7. In fact, the suggested test can give rise to over-payment occasionally. For example, if the original value of the subject-matter insured is Rs. 10,000 and the value at the home port is Rs. 8,000, but the surveyor estimates the cost of repair at more than Rs. 2,000, the assured will be over-paid. (The value at the home port will be a hypothetical figure; but so also will be the estimate of the cost of repairs.)

<sup>1</sup>Cf. Dover, pp. 423-424.

<sup>2</sup>Reproduced in Keate, p. 175, Dover, page 760.

<sup>3</sup>See Dover, page 423, last para.

<sup>4</sup>In practice, claims for such damage are usually compromised ; see Dover, page 424, second para.

8. For these reasons the suggestion has not been accepted.<sup>1</sup>

9. Where a ship is injured by perils insured against but is sold without repair, what is the amount which the insurer has to pay? Section 69 of the English Act does not deal with this situation, presumably because the law on the subject was in an unsettled condition at the time when the proposal to enact legislation on marine insurance was first taken up in England.<sup>2</sup> Sale without repair.

10. Before the 1906 Act, this point arose directly in a case before the Court of Appeal.<sup>3</sup> The rival contentions advanced in that case were:— Decision before the Act—  
Pitman's case.

(i) the diminution in the value of the ship (depreciation) as shown by the difference between the original value of the ship and the price realised on sale, should be the measure of indemnity;

(ii) the estimated cost of repairs is the sole measure of indemnity, and no regard is to be had to the depreciation in value. It was contended that if the owner actually repairs the ship, he would certainly get the reasonable cost of repairs, and the fact that he chooses to sell it instead of repair it should not make a difference.

The first test was upheld by a majority of the Court of Appeal (Jessel M. R. and Cotton L. J. confirming on this point the judgment of Lindley J.), while the second was favoured in the dissenting judgment of Brett L.J.

11. The question as to which of the two tests mentioned above is to be applied, was of great importance in the case cited above,<sup>3</sup> as will be seen from the facts. A ship valued at 3,700 consols was insured in that case. She sailed from Singapore to Moulmein, and in passing up the river to the port of Moulmein took the ground and remained aground for four days until she was got off and towed up to Moulmein. The plaintiffs (the owners) determined to abandon the vessel and gave notice of abandonment, but the underwriters declined to accept it. The plaintiffs, thereupon, having made some slight repairs, sold the ship and stores for 3,897 consols. In the statement of claim, the plaintiffs Importance of rule be applied.

<sup>1</sup>As to the possible tests of depreciation, see also Halsbury, Volume XXII, page 138, para. 266, foot-note (a), where two tests have been mentioned:—

- (i) difference between conventional value and damaged value,
- (ii) proportion of the actual depreciation to be ascertained and applied to conventional value.

The point was left open in *Irvin v. Hyne*, (1949) 2 All E.R. 1089.

<sup>2</sup>*Cf.* Chalmers, page 108.

<sup>3</sup>*Pitman v. The Universal Marine Insurance Co.* (1882) 9 Q.B.D. 192.

had stated the value of the ship at the commencement of the risk as 4,000 consols. The plaintiffs claimed 781 consols and odd as a partial average loss, apparently on the basis that the loss to be made good is to be measured by the amount which it would have cost to repair the ship (deducting one-third as the customary allowance for new material). On this basis, the plaintiffs argued that the cost of repairing the ship so as to make her as good as she was before she took the ground, would have been about 5,300 consols, and, therefore, the difference between that 5,300 and the value of the ship *minus* 4,000, that is 1,300, less one-third, was the measure of indemnity. It was on this basis that the plaintiffs claimed 781 and odd consols. The defendants, on the other hand, took the stand that since the plaintiffs had actually sold the ship, all that they could recover was the difference between the "sound" value of the ship—4,000 consols—and the sale price realised, 3,897 consols. The difference would have come to about 113 consols, and adding to this certain amounts actually spent by the plaintiffs on slight repairs, the defendants paid 245 consols into court. Thus the adoption of the one or the other rule made a considerable difference in the amount to be borne by the insurer.

Judgment of  
Lindley J.

12. In the court of the first instance, Lindley J., adopted the first test, *viz.*, rule of depreciation. He held, that the cases were conclusive to show that events which had happened and not those which might have happened are to be regarded. He stressed the indemnity aspect of insurance, and repelled the contention that there was authority for the rules suggested by the plaintiffs. Analysing the plaintiff's contention, he said, that it was based upon three assumptions,—

- (i) that the plaintiffs might have repaired if they had chosen;
- (ii) that if they had repaired, the cost of repairs would be the measure of their loss;
- (iii) that it is immaterial to the insurers whether the repairs were actually effected or not.

As to the first, Lindley J., took it to be well-founded, because a shipowner could always repair if he chose and thus refrain from insisting on a total loss. As to the second assumption, he thought that it was well-founded if the repairs are made *bona fide* and with reasonable discretion. But he pointed out that if the repairs are so extensive and so out of proportion to the value of the ship when repaired, as to show want of *bona fides* or a total disregard of what is reasonable, then, it is by no means clear that their cost could be thrown on the underwriter. As to the third assumption, namely, that the plaintiffs had the *right* to repair and to recover the cost, *whether the right is exercised or not*, he regarded it as entirely erroneous. "Against what

do the underwriters agree to indemnify the assured? Surely against such loss as he may in fact sustain by reason of the perils insured against".<sup>1</sup> "Apart from all authority I should have thought it plain that a loss actually sustained under the circumstances which did happen, is to be preferred as a measure of indemnity to a loss which would have been sustained under circumstances which did not happen." He found no authority to the contrary. Accordingly, he held that the depreciation in the value of the ship was the real criterion, and was to be measured by the difference between the value of the ship when sound and what she is sold for when damaged. (The detailed calculation need not be considered at this stage).

13. (a) The plaintiffs appealed, and a majority of the Court of Appeal affirmed the judgment on the main point, namely, which of the two rival tests mentioned above was to be adopted. Jessel M. R. observed:<sup>2</sup> "The contract of insurance is, as I understand, a contract of indemnity to the insured against the loss incurred by him through the ship being injured by the perils of the sea. It follows from this, that as a general rule in no case can the insured become richer by reason of these perils, or in other words, that the insured are not to be entitled to receive from the insurer a larger sum for a single partial loss than if the ship was wholly lost." He further observed, that the rights of the shipowner who actually repaired the vessel to recover the amount expended in repairs are not the same in all cases as those of a shipowner who declines to repair because the ship is not worth repairing and who, therefore, sells the ship during the risk.

(b) Cotton L. J., also took the view that where the shipowner elects to take the course of selling the ship, he "as against himself, fixes his loss", i.e. he cannot, as against the underwriters, say that the depreciation of the vessel exceeds that which is ascertained by the result of the sale. "To hold that in the present case the insured is entitled to recover two-thirds of the estimated cost of repairs would be contrary to what is one of the principles applicable to all insurance cases, that the policy is a contract of indemnity".<sup>3</sup> While he took note of the fact that as a general rule the estimated cost of the repairs is the measure of deterioration, he pointed out, adopting the language of Maule J. in an earlier case,<sup>4</sup> "that the insured must recover the expenses not *eo nomine* as expenses but as the measure

<sup>1</sup>*Pitman v. The Universal Marine Insurance Co.*, (1882) 9 Q.B.D. 192, 197.

<sup>2</sup>*Pitman v. The Universal Marine Insurance Co.*, (1882) 9 Q.B.D. 192, 204.

<sup>3</sup>(1882) 9 Q.B.D. 192, 218.

<sup>4</sup>*Stewart v. Steele*, 5 Scott. N. R. 921, 948.

of the loss". Probably, he observed,<sup>1</sup> the most accurate way of stating the measure of what, under such circumstances, the ship-owner is to recover, is, that it will be the estimated cost of repairs less the usual deduction, *not exceeding the depreciation in value of the vessel as ascertained by the sale.*

(c) Brett L. J., however, in a dissenting judgment, held that a contract of marine insurance has nothing to do with gains or losses which are outside the contract. He observed that it was the cost of repairs against which the owner was indemnified and not the diminution in the value. He cited Arnould's statement<sup>2</sup> to the effect that if the damage done to the ship has not been repaired, the *only* mode of ascertaining its amount is by the estimate of surveyors. He cited certain cases also where the actual sale price was never considered as relevant. He further pointed out that the underwriters had for years paid for repairs. A policy on marine insurance is mainly construed according to long settled and admitted usage of merchants and underwriters, and the startling facts of the case in question which were wholly abnormal, should not, he said, justify any tampering with a settled rule of adjustment of liability. He was, therefore, of the opinion that the plaintiffs' claim ought to be allowed.

Mode of  
calculating  
depreciation.

14. While the judgment of Lindley J., was thus approved on the main question as to the test to be applied, the subordinate question, namely, how depreciation is to be calculated was not discussed at length by the Court of Appeal. The formula suggested in this connection by Lindley J. can be put as follows:<sup>3</sup> The sound value of the ship in the port of distress (Moulmein in this case) is to be ascertained. Her damaged value, i.e. *the value for which she was sold*, less the amount spent on repairs before sale, should be next ascertained. The difference between the sound value as so calculated and the damaged value as so calculated, represents the proportion of loss sustained by the ship-owner. (To this may be added whatever other sums are properly chargeable against the underwriters, and the final proportion of loss thus arrived at). The proportion of loss so arrived at is to be applied to the ship on its *declared* value (or, if the policy is an unvalued one, then on its real value) at the commencement of the risk. The proportion of the loss so calculated will be what the insurers have to pay. In the Court of Appeal<sup>4</sup> Jessel M. R. stated:

"As to the value, I think, the value to be regarded is the value of the ship at the port of departure, but in this

<sup>1</sup>(1882) 9 Q.B.D. 192, 218, 219.

<sup>2</sup>Arnould, Fifth edition, Vol. 2, page 901. Now see Fourteenth edition, Vol. 2, page 954.

<sup>3</sup>(1882) 9 Q.B.D., 192, 203 ; first 13 lines.

<sup>4</sup>(1882) 9 Q.B.D. 192, 205.

case it is not material because, I think, the value at Moulmein before the injury was about the same." Cotton L. J., does not appear to have touched this point (beyond stating that the measure of indemnity should not exceed the depreciation as ascertained by the sale.)

15. It would seem that there is no reason why the case of the ship being sold without repair in damaged state should not be covered. The amount to be recovered by assured should not exceed the depreciation as ascertained by the sale. Subject to this restriction, the reasonable cost of repairing damage can be allowed.<sup>1</sup>

Departure  
from the  
English  
Act.

Necessary departure has been made accordingly from the English Act.<sup>2</sup>

The effect of this decision has been thus stated in Arnould<sup>3</sup>:

"If the ship after sustaining an average loss is sold by her owner unrepaired, the measure of what he is entitled to recover against the insurer is the estimated cost of repairs less the usual deduction, not exceeding the depreciation in value of the vessel as ascertained by the sale."

[Arnould, of course, observes that it is impossible not to feel the force of the powerful dissenting judgment in view of which the law can hardly be stated to be settled.]

#### Clause 71

This deals with partial loss of freight. The proportion of the freight lost with reference to the whole freight at the risk of the assured has to be ascertained. That proportion of the sum fixed by the policy (if valued) or of the insurable value (if unvalued) is the measure of indemnity. General.

#### Clause 72

This deals with partial loss of goods, etc.

General.

The measure of indemnity is fixed with reference to "insurable value". Now, insurable value as defined<sup>4</sup> is the prime cost of the property insured plus the expenditure etc. Insurable value is thus artificially frozen with reference to the value before the shipping of the goods. The result is that, if the market prices of the goods fall, the assured can nevertheless claim indemnity on the basis of the old value. Hence, "cargo claims have a tendency to be more

<sup>1</sup>Cf. the judgment of Cotton L.J., discussed above—para. 10(b).

<sup>2</sup>See also the body of Report, para. 10.

<sup>3</sup>Arnould, 1954 Edition, Vol. 2, page 954, Article 1034.

<sup>4</sup>Section 16 (3), English Act—Clause 13 (3).



frequent in times of commercial depression than when there is a heavy consumer demand.”<sup>1</sup>

### Clause 73

**General.** This deals with apportionment of valuation. The section obviously is confined to valued policies.

**Application of the section.** The necessity for a section like this arises in the following cases:—

Supposing different species of property are insured under a valued policy; but the value of *each species* is not mentioned separately; then how is the value of each species to be taken in case of loss? If the policy is taken as unvalued, then there is no point in having entered a valuation. But, on the other hand, the valuation is a single one. What the section provides in effect is—the splitting up of the valuation, “apportionment”. The single value is apportioned over the different species, that is, split up, “as in the case of an unvalued policy”.<sup>2</sup>

The process is as follows:—

(i) First find out the insurable value of the species (see section 16 of the English Act);

(ii) then find out the insurable value of the whole (s. 16, English Act);

(iii) then find out the proportion between (i) and (ii) above. That proportion of the *total insured value* (which is already entered in the policy, the policy being a valued one) is taken as the insured value of the species.

This principle applies to species as well as to a part of a species.

**“Net arrived sound value”.** Where it is not possible to ascertain the value of the species by the test given above (because the various ingredients mentioned in section 16 of the English Act cannot be ascertained), a division of the valuation is made with reference to the “net arrived sound value” of the goods and their various species. “Arrived” values means the value of the goods when they arrive at the destination.

### Clause 74

**General.** This deals with measure of liability for—

- (i) general average contribution; and
- (ii) salvage charges.

<sup>1</sup>Dover, page 427.

<sup>2</sup>For unvalued policies, see section 16 of the English Act—Clause 13.

The section [sub-section (1)] is intended to indicate the Application of the Section. rules governing measure of liability of the insurer for amounts which the assured has paid or is liable to pay as general average contribution. Loss caused directly by the act of assured himself is not the subject-matter of the section.

The measure of indemnity is governed by "Contributory Value". The contributory value of an interest is its arrived value less any expenses or charges incurred after the general average act which would not have been incurred had this proved abortive.<sup>1,2</sup>

If the contributory value is less than the insured value, the insurer pays in full. Otherwise his liability is rateably reduced.

The rules actually adopted in business practice as to contributory values provide that contribution shall be made, "upon the actual net values of the property at the termination of the adventure, to which values shall be added the amount made good as general average for property sacrificed if not already included." (with certain deductions).<sup>3</sup>

The following illustration<sup>4</sup> may be useful:—

Illustration.

Cargo insured on valuation of 5000

Particular loss amounting to 10%

Deduction from the insured value [*vide* last 20 words of sub-section (1)] 500 (i.e. 5000 divided by 10).

Basis of insurer's liability thus reduced to 4500 (5000—500).

On the above data—

(i) if the contributory value is less than 4500, the insurers are liable in full for general average contribution [section 73 (1), earlier part].

(ii) if the contributory value is more than 4500, the insurer's liability is proportionately reduced. For example, if the contributory value is 6000, the insurers pay only three-fourths (4500/6000) of the general average contribution. [section 73 (1), middle part].

<sup>1</sup>Dover, page 430.

<sup>2</sup>For a detailed treatment of contributory values, see Keate, pages 128-129.

<sup>3</sup>See Rule XVII of the York-Antwerp Rules, 1950, reproduced in Keate, page 177 and in Dover, page 749. See also the Rules of Practice of the Association of Average Adjusters, rules 30, 31, 32, 33 and 34, reproduced in Keate, page 194 and Dover, page 734.

<sup>4</sup>*Cf.* Dover, pages 430-431.

**Salvage.** Sub-section (2) provides that liability for salvage charges<sup>1</sup>—i.e. extent of liability—will be determined on the like principles.

**Criticism regarding salvage charges.**

Two criticisms have been made against this provision (relating to salvage charges)—

(i) The subject-matter must contribute to salvage charges on the basis of its *saved* value and not its arrived value as in general average.

(ii) Where a portion has been actually *sacrificed* in general average and the general average act necessitates salvage, one difficulty arises. The salvors can collect *pro rata* on the saved values, while the contribution in general average must be based on *arrived values*. The sacrificed portion does not, however, actually “arrive” but should be charged with its share of the general average (on equitable principles). But since it was not saved, the salvors cannot expect it to meet any proportion of the salvage remuneration. This difficulty was formerly solved<sup>2</sup> by introducing (in statements of general average) a figure called “hypothetical salvage”, representing the value on which the sacrificed goods would have contributed to the salvage if they had not been sacrificed. This ensures equitable distribution of the burden by placing the sacrificed goods in no better position than if some other interests had been sacrificed. (The assured contributing on the basis of this hypothetical value can of course recover from the insurer under section 66(5)].

However, in modern times, Rule 44A of the Rules of Practice of the Association of Average Adjusters<sup>3</sup> provides that “expenses of salvage services rendered by or accepted under agreement shall in practice be treated as a general average provided that such expenses were incurred for the common safety.....” It is, therefore, unnecessary to pursue the matter further.

#### Clause 75

**General.** This deals with third party liabilities.

**Examples.** The following examples may be given:—

(i) Ship-owner’s liability arising out of negligent navigation.

(ii) Ship-owner’s liability under the contract of affreightment.

<sup>1</sup>See clause 66.

<sup>2</sup>Dover, page 432.

<sup>3</sup>Reproduced in Dover, page 739 and in Keate, page 200.

The section does not apply unless there is any express term for insurance against liability to a third party. The common law rule<sup>1</sup> was that a marine insurance policy in an ordinary form does not cover payments made by the assured to a third party in consequence of collision for which the assured ship was to blame. Express terms.

The Running Down Clause<sup>2</sup> is usually added to insure the ship against third-party liability. It is also known as the Collision Clause. It provides that "if the vessel thereby insured shall come into collision with any other vessel and the assured shall in consequence thereof become liable to pay and shall pay by way of damages to any other person... any sum in respect of such collision,...the underwriters will pay the assured, such portions of *three-fourths* of such sum or sums so paid as their respective subscriptions thereto bear to the value of the vessel", etc. Running Down Clause or Collision Clause.

The Running Down Clause covers liability only in tort and not in contract.

The reason why the ship-owners do not accept liability for the one-fourth is, that<sup>3</sup>—

"the ship-owner is a member of one of the Mutual Insurance Clubs which are established to take over the liability of the ship-owner for this 1/4th...or that the ship-owners have an insurance fund of their own, established for this purpose."

As has been stated, "Protection" associations cover the one-fourth collision liability for damage done.<sup>4</sup>

#### Clause 76

This deals with the general provisions as to measure of indemnity and is in a sense residuary provision. General.

Insurances on commissions and on securities sent by registered post insured in marine policy form are covered by this section. Application —securities sent by post.

#### Clause 77

This deals with "particular average". As to "particular average", see section 64 of the English Act. General.

Where the subject-matter insured is warranted "free from particular average" (F.P.A.), the assured cannot F.P.A. (Free from particular average).

<sup>1</sup>*De Vaux v. Salvador*, (1836) 4 Ad. & E. 420.

<sup>2</sup>Discussed in detail in—

(i) Keate, pages 110—112;

(ii) Dover, page 524, *et seq.*

<sup>3</sup>Keate, page 111.

<sup>4</sup>See Dover, page 494, under "Protection"

recover for loss of a part except in certain cases provided by this section. Salvage charges (section 65 of the English Act) and general average expenditure (section 66 of the English Act) are, however, recoverable, as expressly provided in this section.

**Percentage—franchise and excess.** For a discussion of “percentage” and mode of application of the rules relating thereto, see the discussion in the under-mentioned book.<sup>1</sup>

### Clause 78

**General.** This deals with successive losses.

**Importance of the section.** This section is most important in the case of time policies, because there is greater opportunity there for repairing the damage and for again incurring loss which can be claimed from the insurer.

**Total loss<sup>2</sup>** It has been said<sup>2</sup> that section 77(2) of the English Act is not exhaustive and that if the vessel is lost during the period of the policy, *whether by a peril insured against or otherwise*, and by a peril insured against has previously suffered damage which has been unrepaired and not otherwise made good, the assured can recover nothing in respect of the unrepaired damage.

**Same policy.** In this connection, reference may be made to a case decided by the House of Lords<sup>3-4</sup> where the facts were as follows: The vessel *Eastlands* was insured against marine risks under a time policy. There was no insurance against war risks, but during the whole period of the policy it was chartered to the Admiralty who assumed all responsibility for war risks. The ship was damaged from marine risks; the damage was repaired in part, but repairs estimated at £1,770 were *postponed*. Before these repairs could be carried out, the vessel was torpedoed by an enemy submarine and became a total loss. The Admiralty paid the agreed “sound” value less £1,770. The ship-owners claimed this amount from the underwriters. It was held that as the unrepaired damage was followed by a total loss, the smaller loss merged in the larger, and the underwriters were not liable even though the liability for the total loss did not fall upon them. The judgment of the Court of Appeal (Bankes, Warrington and Scrutton, L.J.) was reversed, and that of Bailhache, J. restored.

<sup>1</sup>Dover, page 280.

<sup>2</sup>Dover, page 437.

<sup>3</sup>*British and Foreign Insurance Co., Ltd., v. Wilson Shipping Co., Ltd.*, (1921) 1 A.C. 188.

<sup>4</sup>The case has been discussed in Arnould, Vol. 2, page 951, 952, Article 1072 a.

Lord Birkenhead<sup>1</sup> said that two aspects were to be considered:—

(1) Where the total loss is caused by a peril insured against by the policy in question, (2) where the total loss is not covered by the policy. The first is governed by section 77(2). The second is not dealt with by the Act, and it was necessary to examine the law established by the existing authorities, in view of section 91(2). After examining the authorities, he observed:—<sup>2</sup>

“The true rule is capable of statement in the following proposition. Where a vessel insured against perils of the sea, is damaged by one of the risks covered by the policy and before that damage is repaired she is lost, during the currency of the policy by a risk which is not covered by the policy, then the insurer is not liable for such damage”. He said that the rule embodied a principle on which underwriters and merchants had based their practice for upwards of a century.

The words “same policy” in the section enact a rule narrower than the decision in *Livie v. Jonson*<sup>3</sup> where a partial loss insured under the policy in suit, was followed by a total loss during the same voyage but not insured under that policy. It was held that the partial loss could not be recovered. As pointed out by Lord Sumner in *British and Foreign Insurance Co. v. Wilson Shipping Co.*,<sup>4</sup> the word “policy” and “the policy” are, throughout the sections relating to Measure of Indemnity, used to denote not merely (a) a single instrument whether subscribed (i) by one underwriter, or (ii) by many, but also (b) the entire insurance on the same subject-matter. He said that the words “under the same policy” rather meant “during the adventure” insured (whether a voyage or a period of time). He, however, did not regard the point as important, because section 91(2) of the English Act “preserves *Livie v. Jonson* to its full extent according to the true construction, unless and until it is overruled.” “The Act”, he said, “. . . only speaks of a *sequence* in time between a partial loss and a total loss, and of the partial loss not having been repaired”.

#### Clause 79

This deals with “suing and labouring” charges. “Suing” General is perhaps an abbreviation of “pursuing”.

The so-called sue and labour clause in a policy reads as follows:— Meaning of the section.

“And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assignees to sue,

<sup>1</sup>(1921) 1 A.C. 188, 193.

<sup>2</sup>(1921) 1 A.C. 188, 199.

<sup>3</sup>12 East 648.

<sup>4</sup>(1921) 1 A.C. 188, 211.

in and above the defence, safeguard, and recovery of the said goods and merchandise and ship etc., or any part thereof without prejudice to this insurance. To the charges whereof, we, the insurers, will contribute each one according to the rate and quantity of the sum herein assured".

**Object.** The object behind this clause<sup>1</sup> is to enable the assured to recover costs incurred for preservation of the subject-matter insured. Actually it benefits the insurer because his liability is reduced if the assured etc., take prompt action for preservation.<sup>2</sup>

**Relation to particular charges.** Sue and labour charges are a species of particular charges.<sup>3</sup>

**Examples.** Examples of charges which fall under this section are— (i) charges under a salvage agreement, (ii) costs incurred to recondition damaged goods, (iii) expenses of forwarding goods by another ship to save freight.

The following chart will show the distinction between the various classes of charges:—

	Salvage	General Average	Sue and Labour
<b>Sue and Labour Charges, Salvage Charges and General Average Expenditure, distinguished.</b>	S. 65	S. 66	S. 78
	Arising by Maritime Law	Arising by Maritime Law.	Incurred under an express clause.
	Incurred by others	May be incurred by the assured or by others.	Incurred by the assured or his agents.
	Is governed by the policy	Is governed by the policy.	Is regarded as an independent agreement.
	Measure of indemnity is limited by general provisions.	Measure of indemnity is limited by general provisions.	Is payable notwithstanding that the insurer may have paid for a total loss.
	S. 65 expressly excludes from salvage charges expenses rendered by the assured or his agents for averting peril insured against.	..	S. 78 (2) expressly excludes general average losses and contribution and salvage charges from the Sue and Labour Clause.
	Is incurred for preventing loss and consists of positive expenditure.	Is incurred for preserving the property imperilled in common adventure and consists either of sacrifice or positive expenditure.	Consists of positive charges for the defence, safe-guard and recovery of the goods, etc.
		Incurred for the benefit of the <i>whole adventure</i> .	Incurred for the benefit of a particular subject matter. <sup>4</sup>

<sup>1</sup>Lord Chorley, Shipping Law, 3rd edition, page 319.

<sup>2</sup>For a full discussion, see Keate, pages 72-73 and Dover, pages 270-272.

<sup>3</sup>See notes to clause 65.

<sup>4</sup>See Keate, page 73 and Dover, page 270.

**Clause 80**

This deals with subrogation.

General.

Section 79(1) of the English Act corresponds to section 135A(2), Transfer of Property Act, 1882. Section 79(2) corresponds to section 135A(3) of the Transfer of Property Act. Section 135A(2) and (3) should be deleted since their substance is being incorporated in the clause under discussion.<sup>1</sup>

Corresponding provisions in Indian Law.

Subrogation has been defined as "the right of the insurer on payment of loss to stand in the shoes of the assured and to avail himself of his rights and remedies". The object behind the rule is to prevent the assured from being indemnified for his losses from two or more sources and thus obtaining profit from the loss.<sup>2</sup>

Doctrine explained.

Compare the right of subrogation given to persons interested in immovable property who redeem a mortgage (section 92 of the Transfer of Property Act, 1882). That section says that the person concerned shall "have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee" etc. Compare section 140 of the Indian Contract Act, 1872, under which a surety (by the payment of his liability) is invested with all the rights which the creditor had against the principal debtor.

Analogous provisions.

Where the insurer pays for the whole loss, he takes over the interest of the assured in what remains and thus is entitled to the proprietary rights. In the case of partial loss, however, title in the subject-matter does not pass to the insurer but he gets all rights and remedies of the assured in and in respect of the subject-matter insured.

Distinction in subrogation, total and partial loss.

In practice, "letters of subrogation" are executed by the assured, laying out the rights of the insurer and hindering the assured to lend his name to any proceedings which the insurer might take against third parties liable for the loss.

Letters of subrogation.

Sometimes a clause "without benefit of salvage to the insurer" is inserted. Under such clause, proprietary rights of the assured are not transferred to the insurer.<sup>3</sup>

Without benefit of salvage.

Section 61 of the English Act provides that in the case of a constructive total loss the assured may treat the loss as a partial loss, or, at his option, abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss. The following points of difference between the two can be noted:—<sup>4,5</sup>

Abandonment and subrogation.

<sup>1</sup>For a discussion of the circumstances under which section 135A was introduced, see notes under clauses 52-53.

<sup>2</sup>Dover, page 441.

<sup>3</sup>See also notes under section 4, proviso, of the English Act—Clause 9.

<sup>4</sup>F.G. Hogg, cited in Dover, page 447.

<sup>5</sup>See also Keate, p. 98.



(i) In abandonment, the insurer has the property vested in him including proprietary rights and liens. In subrogation, he is entitled to the rights of action arising out of the loss; "Abandonment is the transferring of ownership in the thing insured from the assured to the underwriter.....Subrogation involves no change of ownership but is a right (which) the underwriter has to stand in the shoes of the assured....."

(ii) In abandonment, the rights follow on a valid abandonment, while in subrogation they arise on payment of the loss;.

(iii) Abandonment applies only in cases of total loss, while subrogation applies both to total and to partial losses;

(iv) Subrogation entitles the insurer to transfer of rights and remedies only in respect of the losses, while abandonment implies complete giving up of the subject-matter itself, leaving it to the insurers to decide whether they would take it over or not.

**Making profit out of subrogation—Query.**

The position as to whether an insurer, having paid the loss can, by virtue of subrogation, claim more than what he has paid, is not very clear. See the under-mentioned cases.<sup>1,2,3</sup> Lord Wright, M.R., has in a case before the Court of Appeal<sup>4</sup> agreed with the observations of Swinfen Eady, L.J.,<sup>5</sup> to the effect that the insurers can, by subrogation, recover upto the amount of the insurance. The point was, however, not material in either case because in both cases the sum claimed by the insurers was less than the amount insured.

**Increased value policy.**

When the assured, after taking out one policy, takes out an 'increased value policy'<sup>6</sup>, and the original policy does not contain a clause expressly or impliedly permitting additional insurance, then the increased value insurer cannot claim any share in the salvage (if the original insurer re-

<sup>1</sup>*North of England Iron Steamship Insurance Association v. Armstrong*, (1870) L.R. 5 Q.B.D. 244 (valued policy—ship worth £9,000 but valued and insured at £6,000—£6,000 paid—owner recovers £5,000 from guilty vessel—held, insurers could claim the whole sum as the owner was estopped by his under-valuation from denying the real value.)

<sup>2</sup>*Goole and Hull Steam Towing Co., Ltd. v. Ocean Marine Insurance Co. Ltd.*, cited in Dover, Handbook to Marine Insurance, 1957 edition, page 446.

<sup>3</sup>*Case of Glen Line, Ltd.*, cited in Dover Handbook, page 447. "§ . . . subrogation will only give the insurer rights upto twenty shillings in the pound on what he has paid." per Lord Atkin.

<sup>4</sup>*Boag v. Standard Marine Insurance Co.*, (1937) 1 All E.R. 714, 719, 720.

<sup>5</sup>*Thames and Mersey Marine Insurance Co. v. British and Chilian Steamship Co.*, (1916) 1 K.B. 30.

<sup>6</sup>See notes under s. 4, proviso, English Act,—Clause 9.

ceived any salvage). This was laid down by the Court of Appeal.<sup>1</sup> In that case, a cargo carried on a certain steamer was insured under an ordinary policy and also under an increased value policy. (But the ordinary policy did not contain any clause for increased valuation or permitting additional insurance). The steamer was stranded, and both insurers paid for a total loss and took letters of subrogation from the owners. The insurers under the ordinary policy paid a sum of £ 685. On a general average adjustment being made, £ 532 and odd was agreed as the sum arising as salvage to be received by the owners. This sum was claimed by the insurers under the ordinary policy, but the insurers under the increased value policy claimed to share rateably in the salvage. It was held, that the insurers under the ordinary policy were entitled to the whole sum of £ 532 and odd. As was pointed out by Lord Wright M.R.,<sup>2</sup> the first insurance was for the whole of the subject-matter for its full value, and the insurers were entitled to the full rights of subrogation; and any attempt by the owner of the goods to dispose of the value of those rights would be futile. If the original policy had contained a clause to the effect that in the event of any additional insurance being placed by the insurer the value of the cargo would, in the event of loss or claim, be deemed to be increased to the total amount insured at the time of the loss or accident, then the subsequent insurer would rank in *pari passu* with the main policy; but there was no such clause here. (Curiously enough, in this case, it was the increased value policy that contained such a clause—which benefitted no body). It was further observed by Romer L.J.,<sup>3</sup> and Scott L.J.,<sup>4</sup> that at the time when the increased value policy was effected, the first insurer had already become entitled to a *contingent* right to receive any sum which might be recovered as salvage. Of this right, the insurer could not be deprived by the assured. Scott L.J., further pointed out, that since there was no increased valuation clause in the first policy, the assured was estopped from alleging that the subject-matter of the insurance ever had any increased value; and if the assured was estopped, the subsequent insurer was also similarly estopped.

#### Clause 81

This deals with the right of contribution.

General.

Sub-section (1) provides that where the assured is over-insured by double-insurance,<sup>5</sup> each insurer is bound as between himself and other insurers to contribute rateably to

Application of the section.

<sup>1</sup>*Boag v. Standard Marine Insurance Co. Ltd.*, (1937) 1 All E.R. 714 C.A.

<sup>2</sup>(1937) 1 All E.R. 714, 720, 721.

<sup>3</sup>At page 722.

<sup>4</sup>At page 724.

<sup>5</sup>As to double-insurance, see section 32, English Act.—Clause 29

the amount for which he is liable. The important word is "contribute". The following points emerge:—

(i) the section does not apply unless there is over-insurance by double-insurance;

(ii) the section applies as between one insurer and the other insurers. It does not apply as between insurer and the assured, for which section 32(2)(d) applies;

(iii) contribution is proportionate to the amount undertaken by each insurer.

Position of assured.

As provided by section 32 (2) (a), the assured can claim payment from the insurer "in such order as he thinks fit", so long as the total sum recovered by him does not exceed the indemnity allowed by the Act.<sup>1</sup>

Marine and other policies.

The Marine Insurance Act is obviously confined to rights and duties under *marine* insurance. In the case of competition or conflict between a marine policy on the one hand and a non-marine policy on the other, the Act as such does not apply; but on general principles, it has been stated,<sup>2</sup> contribution would be applied. In practice, standard fire policies contain a clause limiting the insurer's liability to the rateable contribution of loss based on *all* subsisting assurances.

#### Clause 82

General.

This deals with under-insurance.

Assured his own insurer.

In the case of under-insurance, the assured is deemed to be his own insurer regarding the uninsured balance.

#### Clause 83

General.

This deals with enforcement of return of premium, and provides that where the premium is wholly or in part "declared to be returnable"<sup>3</sup> then it may be recovered or retained by the assured. As to the liability for the return of premium where the policy is effected through a broker, see section 53(1) of the English Act.

#### Clause 84

General.

This deals with the return of premium.

Returns Clause.

The "Returns Clause" in a policy provides for a *pro rata* monthly return for each uncommenced month if the policy is cancelled by agreement. Further, where the vessel is "laid-up" in a port for a period of 30 consecutive days, the

<sup>1</sup>See also notes under section 27 of the English Act—Clause 24.

<sup>2</sup>Dover, page 449.

<sup>3</sup>As to cases where premium is returnable, see sections 83 and 84, English Act.—Clauses 84 and 85.

clause allows return of premium on a certain basis. (When the ship is in port, it is at less risk of loss than when at sea, and this accounts for the provision for return of premium).

There may be provision for return of premium, in cargo insurance, if the journey proceeds *via* a particular route or the goods are packed in a particular kind of cases.

#### Clause 85

This deals with return of premium for failure of con- General. sideration.

Sub-section (2) provides that where the consideration for the payment of premium is apportionable, and an apportionable part of the consideration totally fails, then a proportion of the premium is returnable. Time policies, it is stated,<sup>1</sup> would not come under this provision because the period of time is non-apportionable and if the risk does not continue for the whole of the period of the policy, no return can be claimed. Apportionment of return.

Sub-section (3) deals with particular cases where re- Particular cases. turn for failure of consideration would apply:

*Para. (a)*—deals with the policy being void or being avoided by the insurer. As to avoiding the policy, see section 18(1) (non-disclosure by the assured), section 20(1) (untrue representation by the assured) etc.

*Para. (b)*—deals with the cases where the subject-matter has never been imperilled.

The proviso deals with "lost or not lost" clause.<sup>2</sup> If the insurer *knew* of the safe arrival of the ship, then, notwithstanding "lost or not lost" clause, he must return the premium, because so far as he was concerned there was no risk. "Lost or not lost".

*Para. (c)*—deals with the case where the assured had no insurable interest. As to insurable interest, see section 5 and the succeeding sections of the English Act. There is, however, no return of premium if the policy is effected by way of gaming or wagering. As to gaming or wagering policies, see section 4(2) of the English Act. The important words are "no insurable interest throughout the currency of the risk", so that where, though the assured had no interest in the beginning, still he acquires it later, and had an expectation of acquiring it when the policy was effected,<sup>3</sup> he can claim return of premium.

<sup>1</sup>Dover, page 455.

<sup>2</sup>*Cf.* section 6 (1), proviso and First Schedule, Rule 1, of the English Act, Clause 10 and Schedule, Rule 1.

<sup>3</sup>See section 4(2)(a), English Act.

*Para. (d)*—deals with a case where an assured had a defeasible interest which is terminated during the currency of the risk; the premium is not returnable in such case. As to “defeasible” interest, see section 7(1) of the English Act.

*Paras. (e) and (f)*—deal with over-insurance. The distinction between (e) and (f) is, that while (e) deals with over-insurance simply, (f) deals with over-insurance by double-insurance. Further, (e) is confined to unvalued policies, while (f) applies to all policies. Next, (e) contemplates a single policy (contrast the singular word “premium” used there with the plural word “premiums” used in (f)). Under para. (e), where the sum for which the subject-matter is insured exceeds the insurable value, there is over-insurance and a proportion of the premium is returnable if the policy is unvalued. Para. (f) deals with cases where more than one policy is taken out, resulting in over-insurance by double-insurance. The topic of such over-insurance is dealt with in section 32 (as between the insurer and the assured) and section 80 (contribution as between co-insurers). Where there is such over-insurance, a proportion of the *several premium* is returnable, subject to the proviso given below the section.

#### Clause 86

**General.** This deals with mutual insurance.

**Modifications allowed.** The section allows the following modifications in the case of mutual insurance:—

(a) The provisions of the Act relating to premium do not apply to mutual insurance, but a guarantee or other suitable agreed arrangement may be substituted for the premium.

(b) Any provision of the Act which can be modified by the agreement of the parties can, in the case of mutual insurance, be modified by the policies of the association or rules of the association.

**Utility of mutual insurance.** It has been stated<sup>1</sup> that the utility of mutual insurance lies in—

(a) reserving to the members any underwriting profits;

(b) extending protection to members not obtainable in the ordinary insurance market—for example, claims against third parties.

#### Clause 87

**General.** This deals with ratification of a contract of marine insurance effected in good faith by one person on behalf of another. The significance of the section lies in the last 8 words

<sup>1</sup>Dover, page 458.

“even after he is aware of a loss”. As to ratification generally, see sections 196—200 of the Indian Contract Act, 1872.

#### Clause 88

This deals with the variation of the implied obligations General. by agreement or usage.

#### Clause 89

This deals with “reasonable time”, “reasonable premium” General. and “reasonable diligence”.

#### Clause 90

This provides that for interpreting a policy, reference General. may be made to the “slip” or “covering note”,<sup>1</sup> for certain purposes. Section 21 expressly provides that for showing when the proposal was accepted the slip etc. may be referred to. In the case of mutual mistake also, presumably, the slip can be referred to for ratification.<sup>2</sup>

#### Clause 91

This saves the provisions of the common law. For an interesting application of this section, see Lord Sumner’s judgment in *British and Foreign Insurance Co. v. Wilson Shipping Co.*<sup>3-4</sup>.

There are provisions in—

- (a) the Indian Stamp Act, 1899;
- (b) the Companies Act,<sup>5</sup> 1956;
- (c) the Insurance Act, 1938,

which also have a bearing on marine insurance, but as they would remain unaffected for the proposed Bill, it is considered unnecessary to insert any savings for them.

### THE SCHEDULE

#### *Rule 15 of the Rules of Construction*

The English Act does not cover specifically the case of a ship driven by power other than steam. To cover such ships, a change has been made by adding appropriate words.<sup>6</sup>

Departure  
from the  
English  
Act.

<sup>1</sup>As to the meaning of these expressions, see notes under section 21 of the English Act,—Clause 18.

<sup>2</sup>*Cf.* Dover, page 460.

<sup>3</sup>(1921) 1 A.C. 188, 211.

<sup>4</sup>The case has been discussed in the notes to section 77 of the English Act—Clause 78.

<sup>5</sup>Clause 86 of this Bill deals with associations, and such associations must, it need not be said, comply with the Companies Act.

<sup>6</sup>*Cf.* Section 16 of the English Act and the departure proposed therefrom,—Clause 13.

*Suggestion regarding section 7(1) of the Indian Stamp Act, 1899*

Section 506, Merchant Shipping Act, 1894 (57 and 58 Vict. c. 60) runs as follows:—

Insurances  
of certain  
risks not  
invalid.

“506. An insurance effected against the happening, without the owner's actual fault or privity, of any or all of the events in respect of which the liability of the owner is limited under this Part of the Act shall not be invalid by reason of the nature of the risk”.

Chalmers<sup>1</sup> explains this as follows:—

“Part VIII limits the liability of the owner of British ships. The object of this section is to make it clear that although the liability of a ship-owner is limited, he is still at liberty to insure”. In other words, the “want of interest” objection is avoided.<sup>2</sup>

So far, there is no difficulty. But, curiously, section 7 of the Indian Stamp Act [following section 93, (English) Stamp Act, 1891] excepts contracts governed by section 506, Merchant Shipping Act from its operation. As pointed out by Chalmers,<sup>3</sup> the saving effected by this section (the English section) is curious. The object of the Merchant Shipping Act was to make it clear that although the ship-owners' common law liability was limited by the Act, he was nevertheless entitled to insure against this limited liability—but the apparent effect of the saving is to dispense with the necessity of a *policy* in those cases.

Suggestion.

In view of this criticism, which applies equally to section 7, Indian Stamp Act, the mention of section 506, Merchant Shipping Act in that section should be deleted. Further, there is no provision in the (Indian) Merchant Shipping Act, 1958 (44 of 1958), corresponding to section 506, English Merchant Shipping Act (though provisions limiting the liability occur in section 352 of the Indian Act).<sup>4</sup> Hence the mention of section 506, Merchant Shipping Act, has become obsolete in the Indian Stamp Act.

<sup>1</sup>Chalmers, page 164, foot-note 1.

<sup>2</sup>See the following note in 5th Edn., page 341—

“This section appears to have been inserted in the Act of 1862 *ex abundante cautela* to allay any apprehension there might be that such insurances could be impugned on the ground of want of interest or illegality. It seems, however, clear that they are valid apart from this section. See Hansard, Parl. Deb., Vol. 166, page 2227.”

<sup>3</sup>Chalmers, page 160, foot-note 2.

<sup>4</sup>Section 352 of the (Indian) Merchant Shipping Act, 1958 corresponds to section 503, Merchant Shipping Act, 1894.

### APPENDIX III

SHOWING THE PROVISION IN THE (ENGLISH) MARINE INSURANCE  
ACT, 1906, AND THE CORRESPONDING PROVISION, IF ANY, IN APPENDIX  
I.

<i>Section of the English Act</i>	<i>Clause in Appendix I</i>
I . . . . .	3
2 . . . . .	4
3 (1) . . . . .	5 .
3 (2) (a), part . . . . .	2 (c)
3 (2)(a), part and 3 (2)(b) (c) . . . . .	2 (d)
3 (2), Expl. . . . .	2 (e)
4 . . . . .	9
5 . . . . .	6
6 . . . . .	10
7 . . . . .	7 (1)
8 . . . . .	7 (2)
9 (1), part . . . . .	7 (3)
9 (1), part and 9 (2) . . . . .	12
10 . . . . .	7 (4)
11 . . . . .	7 (5)
12 . . . . .	7 (6)
13 . . . . .	7 (7)
14 (1) and 14 (3) . . . . .	8
14 (2) . . . . .	11
15 . . . . .	55



<i>Section of the English Act</i>	<i>Clause in Appendix I</i>
16 . . . . .	13
17 . . . . .	14
18 . . . . .	15
19 . . . . .	16
20 . . . . .	17
21 . . . . .	18
22 . . . . .	19
23 . . . . .	20
24 . . . . .	21
25 . . . . .	22
26 . . . . .	23
27 . . . . .	24
28 . . . . .	25
29 . . . . .	26
30 . . . . .	27
31 . . . . .	28
32 . . . . .	29
33 (1) (2) . . . . .	33
33 (3) . . . . .	35
34 . . . . .	36
35 . . . . .	34
36 . . . . .	37
37 . . . . .	38
38 . . . . .	39
39 . . . . .	40
40 . . . . .	41

<i>Section of the English Act</i>	<i>Clause in Appendix I</i>
41	42
42	43
43	44
44	45
45	46
46	47
47	48
48	49
49	50
50 (1)	52 (1)
50 (2)	54
50 (3)	52 (2)
51	53
52	30
53	31
54	32
55	57
56	58
57	59
58	60
59	51
60	61
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62	63
63	64
64	65

<i>Section of the English Act</i>	<i>Clause in Appendix I</i>
65 . . . . .	66
66 . . . . .	67
67 . . . . .	68
68 . . . . .	69
69 . . . . .	70
70 . . . . .	71
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85 . . . . .	86
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87 . . . . .	88
88 . . . . .	89
89 . . . . .	90
90 . . . . .	2 (b) (f) (g) (i)

<i>Section of the English Act</i>	<i>Clause in Appendix I</i>
91 . . . . .	91
92 (Repeal clause) . . . . .	..
93 . . . . .	I, part
94 . . . . .	I, part
First Schedule . . . . .	Schedule
Second Schedule (Enactments re-pealed).	..

## APPENDIX IV

### *Suggestions in respect of other Acts*

1. *Indian Stamp Act, 1899*—(a) Policies governed by s. 2(2) of the English Act—building risk, launching risk etc. policies and policies for adventures analogous to a marine adventure—should be subject to stamp duty as on sea-policies for insurance for voyages.<sup>1</sup>

(b) Certain provisions of the Stamp Law of England, which are of importance in the law of marine insurance, should be embodied in the Indian Stamp Act.<sup>2</sup>

(c) A provision similar to s.11 of the (English) Finance Act, 1901, providing that a marine insurance policy for time shall not be invalid merely on the ground that by the “continuation clause” it becomes available for a period of more than twelve months, should be inserted in the Indian Stamp Act, if s.7(2) of that Act is retained.<sup>3</sup>

(d) Section 7(1) of the Indian Stamp Act should be amended by deleting the mention of section 506 of the Merchant Shipping Act.<sup>4</sup>

(e) Sections 7(2) and 7(3) of the Indian Stamp Act should be omitted after the Bill on Marine Insurance is passed.<sup>5</sup>

2. *The Transfer of Property Act, 1882*—(a) Sections 130A and 135A(1) of the Transfer of Property Act should be deleted.<sup>6</sup>

(b) Sections 135A(2) and (3) of that Act should be deleted.<sup>7</sup>

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<sup>1</sup>See notes to s. 2 of the English Act—Clause 4 (notes on clauses).

<sup>2</sup>See notes to s. 22 of the English Act—Clause 19 (notes on clauses).

<sup>3</sup>See notes to s. 25 of the English Act—Clause 22 (notes on clauses).

<sup>4</sup>See note entitled “Suggestion regarding section 7 (1) of the Indian Stamp Act, 1899”, at the end of the notes on clauses.

<sup>5</sup>See notes to clauses 22 and 20, respectively.

<sup>6</sup>See notes to s. 50 of the English Act—Clauses 52-53 (notes on clauses).

<sup>7</sup>See notes to section 79 of the English Act—Clause 80 (notes on clauses).