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Author(s): Everett V. Abbot
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PERILS OF THE SEAS.

A STUDY IN MARINE INSURANCE.

NICHOLAS MAGENS, an English merchant, writing, in 1755, the earliest book in our tongue on the subject of insurance, sets out at length[1] a policy of marine insurance dated at London, Aug. 30, 1744. So much of it as is of present interest runs as follows: —

"Touching the Adventures and Perils which we the Assurers are contented to bear, and take upon us, in this Voyage, they are of the Seas, Men of War, Fire, Enemies, Pirates, Rovers, Thieves, Jettizons, Letters of Mart and Countermart,[2] Surprisals, Takings at Sea, Arrests, Restraints, and Detainments, of all Kings, Princes, 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 Ship, &c., or any Part thereof: And in case of any Loss or Misfortune, it shall be lawful to the Assurers, their Factors, Servants, and Assigns, to sue, labour, and travail for, in, and about the Defence, Safeguard, and Recovery of the said Ship, &c., or any Part thereof, without Prejudice to this Insurance."

Probably the foregoing formula is coeval with the beginnings of our modern commerce, and it is used to-day in New York and London. Although universally condemned by the judges for its looseness,[3] it has been the subject of so much judicial interpretation, not to say legislation, that it will undoubtedly continue in use for many years to come. Out of the mass of precedents to be found in the books certain well-defined rules have emerged. Those that are pertinent to my essay are these: —

I. Risks assumed by the assurer are (*a*) those expressly enumerated; (*b*) those of a character similar to what are enumerated. (This rule states the interpretation that is given to the general

[1] 1 Magens on Ins. 552 (1755).

[2] A somewhat hasty examination of the dictionaries fails to disclose this word "countermart," although it is found in nearly every policy of insurance on vessels that has been written in English for more then three hundred years. The phrase more usually used is, "letters of marque and reprisal."

[3] For a list of such animadversions, see 2 Pars. on Shipping, 27 (1859).

words "and of all other Perils, Losses, and Misfortunes that have or shall come, to the Hurt, Detriment, or Damage of the said Ship, &c., or any Part thereof."[1])

II. Risks not assumed are: (*a*) Negligence of the assured personally, of his master, or of his mariners.[2] (It is to be noted, however, that loss from barratry — that is, wilful wrong or *criminal* negligence of the master or mariners — is expressly assumed.) (*b*) Ordinary wear and tear.

Among the risks enumerated in the policy are: "Perils of the Seas," — a phrase of which the attempted definitions have been very numerous. It is one of those phrases which are intended to describe a collection of facts of no very exact or determined character, and, therefore, a strict definition is extremely difficult to come at, if not, indeed, impossible. Before such a definition can be attempted with any degree of success, the constitutive elements of the idea must first be ascertained and stated. When they are accurately known, then it will be time to frame a definition; before that, the attempt to define partakes of the nature of a leap in the dark.

In the case at hand, at least three such underlying ideas are to be noted. There may be others; but it is not my intention now to make an exhaustive list of them.

The first of these seems to be that of *accident*, — a *casus fortuitus*.[3] A peril of the seas is something distinct from the natural and ordinary operation of the forces of the sea or of the air. Thus, the ordinary deterioration of a vessel by wear and tear is not intended by the phrase. Neither would it be a peril of the sea if a vessel were allowed to rot in disuse.

Magnus *v.* Buttemer is a leading case. The ship "Elizabeth" was moored at high tide, and at that time she floated. At low tide she grounded on a hard and steep shingle, and in consequence was severely strained. It was held that that was not a peril of the seas, Maule, J., saying: "Here nothing has happened which the assured could have wished or anticipated to happen otherwise than it did happen. They intended the ship to take the ground as she did. There was no accident."[4]

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[1] 2 Arn. on Ins. 789 (6th ed., London, 1887), and cases cited.

[2] General Mut. Ins. Co. *v.* Sherwood, 14 How. 351 (1852); Dixon *v.* Sadler, 5 M. & W. 405 (1839); S. C. on appeal, 8 M. & W. 894 (1841).

[3] 1 Pars. on Mar. Ins. 544 (Boston, 1868), and cases cited.

[4] Magnus *v.* Buttemer, 11 C. B. 876 (1852), Maule, J., at p. 882.

Another of the constitutive elements is, that the accident must be such as pertains to a ship as a ship. It is not every accident on board a vessel which will render the insurer liable. Lord Bramwell brings out this point very clearly in his opinion in the Thames, &c. Insurance Co. *v.* Hamilton.[1] In that case a donkey-engine upon a vessel suffered serious damage because, while it was in operation, one of the valves became clogged, and the air-chamber was split in consequence. This was an accident *on* the ship, not *of* the ship, and therefore it was unanimously held to be not a peril of the seas.

The third and last element of the definition which I shall discuss seems to be that the damage must be a physical damage, and come from natural forces, if it is to be held within the terms of the policy.

Mr. Arnould,[2] in his valuable work on Insurance, says: —

> "The words 'perils of the seas' only extend to cover losses really caused by sea damage, or of the violence of the elements, *ex marinæ tempestatis discrimine*. . . . Thus, damage sustained by a ship from the fire of another vessel of the same nation, mistaking her for an enemy, is not, it seems, recoverable as caused by a peril of the sea;[3] and the damage sustained by a merchantman from the fire of an enemy would, it is apprehended, be open to the same objection if so stated;[4] though both . . . are included under the general words,[5] and would be recoverable under a correct specification of the cause of loss."

There may be other qualifications necessary before an entirely accurate definition of our phrase can be effected; but these three are sufficient for my purpose. We might now hazard a definition of perils of the sea as *marine accidents*. It is doubtful, however, if we have even yet really advanced towards our goal, for in any given case we must revert to the essential conditions, as just stated, before we can decide whether it is included in the definition.

In considering cases on this subject, it must be borne in mind that at the end of the clause in the policy with which we are dealing are very general words, "and of all other perils, losses, and misfortunes which have or shall come to the hurt, detriment, or

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[1] Thames, &c. Ins. Co. *v.* Hamilton, L. R. 12 App. Cas. 484, 495 (1887).

[2] 2 Arn. on Ins. (6th ed., London, 1887), 754.

[3] Citing Cullen *v.* Butler, 5 M. & Sel. 461 (1816).

[4] Citing Taylor *v.* Curtis, 6 Taunt. 608 (1816).

[5] "All other Perils," &c.

damage of the said ship," &c., and many recoveries are due to these words rather than to the description, "perils of the sea."[1] As this distinction is not always clearly made, care must be taken not to overlook it.

There are certain general classes of accidents which are always held to be perils of the sea. They are the three following: (1) Collision; (2) Foundering; (3) Stranding, shipwreck, or grounding. They include by far the largest number of losses, but the questions presented by them are not so difficult as those which arise in other cases. In a very large proportion of marine accidents there is an element of negligence, — negligence either of the master or of the crew of the vessel. It is this element of negligence which has raised the most puzzling points of interpretation, and it is with this same element of negligence, in its relation to what are called perils of the seas, that I propose to deal in this essay. All that has preceded is merely a preliminary clearing of the ground for the purposes of the following discussion.

As we have seen, by the terms of the policy the underwriter assumes to indemnify the owner against all perils of the seas. He does not assume, according to the books, to indemnify against negligence, unless it be negligence of the crew or captain amounting to barratry.[2] If, then, an accident occurs which comes within the description of a peril of the seas, but which is due to negligence not amounting to barratry, shall the underwriter be held responsible, or shall he be absolved? Let us assume an illustrative case.

A steamer carries a spare propeller weighing four or five tons. It is obvious that such a mass of steel must be very securely fastened, if great, or even fatal, injury to the vessel is to be avoided. Let it be supposed that the fastenings are negligently made, with the result that in a heavy storm which strikes the steamer the propeller comes loose, and, being tossed about, causes severe damage.

The injury to the vessel conforms to the requirements which have been found to be explicitly contained in the policy; that is, it was an accident pertaining to the ship as such, and caused by the physical forces of the sea. It was ultimately due, however, to the negligence of the master in stowing the propeller. On whom shall fall the loss, — on the owner, who must bear the consequences of

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[1] 2 Arn. on Ins. (6th ed., London, 1887), 754, 789, and cases cited; 1 Pars. on Ins. (Boston, 1868), 547, and cases cited in n. 4.

[2] See *ante*, p. 222.

his agent's carelessness, or upon the underwriter, who has taken upon himself responsibility for all perils of the seas?

In this dilemma the courts have evolved two rules to assist them. Mr. Arnould states one of them as follows: "Where the loss is not proximately caused by the perils of the sea, but is directly referable to the negligence or misconduct of the master or other agents of the assured, not amounting to barratry, there seems little doubt that the underwriters would be thereby discharged."[1] And Mr. Justice Curtis, in a very acute opinion in the case of the General Mutual Insurance Co. *v.* Sherwood,[2] after quoting the foregoing passage from Arnould, states the other rule thus: "A loss caused by a peril of the sea is to be borne by the underwriter, though the master did not use due care to avoid the peril." Mr. Justice Curtis then goes on to say: "The two rules are in themselves consistent. Indeed, they are both but applications to different cases of the maxim, *Causa proxima non remota spectatur.* In applying this maxim, in looking for the proximate cause of the loss, if it is found to be a peril of the sea, we inquire no further. We do not look for the cause of that peril; but if a peril of the sea which operated in a given case was not of itself sufficient to occasion, and did not in and by itself occasion, the loss claimed, if it depended upon the cause of the peril whether the loss claimed would follow, and, therefore, a particular cause of the peril is essential to be shown by the assured, then we must look beyond the peril to its cause to ascertain the efficient cause of the loss." This was the case to which these remarks applied: —

The brig "Emily" collided with another vessel, and the collision was due to the undisputed negligence of the first mate. Both vessels suffered considerable damage, and it was adjudged, after suit in admiralty, that the "Emily" was responsible for the damage to the other vessel. Her owner, having paid the amount fixed by the decree, brought suit against the insurance company to recover both losses, that is to say, the loss caused to the "Emily" herself, and the loss caused by her owner's having to pay for the damage to the other boat. The learned justice decided that the underwriter was liable for the damage to the brig herself, for the reason that it was caused by the collision, admittedly a peril of the sea; and it was immaterial, therefore, that the collision was due to the negligence of the first mate. He decided further that the underwriter was not

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[1] 2 Arn. on Ins. (1st ed., London, 1849), 771.

[2] 14 How. 351 (1852).

responsible for the damages paid to the other boat, because that damage was not caused by the collision. The collision alone would not have been sufficient to render the "Emily" liable. It was for the reason that the collision was a negligent collision, and for that reason alone, that the "Emily" was liable at all; and, therefore, the cause of that loss was, not the collision, but the negligence. Mr. Justice Curtis's opinion in this case contains by far the best discussion of the two rules with which I have met in my reading.

The Latin maxim used by the learned justice seems to have been first used in this connection by Lord Ellenborough in the case of Livie *v.* Jansen[1] in 1810. Certainly prior to that time the text-books do not contain it. In 1806, however, Chambre, J., speaks of the "inevitable cause" in substantially the sense of *proxima* in the maxim, and Bayley, Serjeant, in the same case, *arguendo*, says: "The loss ought to be assigned to the immediate cause."[2] From these quotations and from the fact that it was not until the present century had opened that the question began to be common in the courts, we may infer that the solution of the problem which the maxim affords was applied nearly simultaneously with the rise of the problem itself.

The difficulty with these two rules, or rather with the one rule, is twofold. In the first place, it is assumed that the *cause* of the loss is a peril of the seas. The fact is, however, that a peril of the seas, as that phrase is used in the policy and defined in the cases, is not a *cause* at all; it is always a *result*. That was established when it was determined that a peril of the seas must be an accident.[3]

A cause is a force, an energy. It is dynamic. Winds, waves, rain, lightning, steam, gravity, men's muscles, are all forces, and accidents are the resultants of their interaction. In the illustrative case, for example, the accident was the breaking of the timbers, the partitions, the decks, or whatever was injured. The causes were the steam driving the vessel through the water, the waves buffeting her, the hurricane rushing upon her, and finally the muscles of the men at the wheel which directed her course. These were all co-working, efficient causes, and out of their conjunction came the accident.

It is perfectly evident that when the insurer underwrites the

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[1] 12 East, 648 (1810).

[2] Hodgson *v.* Malcolm, 2 Bos. & P. N. R. 336 (1806).

[3] See *ante*, p. 222.

policy, it is accidents, injuries, damages, that he has in mind. It is these, not causes, that he promises to make good, and it is these that he would naturally enumerate in drafting his contract. He might describe his risks, it is true, by making a list of possible causes of injury, and then undertake indemnity against their effects. That would, however, be quite too philosophical for the merchant of the Middle Ages, and he, be it remembered, devised our policy.

To a very large extent this reasoning is tacitly involved in the reported decisions. The three recognized and principal perils are, as before stated, collision, stranding, and foundering. These are results, not causes; accidents, not forces. When the courts say, as they do, in pursuance of the second rule, as stated by Mr. Justice Curtis, that the insurer is responsible for collisions, even though the cause of them be negligence, it is in effect saying that that class of accidents has been uniformly accepted as one of the perils of the seas, and that in all such cases an inquiry into cause is unnecessary. The reason is that the insurer assumed the responsibility of that kind of accident, irrespective of cause. Indeed, every decision holding that, when a peril is expressly assumed, it is immaterial in determining the question of liability that it is caused by negligence, is a decision to the point that the underwriter insures effects, not causes.

The practical interpretation of insurance adjusters is confirmatory of this view, and they are courts who decide innumerably more cases than does any judicial tribunal. Such men do not look for the proximate cause in disputed cases, and it is extremely doubtful whether the mercantile mind would ever lend itself to such a refinement of reasoning as that. The fact is, the contract of insurance is a mercantile contract, and the general principles of its interpretation among merchants and insurance men were settled long before the courts were ever called upon to decide such questions. When, therefore, the courts use rules in interpreting the policy which merchants have not adopted, that is some evidence that the courts have gone astray.

Passing by, however, the first objection, that a peril of the seas is not a cause, there arises another objection still, — an objection that is logical in its nature. The owner of a vessel comes before the court and claims indemnity against an insurance company for an accident which he says was a peril of the seas. The court says to him in reply, "You must show what was the proximate cause of

your loss. If the proximate cause was a peril of the seas, then your claim is just. If the proximate cause was the negligence of your master, then your cause is unjust." The court has obviously not relieved itself of the necessity of defining perils of the seas. The logical syllogism may be baldly stated thus: The plaintiff may recover indemnity for perils of the seas. If the proximate cause of his loss was a peril of the seas, he has suffered a peril of the seas. If the proximate cause was negligence, he has not. This, in the process of deciding, is *analogous* to the fault of using in the proof of a proposition the proposition itself. When the decision is reached and announced, however, the error has evolved into a complete and veritable *petitio principii.*

It is not to be supposed for a moment that any court has openly allowed itself to fall into the logical error here pointed out. The error is implicit, however, in all decisions in which the maxim forms a link in the chain of reasoning, though it is very completely concealed. To show that the arguments of the courts are not misrepresented, I have chosen for illustration of the error the best-reasoned case that I know, the facts and decision of which have already been stated.

In the General Mutual Insurance Company *v.* Sherwood,[1] Mr. Justice Curtis thus states the question submitted to him: "The question is whether, under a policy insuring against the usual perils, including barratry, the underwriters are liable to repay to the insured, damages paid by him to the owners of another vessel and cargo, suffered in a collision occasioned by the negligence of the master or mariners of the vessel insured." There were in that case only three clauses of the policy within which the plaintiff could bring himself, as will be readily seen by the extract from the policy given in the opening paragraph of this article. These are: (1) Perils of the seas; (2) Barratry of the master or mariners; (3) The final clause as to all other perils and losses.

Take these in inverse order. The third clause introduces no considerations different in kind from the other two. As has already been shown, it is limited in its scope to losses similar in character to those already provided for by the preceding words of more special import. As to the second, barratry, there was no proof that it was the cause of the collision. If such had in fact been the case, the underwriters would have been responsible, since

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[1] 14 How. 351, 362 (1852).

they expressly assumed the risk of barratry. It follows, then, that the plaintiff was to entitle himself to a recovery, if at all, on the ground that he had suffered a peril of the seas, or something of that nature, and the question was whether that particular loss, *i. e.* the necessity of paying damages to the other boat, was a peril of the sea, or something of that nature.

The learned justice, having stated the question, then says: "Upon principle, the true inquiries are, what was the loss, and what was the cause?"[1] The course of his inquiry was to ascertain whether a peril of the sea (in this case, a collision) was the cause, or whether the cause was the mariners' negligence; for in the one case, he said, the underwriter, and in the other case the shipowner, was liable. It was the necessity of that inquiry that led him to state and distinguish the two rules. When it was finished, the learned judge was no farther advanced than when he began. He had determined, it is true, that the cause of the loss was negligence; but he had not determined that the result of the negligence was not a peril of the seas, *except by assuming that such results never are perils of the seas.* Since that was the very issue, the assumption was of course unwarranted.

In truth, the whole inquiry into cause should be abandoned. It has involved the courts in a maze of mediæval subtleties utterly foreign to the contract with which they are dealing, to say nothing of the internal inconsistency with themselves, and the external irreconcilability with each other, which has resulted therefrom. I defy any one to produce an intelligible rule by which to harmonize the adjudged cases on this subject. The probable truth of the matter is that at the outset the underwriters undertook to indemnify the shipowners for certain kinds of loss, no matter what the cause was. More than that, it was in all probability their conscious purpose to relieve owners of the burden of that special cause of loss, the occasional carelessness of masters and mariners. Such men are beyond control, and their carelessness in many things is inevitable. The shipowners, unable to escape its results, went to the insurers for indemnity, and the latter intended to grant it. Indeed, why should the insurers make themselves liable for the *criminal* wrong-doing of the men, as they have by the clause as to barratry, if they did not mean to be answerable as well for lesser injuries?

The judges, in holding otherwise, have almost certainly varied

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[1] 14 How. 351, at p. 363.

widely from the intention of the parties. Various explanations of the fact, historical and other, might be assigned, but space forbids. Suffice it to say, in conclusion, that if the courts desire to adjust their decisions to mercantile conceptions, they will, I am convinced, make use of some such process as has been indicated earlier in this article. They will first accurately determine the constituent ideas contained in the words "perils of the seas," and then, if it seems well, embody them in a definition; but in all doubtful cases it is to these constituent ideas, rather than to the definition, that they will ultimately resort. That is a method which may well be used in subjects other than the limited one here discussed.

Everett V. Abbot.

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