RIGHT OF UNDERWRITERS WHO HAVE SETTLED CLAIMS FOR GENERAL AVERAGE SACRIFICE AS DIRECT LIABILITY.

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RIGHT OF UNDERWRITERS WHO HAVE SETTLED CLAIMS FOR GENERAL AVERAGE SACRIFICE AS DIRECT LIABILITY.

This thesis is based on the English law. But in effect the Japanese law is same with the English law.

In my opinion General Average can, as a rule, neither be treated as Particular Average nor as Total Loss. General Average can not be anything else but General Average. Paying total amount of insured sum does not necessarily mean payment as for a total loss and therefore does not necessarily mean abandonment or transfer of proprietary right.

In England it became clear that general average loss is quite different from particular average loss and the former can not be treated as the latter. Now I think it is time to recognize that general average loss is quite different from total loss and direct liability of underwriters for g. a. claims can not be treated as for a total loss.

CHAPTER I—GENERAL AVERAGE EXPLAINED.

According to Marine Insurance Act, 1906, losses are divided into two, viz., " A loss may be either total or partial. Any loss other than a total loss is a partial loss." [M. I. Act S. 56—(1)] And again total loss is divided into two :—" A total loss may be either an actual total loss, or a constructive total loss." [M. I. Act S. 55—(2)].

Partial loss is also divided into two, viz.,—

(1) Particular average loss which is a partial loss of the subject matter insured, caused by *a peril insured against*, [M. I. Act S. 64-(1)].

(2) General average loss caused by general average act. G. A. loss includes expenditure and sacrifice. [M. I. Act S. 66-(1)]. G. A. also include general average contribution due by the assured. [M. I. Act. S. 66-(5)].

The essential point to be noticed is the fact that particular average is caused directly by the perils insured against [M. I. Act S. 64—(1)]. Insurer is liable for any loss proximately caused by a peril insured against [M. I. Act S. 55—(1)]. When the degree of damage of particular average increases to certain extent it becomes total loss. When it reaches to the point of actual total loss it is total loss any how. But when it reaches to the point of constructive total loss it can be treated as total loss or particular average according to the election of the assured. But general average is quite different from particular average and total loss for the reason that it is caused by the master's voluntary act to avert or minimize maritime perils. When such maritime perils are the perils insured against then the underwriters become liable for the general average loss or contribution [M. I. Act s. 66—(6)].

Let me now refer to English authorities on this question.

McArthur says,—"Total loss, as applied to insurance, signifies the utter loss, either actual or constructive, of the subject insured, by the *direct operation of the perils insured against*" (P. 145).

With regard to "Average" the same author explains,— Earliest use meant "a rateable contribution" required from the interested parties to make good a sacrifice made for common safety. Later the word average acquired secondary meaning of "sea damage" including every partial loss—particular and general." (P. 163). And the author continues,—"A general average differs from a particular average in its nature and incidence. The former is a partial loss, *voluntarily incurred for the common safely*, and made good proportionably by all parties concerned in the adventure, the latter is a partial loss, *fortuitously caused by a maritime peril*, and which has to be borne by the party upon whom it falls." (P. 163).

Philip,—Chap. XV S. I:—§ 1269:—"A loss which is not incurred for the general benefit is a particular average or total loss. A g. a. loss is, by its character, as being one in which divers interests contribute a part of their value, a partial, as distinguished from a total loss" (P. 60—Vol. II).

CHAPTER II—GOODS JETTISONED (Question of Direct Liability of Underwriters).

Dickenson and Others v. Jardine and Others, 1868 (Law Reports 1867-8, vol. 3 Common Pleas Cases 31 Victoriae):—

	£ s d
641 pckgs Tea valued and insured for	3987-10-0
607 jettisoned..................insured sum	„ 3776- 6-0
Not arrived value (if arrived) namely contributory value	„ 3305- 0-2
Am't to be made good..........................	£ 3305- 0-2
Am't to be contributed for the above goods for whole g.a. per the vessel	„ 995-12-2
Underwriter (defendant) paid...........	£ 995-12- 2
Cargo owner (plaintiffs) claimed	„ 2780-13-10
Insured sum	£ 3776- 6-0
Assured already received	„ 995-12-2
Claimed	£ 2780-13-10

The questions for the Court were: 1st. Whether the plaintiffs were entitled to recover in the action the whole of the insurable value of the cargo jettisoned? 2ndly. If the Court should be of opinion in the negative, then whether the plaintiffs were entitled to recover anything more than their g.a. proportion calculated upon the net arrived value of the goods?

The cargo owner sued the underwriters for the whole amount insured, without having first collected the contributions to which he was entitled from the other owners of the ship and cargo, it was held that the cargo owner was entitled to recover; and that the underwriters having paid him would be then entitled to stand in his place with respect to the general average contribtion.

By this decision, the direct liability of underwriters for jettisoned cargo (sacrifice for common safety) was expressly affirmed. Previous to this decision it was considered that, in case of a jettison or other sacrifice, the only liability of underwriters was to contribute their respective portions to the amount required to make good the loss in general average. (McArthur P. 134 foot note).

Note:—Memo clause in the policy originated in 1749 (Arnould S. 885). The word "unless general" in the Memo Clause to mean g.a. contribution only, not g.a. losses. In McArthur,—"The word average," said Lord Mansfield in Wilson V. Smiths 1764 "is used to signify a contribution to a general loss, and it is also used to signify a particular partial loss" (P. 163).

As to the reasonablity of allowing the assured direct claim for general average sacrifice—late Mr. Gow seems to have embraced doubt. In his opinion the case of D. v. J. above cited might be all right, but this decision, he thinks, lead to misconception. He says—"The reason why the assured in the case of D. v. J. could recover from two sources was that the accident which happened was one of the *perils specifically named in his insurance policy* giving him a contract right to recover, and that he had at the same time a common law right to have his loss made good by contributions from others interested in the venture. But the fact that the latter right is a right in general average does not seem to imply of necessity that the assured's direct claim against his underwriter must be a claim of the same class. . . . . . . Consequently it is submitted that had the casualty in Dickenson v. Jardine not been a *named peril* in the policy, there would have been no opportunity to resort to analogy and bring in the idea of a direct claim for g.a. sacrifice, such as is now legalized by the enactment of S. 66, Sub-section 4." (Gow M. I. p. 122).

Note:—McArthur seems to have embraced the idea that "all other perils, losses, etc." include the water damage in ejusdem generis of fire (P. 116) (Also see Mr. Carver's opinion on P. 57 of the Report of A.A. Association of 1889).

Bovill, C. J. said in the case of D. v. J. "goods were insured against jettison and the goods were jettisoned.....................therefore the assured is entitled to recover the sum insured."

Willes, J. in the above case of D. v. J. said "the goods were totally lost at the time, though their owner had a contingent right to recover from certain persons a portion of their value."

Recognizing the direct liability of the underwriters for the g.a. sacrifice (as it is now recognized in the law of England) doubt may arise with regard to the nature of the losses to be paid by the underwriters.

The doubt may arise in the following manner :—

The idea that general average in always partial loss is based on the idea that the loss of the cargo sacrificed is the part of the loss which ultimately falls upon that cargo. The part which has to be coutributed by other interests, although contingent, is not necessarily considered to be the loss. But on the other hand, when the sacrifice is paid by the underwriter—for instance—in case of water damaged cargo (sacrifice) arriving at destination—percentage of depreciation on insured sum is paid (method of particular average calculation as shown in M. I. Act. S. 71—(3). If the insured sum is bigger than the market value the underwriter can not recover (from contribution) all the sum he paid (less contribution). For example :—

Insured value......... ¥1,000
Market value......... „ 800
Depreciation 15% (damaged by water used to quench fire)
u/w recovers by Contribution (made good)
¥800 × 15% = ¥120.00
Less sacrifice falling upon the cargo
¥800 × 5% (5% being percentage
of whole g.a.) .... ¥ 40.00
Am't to be recovered by the u/w .... ¥ 80.00
Now, — u/w pays first ¥1,000 × 15% = ¥ 150.00
u/w recovers afterward.......................... ¥ 80.00
Net liab. of u/w .... ¥ 70.00

But should the assured have waited till the statement of general average is drawn up,—

U/w would have to pay ¥800 × 5% = ¥40 Only.

The difference bet. ¥70—¥40 = ¥30. arises from the excess of insured value over market value.—

$$\text{¥}800 \times 15\% = \text{¥}120.00$$
$$\text{¥}1,000 \times 15\% = „\ 150.00$$
$$\text{¥}\ 30.00$$

who shall bear this loss of ¥30.00. ?

In case of particular average there is no doubt that this ¥30.00 should fall on the u/w. But if g.a. supposes that there is no loss excepting the loss ultimately falling on the cargo (the am't being contributed from other interests) no claim should be allowed to the assured. The payment by the u/w (direct liability) is simply supposed to arise from paying in advance instead of waiting until the completion of the statement. The above refers to the case when the goods arrived damaged. But the same is true when the cargo is jettisoned. In D. v. Jardine, for example,—u/w was ordered to pay £3776-6-0 (insured sum) and paid. But market value was £3305-0-2. The am't of total contribution was £995-12-2. Then :—

	£3776-6-0
Less am't of cont.	,, 995-12-2
u/w should recover ?...............	£2780-13-10

	£3305-0-2	
	,, 995-12-2	
Did recover	£2309- 8-0	£2309- 8-0
	Over paid by u/w ?—	£471-5-10

This difference comes from the difference of Insured value over market value viz :—

£3776-6-0
£3305-0-2
£ 471-5-10

Should this £471-5-10 be treated as ultimately to fall on the underwriter, if so, on what reason ?

Coming to think of the above fact one becomes inclined to think that general average sacrifice,—in case being treated as direct liability on underwriter basing claim on the insured value—g.a. sacrifice was probably treated as particular average in the case of D. v. Jardine above cited.

CHAPTER III—RULES OF PRACTICE OF ASSOCIATION OF AVERAGE ADJUSTERS, LONDON, TREATING THE G. A. SACRIFICE [illegible] PARTICULAR AVERAGE.

Hereunder I try [illegible] in that General Average can not be particular average. [illegible]/74 (Report P. 20) Mr. Lowndes moved :—

"That the direct liability of an underwriter on goods for the value of goods insured by him which have been jettisoned or sacrificed for the common safety, or of an underwriter on ship, for ships' materials sacrificed for the common safety, be treated as particular average." This proposal passed without explanation as probationary rule. Next year Mr. Lowndes moved and was confirmed without discussion.

In 1879 Mr. Powell moved to rescind the above Rule of Practice. (P. 24). According to Mr. Powell's explanation—A ship had slipped her anchor, a loss which was general average; and damage was also sustained by the vessel, which was acknowledged to be particular average. The latter, not amounting to the stipulated 3 percent on the insured value, the adjuster following the rule under discussion, had added the loss of the anchor to the acknowledged particular average, and the claim being thus raised to the required percentage, was submitted for payment. The claim was ultimately placed before Mr. Watkin Williams, Q. C., the Counsel for the defendant in D. v. Jardine.

It was not questioned that the u/w was directly liable for the loss of anchor (general average loss). As to the question whether these two damages can be added together in order to make up the required 3 percent. Mr. Watkin answering in negative said——"It is a fallacy to suppose that general average is confined to the contributions made toward a sacrifice, although it includes such contributions as being constructive losses pro tanto of the goods on other interest in respect of which the contribution is made. Primarily, the general average loss is the loss directly caused by the sacrifice; indirectly and constructively, it includes the contributions which, by the maritime law, all interests have to make. D. v. Jardine, properly understood, has really no bearing upon the point; but of course those average staters, *who imagined that general average meant and was confined to general average contributions* rather than the loss itself which gave rise to such contributions, and who overlooked the fact that the contributions were only constructively brought within the definition of such loss at all; those average staters, if they are unwilling to admit the logical accuracy and soundness of D. v. Jardine, *will of course contend that it has decided that a general average can be particular average.* Such however, is not true result of that case. It is equally clear now, as it always has been, that in calculating the minimum percentage of average under the memorandum, all losses in the nature of general average must be excluded." Mr. Powell citing the above opinion of Mr. Watkins concluded saying,—"Just as there are two descriptions of total loss,—absolute and constructive,—so there may be two descriptions of partial loss,—general average loss and particular average loss. It seems absurd that average can be general and particular at the same time. I take the position that there is such a loss as general average loss and that the expression in the policy "unless general" means general average loss as well as general average contribution. (Report 1879 P. 26) But Mr. Powell's resolution was lost by vote.

In 1882 and in 1883 Mr. Hogg explained that the above Rule of Practice should be rescinded. In the case of Price v. AI Ships Small Damage Ins. Association (1889) it was decided that general and particular average loss can not be added combined to attain the franchise in the poliey. So in the same year (1889) Mr. Hogg moved that the Rule of Practice dealing with the underwriters liability in respect of jettison should be rescinded. All the members agreed that the Rule of Practice was against the Price case and was rescinded.

As the decision of the Court of Appeal of the Price case was given in 1889 and the Rule of Practice was rescinded as explained above, a new rule intended as a substitute was proposed by Mr. McArthur, viz:—

Sacrifice for the common safety; direct liability of underwriter.—

"That a partial loss of goods or ships materials jettisoned or otherwise sacrificed for the common safety, not being particular average, is not taken into account in computing the memo. percentages; and the direct liability of underwriters for such a loss is consequently unaffected by the memo. or any other warranty against particular average" (Report P. 42) Mr. McArthur said in supporting the proposition..............that the first portion of the resolution was simply a statement of the decision in the Price's case;....................The second clause followed, he thought it would be allowed, by logical sequence from the first, etc. Mr. Lindley moved following amendment to Mr. McArthur's proposal and passed:—

"That in case of g.a. sacrifice there is under ordinary policies of insurance, a direct liability of an underwriter on ship for loss of or damage to ship's materials, and of an underwriter on goods or freight, for loss of or damage to goods or loss of freight so sacrificed as a g.a. loss; that such not being particular average is not taken into account in computing the memo. percentages, and that the direct liability of an underwriter for such loss is consequently unaffected by the memo. or any other warranty respecting particular average."

In 1891 the above probationary rule was confirmed (P. 34—R. of P. No. 38).

The above account of Rules of Practice affected by Dickenson v. Jardine and Price v. A. I. Ships Small Damage Ins. Assn. shows that General Average always occupies its own position and ought not to be treated as particular average.

CHAPTER IV—PAYMENT OF TOTAL INSURED VALUE IS NOT NECESSARILY PAYMENT AS FOR A TOTAL LOSS. IN THE PRECEEDING CHAPTER (CHAPTER V) I MADE CLEAR THAT G. A. IS NOT PARTICULAR AVERAGE; HEREUNDER I EXPLAIN THAT GENERAL AVERAGE IS NOT TOTAL LOSS EITHER.

It is true that until the decision of D. v. Jardine came out it was believed that the liability imposed on underwriters under the name of General Average meant contribution to G. A. [Gow's Sea Ins. P. 12. M. I. Act S. 66—(4)]. Just as the direct liability is not particular average (which is confirmed by Price v. AI Ships Small Damage Ins. Association) so for the same reason General Average is not total loss. Because both particular average and total loss are losses caused by direct operation of the perils insured againt (McArthur P. 145) [M. I. Act. S. 64—(1)]. General average, from insurance point of view, is caused by struggle of the master against losses to be caused by perils insured against [M. I. Act S. 66—(6)].

General Average keeps its own position :—

When suing and labouring expenses come under General Average expenditure, then the expenditure is no more recoverable under suing and labouring expenses [M. I. Act S. 78—(2)]. In other words,—When the expenditure belongs to general average it can not belong to other item, viz ; to suing and labouring expenditure. Damage by water used to quench the fire for common safety is general average loss. Loss by fire is either particular average or total loss. Water damage which is sacrifice and general average can not be looked upon from the point of ejusdem generis as same with fire damage which is either particular or total loss.

Note :—At the foot note of "The Marine Insurance Act" by de Hart & Simey it is mentioned that "...............neither general average losses nor salvage charges are recoverable at all under a T. L. O. policy" (P. 87). I think the writers are quite right.

Arnould on Marine Ins. S. 1004.—"By virtue of the contract in the policy, the owner of property sacrificed may have recourse in the first instance to his own insurer for the whole of his loss, and the insurer upon payment succeeds, by subrogation, to the rights of the assured as against third persons. This rule however does not apply to g.a. expenditures, as do not involve *the loss or destruction of any part of any particular interest*, so as to make underwriter on that interest directly liable in respect of the whole thereof."—[The Mary Thomas, 1894 M. I. Act S. 66—(4)].

Arnould on M. I. S. 1005 :—"The rule that in case of a g.a. sacrifice the owner of the interest sacrificed can recover the full amount of the loss from the insurer of that interest does not apply when two or more of the contributing interests are owned by the same assured. The reason for this exception, as stated by the Court of Appeal, is that the assured is deemed to have the contributions of the other interests which belong to him in his pocket, and therefore the amount of these contributions must be deducted from the amount of the loss (Montgomery v. Indemnity Mutual, 1902)."

Taking the above description in Arnould and considering also D. v. Jardine—the direct liability of the underwriter is based upon the fact that thing insured is destroyed, and also based upon the contingency that the losses are to be contributed when the remaining interests arrive. These fact and contingency taken together form special feature of g.a. sacrifice, although the idea of loss might not be quite so clear as when the g.a. meant only g.a. contribution.

When goods are sold short of destination—if damaged and damage will increase and become total loss if forwarded to destination:—it is total loss. Or if expenses of forwarding the damaged goods to destination exceed their value on arrival it can be treated as total loss. [(M. I. Act S. 60 (2) (iii)]. (as to expenses to be taken into account see S. 1151 of Arnould) Under such circumstances surveyors recommend usually selling goods at short of destination. But we must bear in mind that selling does not change the nature of g.a. sacrifice into particular average or into total loss. If the damage of goods is water damage caused in extinguishing the fire for common safety—and under surveyor's recommendation are sold at port of refuge—it is still general average and nothing else. (as to constructive total loss of goods refer Gow's M. I. P. 153, McArthur P. 150, Eldridge P. 196, Arnould S. 1138, M. I. Act S. 60, etc.)

In "Marine Insurance and Kindred Subjects" reprinted from Lloyd's List—there is a lecture entitled "Institute Cargo Clauses" given by Mr. W. Richards. In this lecture (P.28) it is described: "Salvage loss occurs when goods are necessarily, by reason of damage through perils insured against, sold short of destination, but unless the whole of the goods are lost and/or necessarily sold short of destination, the loss is partial not total."

In my opinion even if whole of the goods iusured (supposing cotton consisting of 50 bales were all sold) were sold' if it is water damage (sacrifice for common safety), then it can not become total loss. It does not change the nature of general average sacrifice whether whole 50 Bales are water damaged; 25 water damaged and the other half (25 bales) fire and water damaged; or half (25 bales) water damaged and the rest arrived sound; all the same the water damage remains general average.

Note:—With regard to fire and water damaged bales—these may be treated as total loss when the apportionable part is damaged to the extent of reaching constructive total loss [M. I. Act S. 76—(1), S. 79—(1)].

Mr. F. H. Carey's "Marine Insurance"—page 20—when sold short of destination the claim on the Underwriters would be for the insured value, and they would be *entitled to the proceeds* after deducting the expenses of salvage and all other charges that may attach to the cargo.

It is all the same whether water damaged (sacrifice) cargo was sold short of destination or sold at destination unidentifiable,—the nature of the loss always remain as sacrifice and as general average loss. If the assured declares the intention of abandoning to the underwriter and underwriter accepts it, then things may change, but to quote the phrases from McArthur "there is no notice of abandonment i.e. there is no notification by the assured to the underwriters that he elects to treat the claim as one for total loss. The assured's claim is not admitted as for total loss and there can not be act of cession whereby the assured consents to give up to all the remains of the property recovered (P. 154). The payment by the u/w does not convey a tender on the part of the assured to abandon to the underwriter all his interests in the thing insured. The fact that simple payment even of all the insured sum does not necessarily convey the idea of total loss and abandonment is clearly shown in the case of Aitchin v. Lohre, in the decision of House of Lord. (although this is the case of not Goods but of Ship insurance).

CHAPTER V—EXTENT OF RIGHT OF UNDERWRITER WHO HAS PAID SACRIFICE AS DIRECT LIABILITY.

Hereunder I intend to explain that the underwriter stands in the shoes of the assured and can recover only up to the amount he has paid. For example, 60 Bales insured, 20 Bales of which water damaged (no proceeds); 40 bales arrived sound. Insured value is £10 per bale, while market value is £15 per bale. Then account between the underwriter and the assured should be as follows :—

		Insured Value	U/n pays on a/c of damage	Contribution	Total payment of u/w	U/w receive made good	Net payment of u/w
60 Bales	20 B/s water damage	£200	£200	£200 × 50% = £100	£300	£200	£100
	40 B/s arrived sound	£400	——	£400 × 50% = £200	£200	——	£200
			£200	£300	£500	£200	£300 Total liability of u/w

Or if all the 60 bales are water damaged (supposing no proceeds were realized) :—

Water damaged	Insured value	U/w pays on a/c of damage	U/w pays Contribution	Total payment of u/w	U/w receive made good	Net payment of u/w
60 Bales	£600	£600	£600 × 50% = £300	£900	£600	£300

According to Arnould S. 1005 :—" The underwriters are not necessarily bound to reimburse the full amount of the sacrifice or of the contribution, but only that portion of it which the value of the interest as insured bears to its value as estimated for the purpose of contribution ; and this is obviously just for the value of the ship or goods, as between the assured and his underwriter, is either their value in the policy or else, in an open policy, their value at the time and place of the ships' sailing, but their contributory value is, as we have seen, something very different to this viz ; their net value as they reach their owner's hands at the port of adjustment. It is evident, therefore, that underwriter can not be at all affected by the latter value, but only by the former. Hence the rule, " whatever is paid in contribution, by the excess of the contributory value over the value in the policy, is paid by the assured ; but for whatever is paid on a contributory value not exceeding the value in the policy, the assured is indemnified on the proportion insured." (M. I. Act S. 73—(1) embodies this principle). [The new rule of Practice No. 40 of A. A. Association confirmed in 1923 is practically same with the M. I. Act. S. 73—(1)] (see Report P. 14)

Arnould at the foot note,—adds that,—" On the other hand it is provided by a rule of the Association of A. Adjusters that " an underwriter who has paid for loss by jettison of the thing insured is entitled, in the proportion that the sum insured bears to the policy value, to whatever is recovered in general average in respect of such loss, although the amount so recovered may exceed the amount paid by him " (Rule No. 57).

Note :—In 1882 Mr. W. Richards moved the above rule which was passed as probationary rule in that year and next year (1883) it was confirmed (P. 47). Mr. Richards' point for proposing the rule is based on the idea that the payment of insured sum for jettison is payment of *a total loss*. (P. 48) Mr. Richards in submitting the rule for confirmation in 1883 explained :— .... the motion is in effect an assertion that an owner of cargo to whom the law has given in case of jettison two modes of indemnity—namely, that of proceeding against his underwriters, or of claiming from the various interests, in ship, cargo and freight, after the arrival of the vessel at the port of discharge—having decided to elect the former, does, by the act of claiming and recovering a total loss from the underwriter, make over to the underwriter all his rights in respect to any contribution which may subsequently be received from the co-adventurers in the ship, cargo, and freight."..................

"When the assured, in case of jettison, elected to seek his remedy under his policy, that policy being valued, the payment by the underwriter of the amount insured was, as between them, a complete indemnity, and the underwriter was entitled to the rights, in their entirety, which the assured may have against third parties."

"Mr. Richards also added,—"If the owner of cargo had been paid in full by the underwriter, that payment under a valued policy represented the loss sustained, and if he were further entitled to claim a portion of any amount made good in general average, that would be, pro tanto, as between himself and his underwriter, a payment twice over (Report P. P. 42—43)."

Under the methods of paying total amount of damage (sacrifice) and receiving proceeds [method of t. l. calculation S. 66—(4)] the net am't to be paid by the underwriter fracutuates according to the rise and fall of the market of the goods. When settled by the method shown in S. 71—(3) (particular average calculation?) amount to be paid only relates to the degree of damage and has no connection with the fractuation of the market. In the method of paying whole loss the underwriter's net liability increases when the market is low. It decreases when the market is high. But the point specially to be noted is the fact that his payment for g.a. never exceeds insured sum in any case. Insured sum is the limit of his obligation to indemnify. If it is sue and labour expenses the payment might go over to higher amount.

In case of rising market his gain should, for the same reason, be limited to the sum insured. In other words he shall not be admitted to subrogate to more than he paid. The excess of market value over the sum of insurance is for the account of the assured. He pays g.a. contribution for it. This margin also should be accounted for the benefit of assured. No abandonment could be inferred under such circumstances. In the chairman's (Mr. Lindley) address of last year (Association of A. A.) there appears:—"The transfer of proprietary rights depends upon abandonment either expressed or implied. The payment of a total loss of goods, even if no notice of abandonment has been given, entitles the Insurers to the transfer to them of what remains of the goods themselves, not in virtue of the payment but by their implied abandonment." (P.9)

But it is not a payment of a total loss, but it is a case of general average loss.

The M. I. Act S. 79.—(1) is always referred in order to argue that the u/w is entitled to take over the whole proprietary right of what remains. But this is, as clearly written in the section, the case of having paid *for a total loss*. "For a total loss" does not mean total sum of insuranee money. Paying total sum of insurance money is one of the method of paying claim. In case of particular average there might occur cases of paying up to the sum of total insured sum as seen in case of Aitchison v. Lohre.

The case of water damaged goods of fire case is shown in S. 79—(2). This is the case of subrogation. Underwriter should not be allowed to recover more than paid by him. Underwriters liability is always measured by the insurable value. His right of recovery should also be measured by the same value. Contributory value (market value at destination) is one thing. Insurable value (value at port of shipment) is another thing. U/W's right of recovery should not be measured by the value for which underwriters have no concern. The case of constructive total loss and consequent abandonment is special case, not to be adopted in the case in question.

Mr. Lindley in the above-mentioned address recommended to solve this question by mutually agreeing to the method of abandonment. He said,—"Might it not be possible for the parties to come to some agreement on these lines? Possibly the solution might be found by the insertion of some such words as these in the Institute Cargo Clauses":

"By settlement as for a total loss of the full Insured value of the whole or of any portion of the goods insured by this policy, what remains of the goods so paid for, and all the rights of the Assured in respect of the loss are transferred to the Underwriter."

(The end)

Shinji Tasaki.