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## The Term Assailing Thieves in Marine Insurance Policy Provided Coverage for Theft by Force or Violence of Personal Property on Vessel, Not Coverage for Theft of Vessel Itself.

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MARINE INSURANCE—THE TERM "ASSAILING THIEVES" IN MARINE INSURANCE POLICY PROVIDED COVERAGE FOR THEFT BY FORCE OR VIOLENCE OF PERSONAL PROPERTY ON VESSEL, NOT COVERAGE FOR THEFT OF VESSEL ITSELF. *S. Felicione & Sons Fish Company, Inc. v. Citizens Casualty Company of New York*, 430 F.2d 136 (5th Cir. 1970).

On November 9, 1967 the *Miss Sondra Leigh* with her master, Mr. Tindall, and two crewmen departed Port Isabelle, Texas, to fish for shrimp off the coast of Mexico. After four days, *Miss Sondra Leigh* was discharging her catch into a service vessel when the *Esto Fleet*, captained by Frank Paprocki, a close friend of Tindall, made fast to the *Miss Sondra Leigh*. Shortly thereafter, Paprocki appeared with a gun in one hand and a bottle of whiskey in the other firing the weapon into the air. A violent argument resulted between Paprocki and Tindall whereupon Paprocki refused to disengage the *Esto Fleet* from the *Miss Sondra Leigh*. Duhon, a crewman of the *Miss Sondra Leigh*, came topside and found Tindall and the other crewman shot to death. Duhon jumped overboard with Paprocki firing twice at him. The next day the *Esto Fleet* was observed towing the *Miss Sondra Leigh* partially submerged towards the open sea. By afternoon Paprocki had capsized the *Miss Sondra Leigh*. After ramming her three times with the *Esto Fleet*, Paprocki departed the area and has not been heard from since. Upon recovery of the *Miss Sondra Leigh* the bodies of her master and one crewman were found chained to the vessel. The United States District Court for the Middle District of Florida, without a jury, found as a conclusion of law that Captain Frank Paprocki was an "assailing thief" thus causing the vessel's loss to fall within that risk specifically insured against. Held—*Reversed*. The term "assailing thieves" in marine insurance policy provided coverage for theft by force or violence of personal property on vessel, not coverage for theft of vessel itself.

If the facts of the principal case are not enough to set it apart from the general class of marine insurance cases then the pleadings of *Felicione* must surely end in that result. He attempts to show the loss of the *Miss Sondra Leigh* as being covered by the risk against "assailing thieves," a term whose current definition is the embodiment of three and one-half centuries of usage<sup>1</sup> and sparse judicial construction.<sup>2</sup> The

<sup>1</sup> *American Insurance Company of New York v. Bryan & Maitland*, 14 N.Y. Common Law Reports (Wendell) 1173 (1841); *Feinberg v. Insurance Company of North America*, 161 F. Supp. 686 (D. Mass. 1958) *vacated* 260 F.2d 523 (1st Cir. 1958). Sharpe, "Thieves" in *Relation to Marine Insurance*, 20 L.Q. Rev. 300 (1904).

<sup>2</sup> *Feinberg v. Insurance Company of North America*, 161 F. Supp. 686 (D. Mass. 1958) *vacated* 260 F.2d 523 (1st Cir. 1958).

ancient forms of marine insurance covering vessels engaged in the maritime industry contained no provision for insurance against the specific risk of "thieves."<sup>3</sup> It was considered that such a loss was covered by a general clause then in use which purported to insure against "all fortuitous occurrences."<sup>4</sup> The conclusion generally reached was that "*latrocinium*," *i.e.* a theft through piracy, robbery or other violence, was a fortuitous occurrence covered by the insurance,<sup>5</sup> while "*furtum*," simple theft, was not.<sup>6</sup> The distinction was that theft by robbery or piracy was an occurrence not readily foreseen, while simple theft was an event that ordinary vigilance on the part of the master could prevent.<sup>7</sup> Malynes, an early Seventeenth Century text writer on insurance, is quoted by Mr. H. Birch Sharpe as saying:

The like (losses) is more or less with Men of War, Enemies, Pirates, Rovers & Thieves . . . which are assailing thieves. For otherwise if there be thieves on ship-board within themselves the Master of the Ship is to answer for that, and make it good, so that the assurers are not to be charged with such loss; which is sometimes not observed.<sup>8</sup>

In the mid-eighteenth century, in the marine insurance policies of England, the term "thieves" was accepted to apply coverage for loss by theft resulting from activities of those outside, or those not connected with the vessel, but not "pirates or rovers."<sup>9</sup> In America, this rule was changed by two decisions which held that thefts of any sort, by persons of, or strangers to, the vessel were to be included within the meaning of the word "thieves" standing alone in the "peril" clause of the policy.<sup>10</sup> These two decisions caused American insurance companies to adopt the term "assailing thieves" to emphasize that the risk to be insured against was theft occasioned by violence of persons from without the vessel.<sup>11</sup> The question now arises, what was intended to be insured thereby? Was the term "assailing thieves" meant to apply to an entire vessel, a vessel *and* the personal property contained thereon, or to *only* personal property aboard the vessel? The Court in the principal case asserts that the term was meant to apply to personal property alone.

<sup>3</sup> *Atlantic Insurance Co. v. Storrow*, 3 N.Y. Ch. 720, 5 Paige 285 (1835).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*; see generally, 3 KENT, COMMENTARIES ON AMERICAN LAW 303 (13th ed. 1884).

<sup>6</sup> *Atlantic Insurance Co. v. Storrow*, 3 N.Y. Ch. 720, 5 Paige 285 (1835); 3 KENT, COMMENTARIES ON AMERICAN LAW 303 (13th ed. 1884).

<sup>7</sup> W. VANCE, HANDBOOK ON THE LAW OF INSURANCE 172 at 930 (3d ed. 1951); *Atlantic Insurance Co. v. Storrow*, 3 N.Y. Ch. 720, 5 Paige 285 (1835).

<sup>8</sup> Sharpe, "*Thieves*" in *Relation to Marine Insurance*, 20 L.Q. REV. 300, 301 (1904).

<sup>9</sup> W. VANCE, HANDBOOK ON THE LAW OF INSURANCE 172 at 930 (3d ed. 1951).

<sup>10</sup> *Atlantic Insurance Co. v. Storrow*, 3 N.Y. Ch. 720, 5 Paige 285 (1835); *American Insurance Company of New York v. Bryan & Maitland*, 14 N.Y. Common Law Reports (Wendell) 1173 (1841).

<sup>11</sup> *Swift v. American Universal Insurance Company*, 212 N.E.2d 448 (Mass. 1965).

The insurance contract under consideration in the principal case is widely used in marine coverage.<sup>12</sup>

Touching the adventures and perils which this company is contented to bear and take upon itself, they are of the waters named herein, fire, lightning, earthquake, assailing thieves, jettisons, barratry of the master and mariners and all other like perils that shall come to the hurt, detriment or damage of the vessel named herein.

It will be observed that the terms seemingly apply to the *vessel* itself; no mention is made of personal property. It follows that in reaching its conclusion the court has re-defined the meaning of the term "*vessel*." Under the principal case "*vessel*" means something other than, "A marine structure intended for transportation of goods or passengers."<sup>13</sup> Here the term is construed to mean something in the nature of personal property and not a structure made to float upon the water.<sup>14</sup> In addition, the ruling in the principal case, by inference, holds that there are at least three elements necessary for one to become an "assailing thief":

- (1) He must be from without the vessel;
- (2) He must board the vessel with an intent to steal; and
- (3) He must forcibly steal personal property.

The court states:

But assuming that he had some degree of rationality when he came aboard the *Miss Sondra Leigh*, there was no evidence that he had any intention to steal nor did he steal any personal property from the vessel. Thus there was a complete absence of proof that there was coverage under the "assailing thieves" peril.<sup>15</sup>

By what reasoning could the court have arrived at these conclusions?

Initially, the court took note of the fact that all American cases construing the term "assailing thieves" dealt with the loss of personal property aboard vessels and none concerned loss of the vessel itself.<sup>16</sup> From this the court concludes that the term was never meant to include theft of an entire vessel.<sup>17</sup> To bolster this assumption the court relies on the "peril" clause set out in *Feinberg v. Insurance Company of North America*<sup>18</sup> by saying,

<sup>12</sup> S. Felicione & Sons Fish Company, Inc. v. Citizens Casualty Company of New York, 430 F.2d 136 (5th Cir. 1970).

<sup>13</sup> BALLENTINE'S LAW DICTIONARY 1339 (3d ed. 1969).

<sup>14</sup> BLACK'S LAW DICTIONARY 1733 (4th ed. 1968).

<sup>15</sup> S. Felicione & Sons Fish Company, Inc. v. Citizens Casualty Company of New York, 430 F.2d 136, 140 (5th Cir. 1970).

<sup>16</sup> *Id.* at 11.

<sup>17</sup> *Id.*

<sup>18</sup> 161 F. Supp. 686 (D. Mass. 1958) *vacated* 260 F.2d 523 (1st Cir. 1958). The clause read: "Perils . . . of the seas, fire, lightning, assailing thieves, theft of the entire yacht, jettisons, barratry of the Master and Mariners, . . ."

If the "assailing thieves" peril contemplated theft of the entire vessel, there would be no reason to provide protection . . . against both "assailing thieves" and "theft of the entire yacht."<sup>19</sup>

The court indicates, because the phrase "theft of the entire yacht" was added to the "peril" clause of the *Feinberg* insurance policy, this was conclusive evidence that theft of the yacht by "assailing thieves" would not be covered by that risk.<sup>20</sup> Loss by "assailing thieves" was neither pleaded nor argued in *Feinberg*.<sup>21</sup> The facts in *Feinberg* were that the insured vessel was removed by unknown persons from its mooring to a place approximately ninety feet away where it was again secured. The vessel was subsequently boarded, its cabin forcibly entered and personal property of the owner was removed therefrom. A small plug in the cabin floor was removed and the vessel was found to be partially submerged the next morning. The district court dismissed the case on the theory that under Massachusetts law there was no "taking" of the vessel so as to constitute a theft of the entire vessel.<sup>22</sup> The court of appeals for the 1st Circuit vacated this judgment; saying there might not have been a technical theft of the entire vessel, but what had happened to the vessel was so like a theft that as such it would fall within the "all other like perils" portion of the insurance policy.<sup>23</sup> The court's decision appears to rest on an *assumption* coupled with an *inference*. The *assumption*: That the lack of cases construing the term "assailing thieves" in connection with the theft of entire vessels means that it was understood that the term never contemplated such a loss. The *inference*: Because the policy in *Feinberg* contained the added provision "theft of the entire yacht" in its "peril" clause, this meant such *was necessary* before recovery could be had for the loss of an entire vessel. It is submitted that history and prior construction regarding a term in an insurance contract heretofore made applicable to one class of fact situations cannot dictate the intention of the parties where the same term is applied to a different fact situation. It is basic contract law that such an instrument is to be read as a whole. It is hard to understand how the court could have found that the "peril" clause, including the term "assailing thieves" could have applied to any other object than the vessel itself.

In its application for rehearing *Felicione* alleged that the court failed to recognize that the "peril" clause of a standard marine insurance

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<sup>19</sup> *S. Felicione & Sons Fish Company, Inc. v. Citizens Casualty Company of New York*, 430 F.2d 136, 140 (5th Cir. 1970).

<sup>20</sup> *Id.*

<sup>21</sup> *Feinberg v. Insurance Company of North America*, 161 F. Supp. 686, 688 (D. Mass. 1958) 260 F.2d 523, 525 (1st Cir. 1958).

<sup>22</sup> *Feinberg v. Insurance Company of North America*, 161 F. Supp. 686 (D. Mass. 1958).

<sup>23</sup> *Id.*, vacated 260 F.2d 523 (1st Cir. 1958).

policy has two elements; one element names the perils insured against and the other describes the property to be insured.<sup>24</sup> *Felicione* asserts that the policy in question is a "time hull" policy which insures a vessel as one integral unit,<sup>25</sup> and further, the "peril" clause refers to the *vessel*. He adds that if the property on board the vessel was being insured against "assailing thieves," then the policy would have insured "property on board" and not the *vessel*. *Felicione* contends that the paucity of cases construing the term "assailing thieves" with reference to the theft of entire vessels proves absolutely nothing.<sup>26</sup>

Turning to the "theft" aspect of the principal case, the court determined that the acts of Paprocki did not constitute theft of personal property.<sup>27</sup> "But assuming that he had some degree of rationality when he came aboard the *Miss Sondra Leigh*, there was no evidence that he had any intention to steal nor did he steal any personal property from the vessel."<sup>28</sup> How could Paprocki have had any other thought than to permanently deprive the owners of the vessel and her contents when he opened the bottom of the vessel to the sea? *Felicione* argues:

In its finding the Court has re-written the law of theft. The Court's conclusion suffers from the prior erroneous limitation of the "assailing thieves" peril to personal property. Notwithstanding this fact, the Court's construction of "theft" is more restrictive than larceny under the strictest criminal law interpretation when it holds that the theft of the vessel did not constitute a theft of personal property on board. The holding is that the theft of the package does not embrace its contents unless the thief had a specific intent as to each article therein.<sup>29</sup>

It is submitted that when Paprocki boarded the *Miss Sondra Leigh* and opened her sea-valves, causing her to take in sea water, he then and there had formed the intent to permanently deprive the owners of the use and enjoyment of that vessel and its contents. His reason for scuttling the vessel, *i.e.* to cover his crime, seemingly is immaterial. The acts of Paprocki, aside from the court's ruling on the personal property requirement, would seem to constitute those of an "assailing thief." He was from without the vessel; he reduced the vessel to his possession by force and violence and he permanently deprived the owners of the use and enjoyment of that vessel.

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<sup>24</sup> S. *Felicione & Sons Fish Company, Inc. v. Citizens Casualty Company of New York*, No. 28319 (5th Cir., July 23, 1970).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> S. *Felicione & Sons Fish Company, Inc. v. Citizens Casualty Company of New York*, 430 F.2d 136 (5th Cir. 1970).

<sup>28</sup> *Id.* at 140.

<sup>29</sup> S. *Felicione & Sons Fish Company, Inc. v. Citizens Casualty Company of New York*, 7, No. 28319 (5th Cir., July 23, 1970).

If Paprocki's actions did not technically fall within the meaning of "assailing thieves" irrespective of the "personal property" issue, then would they be covered by the "all other like perils" provision? This aspect was not considered in the principal case, it being asserted by the court that this issue was first brought up on the appeal.<sup>80</sup> If on considering that issue, the court returned to the *Feinberg* case and followed its reasoning, it is submitted that Paprocki's conduct would definitely meet the necessary prerequisites. This deduction is based on both the *Feinberg* decision rendered by the 1st Circuit and on the reasoning contained in the 1871 case of *Babbitt, Goode and Co. v. Sun Mutual Insurance Co.*<sup>81</sup> In *Babbitt*, the court decided the intent to steal, *animo furandi*, was lacking. The court nevertheless allowed coverage on the basis that the actions of the perpetrators were *ejusdem generis* so that their acts fell within the "general" terms of the "peril" clause.<sup>82</sup> The "peril" clause read: "Of the rivers, fires, rovers, assailing thieves, and all other perils and losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandise or any part thereof by reasons of the dangers of the river."<sup>83</sup> (Emphasis added.)

The "peril" clause in *Feinberg* read: ". . . of the seas, fire, lightning, assailing thieves, theft of the entire yacht . . . and of all other like perils, losses and misfortunes, that have or shall come to the hurt, detriment or damage of said yacht. . . ." The district court stated, "The phrase 'all other like perils, losses and misfortunes,' is essentially a flourish, adding nothing of substance."<sup>84</sup> In vacating this decision, the appellate court said that this phrase was not to be lightly brushed aside. "On the contrary, it is the universally accepted rule that words used in such a document must be presumed to have been used on purpose to convey some meaning. Thus, as a corollary, meaning must be given to every word used in an insurance policy if that be possible."<sup>85</sup> "We think the clause must have been included in the policy to serve a purpose and that its obvious purpose was to include in the coverage all losses which, although perhaps not technically or strictly speaking covered in the specific perils enumerated, are losses very similar to or very much like the enumerated perils."<sup>86</sup> The court concluded that what had happened to the insured vessel was so much like a theft

<sup>80</sup> *S. Felicione & Sons Fish Company, Inc. v. Citizens Casualty Company of New York*, 430 F.2d 136 (5th Cir. 1970).

<sup>81</sup> 23 La. Ann. 314 (1871).

<sup>82</sup> *Babbitt, Goode and Co. v. Sun Mutual Insurance Co.*, 23 La. Ann. 314 (1871).

<sup>83</sup> *Id.* at 316.

<sup>84</sup> *Feinberg v. Insurance Company of North America*, 161 F. Supp. 686, 687 (D. Mass. 1958).

<sup>85</sup> *Feinberg v. Insurance Company of North America*, 260 F.2d 523, 527 (1st Cir. 1958).

<sup>86</sup> *Id.*

that the "all other like perils" clause covered it.<sup>87</sup> If the court followed *Feinberg* reasoning as close as it did the *Feinberg* dicta when applying that case to the principal case, it follows that the loss of the *Miss Sondra Leigh* would be covered by the "all other like perils" clause of the policy.

The terms contained in the "peril" clause as set forth in the principal case would appear to apply to the vessel itself. The face of the clause reflects this intention. Obviously, the difficulty is that those cases construing the term "assailing thieves" deal with only one class of fact situations, *i.e.* theft of cargo or personal property. The situation in the *Felicione* case is different. Here the allegation is that the "peril" clause insured the vessel, though using the same or similar terms as found in other marine insurance contracts that applied to goods and merchandise. It is basic contract law that parties are generally free to make such mutual agreements they desire. It is difficult to imagine that the owners of the *Miss Sondra Leigh* were interested only in insuring a future cargo of shrimp, instead of their \$34,000 vessel. Further, it is conceded that when Paprocki first boarded the *Miss Sondra Leigh* there was no evidence that he intended to reduce the vessel to his possession, and to permanently deprive the owners thereof. Yet, this was the precise result of his behavior. In addition, his actions would seem to fall within the *latrocinium* elements of the term "assailing thieves;" what more force or violence could be needed? The beginning of the court's opinion is the end of this brief note: "This bizarre saga of the seas—involving double murder and ship scuttling by a drunkenly irrational master—is not only novelesque, but leaves novel legal consequences in its wake."<sup>88</sup>

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<sup>87</sup> *Id.* at 528.

<sup>88</sup> *S. Felicione & Sons Fish Company v. Citizens Casualty Company of New York*, 430 F.2d 186 (5th Cir. 1970).