



CARRERE vs. THE UNION INSURANCE COMPANY of MD.

[NO NUMBER IN ORIGINAL]

COURT OF APPEALS OF MARYLAND

3 H. & J. 324; 1813 Md. LEXIS 2

December, 1813, Decided

PRIOR HISTORY: [**1] APPEAL from Baltimore County Court. Covenant on a policy of insurance. The defendants, (now appellees,) pleaded non infregit conventionem, and issue was joined. The plaintiff, (the appellant,) at the trial, read in evidence a policy of insurance, executed to him by the defendants, under their common seal, on the 5th of June 1806, in the usual form, from Baltimore to Bourdeaux, upon all kinds of lawful goods and merchandize, laden or to be laden, on board the schooner Venus, at the rate of 4 pr. ct. to the amount of \$ 20,000, warranted to be American property, proof of which, in case of need, to be required in the United States only. He also gave in evidence, that on the 28th of June 1806, he shipped on board the Venus, at the port of Baltimore, certain goods and merchandizes then belonging to him, viz. 44 hogsheads of clayed sugar, 41 hogsheads brown sugar, 23 barrels of clayed sugar, 101 bags Carracas cocoa, and 308 bags of cotton, which were accompanied by a manifest, bills of lading, and proof of property, in due and regular form. That at the time of making of the policy and shipment, the plaintiff was a citizen of the U. S. residing in Baltimore. That the schooner Venus did regularly [**2] clear out on her said voyage from Baltimore to Bourdeaux, on the 2d of July 1806, and sailed on the 7th, with the above mentioned goods, papers and documents, on board, and in the regular prosecution of her said voyage she was, on the 24th of July 1806, captured on the high seas by a British sloop of war, and carried into Halifax in Nova Scotia, where the goods were libelled as prize, and condemned as such on the 9th of September 1806, in the vice admiralty

court there, and thereby totally lost to the plaintiff. The defendants then gave in evidence, that on the 28th of June 1806, the plaintiff took and subscribed in Baltimore, and put on board the said schooner, an affidavit to prove his property in the said goods; and also on the 4th of July, in the said year, wrote the following letter, under the signature of Maniele, in the French language, addressed to his correspondents in Bourdeaux, by the name of Duhally, (which was not their real names.) "The purpose of this letter is to acknowledge the receipt of yours dated 25th of April, which I have not time to answer by this opportunity, but shall do so very speedily." And also, on the same day, wrote in the French language, in sympathetic [**3] ink, upon the paper containing the above letter, another letter addressed to John Ducorneau, a citizen of the French government, his correspondent in Bourdeaux, by his real name, to whom the said goods were consigned. In this letter, amongst other things it is said, "In the hogshead No. 36, under the tail of the J, you will find in the head the authenticated copy of the discharge, upon security of the shipment to the Isle of France, of the Ck. the original was sent you by friend R, with whom you will settle for the 101 bags of cocoa on board the Venus, the freight of which, on the back of the bill of lading, is £ 37 5 1, add to this 5 pr. ct. average damage, and it will give the amount of the freight of that article. The 23 barrels of sugar belong to James Chaytor, and the freight is £ 13 17 10, which you will place to his account, and the remainder of the goods is mine. You will give me credit for the nett produce of these 23 barrels." That the plaintiff put both the said letters on board of the

schooner, on the day of their date, to be transmitted therein to Bourdeaux. That the said letters, together with the affidavit aforesaid, were found on board the schooner at the time of [**4] her capture. That the letter in sympathetic ink was not visible at first, and was not discovered until after the arrival of the schooner in Halifax, and after her papers, including that letter, were deposited in the office of the court of vice admiralty, where the letter was discovered and rendered legible by the proctor of the captors, by the application of a chymical mixture to the paper; and that the goods, mentioned in the said letter as the property of R, and of James Chaytor, were part of the goods so shipped by the plaintiff, and mentioned in the said affidavit as his own. That the paper mentioned and described in the letter written in sympathetic ink, as being concealed in one of the hogsheads of sugar, was, after the discovery of the said letter, actually found so concealed in the said hogshead, by the officers of the court of vice admiralty, and was exhibited and filed in the said court, and purports to be a discharge given at the principal office of Bourdeaux, upon security, of goods dispatched for the ports of the republic, and is signed by the Receiver and the Director of Customs at Bourdeaux, the 23d Fructidor, year 12, also by the Director of Customs at the Isle of France, [**5] the 11th Thermidor, year 13, and by the commissary of the commercial relations of France with Baltimore on the 20th of May 1806. It stated that "the officers set over the police of external commerce will allow to pass for Mr. J. Ducorneau, merchant, residing at Bourdeaux, the goods hereafter mentioned bound to the Isle of France, or other French ports, and not elsewhere, unless compelled by force, of which there shall be the evidence of authentic instruments, upon the ship Chesapeake of Baltimore, Capt. Lee, where they were shipped, as appears by permits of books in this office, reported and clothed with the formalities of shipment, viz. 252 tons three hogsheads red wine; 16,870 gallons red wine in 670 boxes," &c. "The above mentioned vessel is French, neutralized at Bourdeaux the 9th Fructidor, instant, which goods have paid no duties, considering their destination, for which Mr. J. Ducorneau has bound himself with Mr. Constantin, to make them be carried to the Isle of France, or other French ports, in the space of 13 months, and to bring back, on the outside of the present certificate, one from the officers of customs or constituted authorities of the place, &c. The defendants also [**6] read in evidence a copy of the record of the proceedings in the vice admiralty court at Halifax, condemning the whole of the goods on board of the

Venus at the time of capture, excepting the private adventure of the master, as lawful prize, &c. The plaintiff then gave in evidence, that the papers, so found concealed in a cask of sugar, did not in any manner relate to the schooner Venus, or her cargo, or to any part thereof, but to a former shipment of goods made by the said Ducorneau, to whom the letter in sympathetic ink was addressed, to the Isle of France, and that the 101 bags of cocoa, mentioned in the said letter, was originally the property of Caze and Richaud, merchants of New York, who are the persons meant and intended in the said letter by the name of R, and had been before the 1st of June 1806, received for them by the plaintiff, and were by them directed to be sold for their account, by their letter to him of the 7th of June 1806, which letter he read in evidence. This last letter was received by the plaintiff on the 9th of the same month, and not being able to sell the cocoa on advantageous terms, he resolved to take the same on purchase on his own account at a certain [**7] price, and to ship the same as his own property in the Venus. That on the 29th of June 1806, he informed Caze and Richaud of this determination, and of the shipment, by letter of that date, which he gave in evidence, and which letter was received by them on the 2d of July, who dissented immediately from the said purchase, and expressed such their dissent by letter of that date, and which he also gave in evidence. That the said letter was received by the plaintiff on the 4th of July, before the writing of the letter in sympathetic ink; and that in consequence of the receipt of the letter from Caze and Richaud, and of their dissent therein expressed, the plaintiff relinquished his claim to the 101 bags of cocoa under the said purchase, and did, in and by the letter in sympathetic ink, direct the cocoa to be considered by his correspondent aforesaid as the property of R, meaning Caze and Richaud. The Caze and Richaud were natives of France, but before the year 1806 were duly naturalized as citizens of the U. S. and did then reside in New-York. That the 23 barrels of sugar, mentioned in the letter in sympathetic ink, were, before the 5th of June 1806, the property of James Chaytor, and [**8] were before that day sold by him to the plaintiff, who shipped them as aforesaid, they then being his property; and on the 2d of July, and before the writing of the said letter, Chaytor, who is a native citizen of the U. S. then residing therein, requested the plaintiff to rescind the said sale, and permit the 23 barrels of sugar to go to Bourdeaux in the Venus as the property of him, Chaytor, and so to mention it to the plaintiff's correspondent; to which the plaintiff consented, through a wish to oblige Chaytor, and in

consequence thereof, in the letter in sympathetic ink, informed his correspondent, that the 23 barrels of sugar belonged to James Chaytor. The plaintiff further gave in evidence, that a claim was put in for the said goods in the vice admiralty court in his behalf, and duly prosecuted, and that after the condemnation, an appeal on his part was duly made, of which appeal, still depending, the defendants had due notice. The defendants then prayed the court to direct the jury, that if they believed the foregoing evidence, the plaintiff was not entitled to recover. This direction the Court, [Nicholson, Ch. J.] gave to the jury. The plaintiff excepted; and the verdict [**9] and judgment being against him, he appealed to this court.

DISPOSITION: JUDGMENT AFFIRMED.

COUNSEL: W. Dorsey and Harper, for the Appellant, contended, 1. That the warranty was not falsified by the concealed papers. They cited Rich vs. Parker, 7 T. R. 705. 1 Marsh. 409, 475, 476. 2 Postlew. Dic. tit. Silesian Loan, 716. Park, 229; and Livingston vs. The Maryland Insurance Company, 6 Cranch, 274.

2. That if the risk was increased by those papers, yet that was a fact for the jury to decide; and to vitiate the policy, it must be shown that there were circumstances which increased the risk. Livingston vs. The Maryland Insurance Company, 6 Cranch, 274.

3. That the insured need not abandon where there was not a total loss, but may recover for a partial loss. They cited Gardiner vs. Croasdale, 2 Burr 906. Goss vs. Withers, Ibid 697. Watson vs. The Insurance Company of North America, 1 Binney, 47, 53; and Marsh. 511, 512, 599.

Martin, Pinkney (Attorney General, U. S.) and Purviance, for the Appellees, contended, that the least variation so as to create a risk, would defeat the insurance, and annul the contract. That the property must not only be American, but must have all papers to prove [**10] it such, and free from those that might be calculated to call it in question. They cited Marsh. 406, 407, 408, 409, 411, 398, 183, 203, 281, 473. Park, 242 to 252, 264, 265, 272, 273, 387, 388, 408. Middlewood vs. Blakes, 7 T. R. 163, 1 Rob. 111. Blagge vs. The New York Insurance Company, 1 Caine's Rep. 549. Vandenheuevel vs. The United

Insurance Company, 2 Caine's Cases, 217, 222. Crousillat vs. Ball, 4 Dall. Rep. 295. The Chesapeake Insurance Company vs. Stark, 6 Cranch, 268, 270, 273. The Maryland Insurance Company vs. Le Roy, 7 Cranch, 26. Chitty's L. N. 314, 315. Lee on Captures, 130. Vattell, 339. Goix vs. Low, 1 Johns. Ca. 346. Pollard vs. Ball, 8 T. R. 444. Livingston vs. The Maryland Insurance Company, 6 Cranch. 279. 1 Rob. 104, 106, 139; and 2 Rob. 13, 294, 295, 133, 134, 89, 91.

JUDGES: The cause was argued before CHASE, Ch. J. and BUCHANAN, and JOHNSON, J.

OPINION BY: CHASE

OPINION

[*328] CHASE, Ch. J. delivered the opinion of the court. The most important question in this case is, whether the warranty [*329] has been fulfilled? In my opinion the concealed papers, the artifice practised to prevent detection of them, the fictitious names used, and the mystery in which the whole [**11] are enveloped, contradict and discredit the legal documents, (the bill of lading, manifest and affidavit, of the appellant *John Carrere*.) which cover the whole property insured as his property. These circumstances are inconsistent with good faith, that purity of intention and fair dealing, which should be the concomitants of every policy of insurance, and contaminate the whole transaction by indicating a fraudulent design of covering property not the property of the appellant, and justly exciting suspicion that the property belonged to the enemy of the belligerent making the capture. The documents being falsified in part were deprived of all credit, and the warranty was not complied with.

Although the concealed papers were not known at the time of the capture, yet being on board of the vessel, and discovered at the time of the trial in the court of admiralty, they were a justifiable cause of capture and detention, and from their suspicious aspect, precluding further proof and explanation, violated the warranty.

JUDGMENT AFFIRMED.