

## King v. Delaware Insurance Co.

This cause came on to be heard, on the transcript of the record from the circuit court for the county of Washington, and was argued by counsel ; all which being seen and considered, this court is of opinion, that the circuit court erred, in refusing to give the opinion prayed by the counsel for the defendants in that court, that, on the whole testimony, if believed, the plaintiffs in that court could not support their action : This court doth, therefore, reverse and annul the judgment rendered in this cause by the said circuit court, and doth remand the cause to that court for a new trial thereof.

## \*KING v. DELAWARE INSURANCE COMPANY.

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*Marine insurance.—Illegal voyage.*

The questions whether the voyage be broken up, and whether the master was justified in returning, are questions of law, and the finding thereupon by a jury, is not to be regarded by the court.

The British orders in council of the 11th of November 1807, did not prohibit a direct voyage from the United States to a colony of France.

If, from fear, founded on misrepresentation, the voyage be broken up, the insurers on freight are not liable.<sup>1</sup>

King v. Delaware Insurance Co., 2 W. C. C. 300, affirmed.

ERROR to the Circuit Court for the district of Pennsylvania, in an action of covenant, upon a policy of insurance upon the freight of the Venus from Philadelphia to the Isle of France.

The vessel sailed early in December 1807, before the British orders in council of the preceding November were known in the United States. On the afternoon of the 16th of January 1808, while prosecuting her voyage, she was arrested by the British ship of war Wanderer, by whom she was detained until the morning of the 18th, when she was restored to the master, her papers being first indorsed with these words :

“ Ship Venus warned off, the 18th of January 1808, by his majesty’s ship Wanderer, from proceeding to any port in possession of his majesty’s enemies.

EDWARD MEDLEY, 2d Lieut.”

The master was verbally informed by an officer of the Wanderer, that the Isle of France was blockaded, and that the Venus would be a good prize, if she proceeded thither. The master returned to Philadelphia, where he was disabled from prosecuting his voyage by the embargo. Considering the voyage as broken up, by the arrest and detention of his vessel by the Wanderer, he, on that account, abandoned to the underwriters.

These facts were specially found by the jury, who also found, that “by the interruption, detainment and warning off of the British force, the voyage of the ship Venus was broken up.” They also found, that the Isle of France was not <sup>1</sup>actually blockaded, from the 6th of December 1807, to the 1st of February 1808. And that by the information and warning given by the officers of the British fleet to the master of the Venus, he was fully justified in returning to Philadelphia ; and that by reason of the embargo, she was unable to renew the voyage.

<sup>1</sup> And see Jordan v. Warren Ins. Co., 1 Story 342.

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By the British orders in council of the 11th of November 1807, as found by the jury, it is ordered, "That all the ports and places of France and her allies, or of any other country at war with his majesty, and all other ports or places in Europe, from which, although not at war with his majesty, the British flag is excluded, and all ports or places in the colonies belonging to his majesty's enemies, shall from henceforth be subject to the same restrictions in point of trade and navigation, with the exceptions herein after mentioned, as if the same were actually blockaded by his majesty's naval forces in the most strict and rigorous manner.

" But although his majesty would be fully justified, by the circumstances and considerations above recited, in establishing such system of restrictions with respect to all the countries and colonies of his enemies, without exception or qualification ; yet his majesty, being nevertheless desirous not to subject neutrals to any greater inconvenience than is absolutely inseparable from the carrying into effect his majesty's just determination to counteract the designs of his enemies, and to retort upon his enemies themselves, the consequences of their own violence and injustice ; and being yet willing to hope that it may be possible (consistently with that object) still to allow to neutrals the opportunity of furnishing themselves with produce for their own consumption and supply ; and even to leave open, for the present, such trade with his majesty's enemies, as shall be carried on directly with the ports of his majesty's dominions, or of his allies, in the manner herein after mentioned.

\*73] " His majesty is, therefore, pleased, further to order, \*and it is hereby ordered, that nothing herein contained shall extend to subject or capture or condemnation, any vessel, or the cargo of any vessel, belonging to any country, not declared by this order to be subjected to the restrictions incident to a state of blockade, which shall have cleared out with such cargo from some port or place of the country to which she belongs (either in Europe or America, or from some free port in his majesty's colonies, under circumstances in which such trade from such free port is permitted), direct to some port or place in the colonies of his majesty's enemies, or from those colonies direct to the country to which such vessel belongs, or to some free port in his majesty's colonies, in such cases and with such articles as it may be lawful to import into such free port ; nor to any vessel, or the cargo of any vessel, belonging to any country not at war with his majesty, which shall have cleared out from some port or place in this kingdom, or from Gibraltar or Malta, under such regulations as his majesty may think fit to prescribe ; or from any port belonging to his majesty's allies, and shall be proceeding direct to the port specified in her clearance ; nor to any vessel, or the cargo of any vessel, belonging to any country not at war with his majesty, which shall be coming from any port or place in Europe, which is declared by this order to be subject to the restrictions incident to a state of blockade, destined to some port or place in Europe belonging to his majesty, and which shall be on her voyage direct thereto ; but these exemptions are not to be understood as exempting from capture or confiscation, any vessel or goods which shall be liable thereto, in respect of having entered or departed from any port or place actually blockaded by his majesty's squadrons or ships of war, or for being enemies' property, or for any other cause than the contravention of this present order.

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"And the commanders of his majesty's ships of war, &c., are hereby instructed to warn every vessel which shall have commenced her voyage, prior to any notice of this order, and shall be destined to any port \*of France, or of her allies, or of any other country at war with his maj- [\*74] esty, or to any port or place from which the British flag as aforesaid is excluded, or to any colony belonging to his majesty's enemies, and which shall not have cleared, as is hereinbefore allowed, to discontinue her voyage, and to proceed to some port or place in this kingdom, or to Gibraltar or Malta ; and every vessel which, after having been so warned, or after a reasonable time shall have been afforded for the arrival of information of this his majesty's order, at any port or place from which she sailed, or which, after having notice of this order, shall be found in the prosecution of any voyage, contrary to the restrictions contained in this order, shall be captured, and, together with her cargo, condemned as lawful prize to the captors."

The Venus returned to the Delaware on the 21st of February 1808, and, on the 22d, the following letter of abandonment was written by Vanuxem & Clark, the agents of the plaintiff :

Thomas Fitzsimmons, Esq.

Sir :—The ship Venus, Captain King, bound from hence to the Isle of France, having had the register indorsed, and warned by the British ship Wanderer, from proceeding to her destination, has returned to this port ; by which circumstance her voyage is broken up. We do, therefore, hereby abandon to your office the freight insured by policy of 5th December last, for \$6000, on freight out valued at \$8000. Yours, VANUXEM & CLARK.

Thomas Fitzsimmons, Esq., Pres. Del. Ins. Co.

The jury further found, that the possession was not \*as prize, but merely to prevent the Venus from prosecuting her voyage to the Isle [\*75] of France.

Upon this special verdict, judgment, in the court below, was rendered for the defendants.

*Ingersoll, jun.*, for plaintiff in error, contended, 1. That no abandonment at all was necessary in this case. 2. That the abandonment was sufficient. 3. That this was a loss within the policy. 4. That the justification of the master, from all the circumstances of the case, was a matter of fact, to be decided by the jury, and that their finding upon that point was conclusive. 5. If the justification be not a matter of fact for the jury, yet the facts found by the jury are, in law, a justification.

1 and 2. Upon the question of abandonment he cited 2 Emerig. 174, 175 ; Marsh. 480 (5th edit.) 148 ; Le Guidon, c. 7 ; Rooccus, in notis, 44, 95 ; 3 Atk. 195 ; 1 T. R. 608 ; Park 171, 192, 239 ; Marsh. 517, 559 ; 2 Valin 99 ; Pothier, n. 128 ; 1 Johns. 181 ; Emerig. 197 ; 1 T. R. 304 ; Millar 308, 282 ; 2 Burr. 1209 ; Park 143 ; *Lucena v. Craufurd*, 5 Bos. & Pul. 310.

Upon the 3d, 4th and 5th points, which included the question of justification of the master in returning to Philadelphia, he cited *The Ship Hope*, 1 Doug. 219 ; Marsh. 498, 505 ; *The Ship Grace*, Park 168 ; *The Ship Tartar*, 3 Bos. & Pul. 434 ; 3 Caines 188 ; 1 Johns. 301 ; 5 Bos. & Pul. 434 ; 2 Johns. 264 ; 1 Rob. 146 (Amer. edit.) ; *Blackenhagen v. London Assurance Company*, 1 Camp. 454. And the case of *Dederer v. Delaware Insurance*

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*Company*, in the circuit court for the district of Pennsylvania, in April, 1807, (a) to show that the justification \*of the master was matter of fact to be left to the jury.

And to show that in point of law the master was justified in returning, he cited *Goss v. Withers*, 2 Burr. 696; *Marsh.* 486; *Roccus*, not. 64; *Rhinelander v. Pennsylvania Ins. Co.*, 4 Cr. 29.

That the abandonment was sufficient, and related back to the time of arrest, when the loss was total. 1 *Emerig.* 440; *Marsh.* 519; *Marshall v. Delaware Ins. Co.* 4 Cr. 202, which case has been confirmed in England, in *B. R.*; *Bainbridge v. Nielson*, 10 *East* 329; 2 *Valin* 123; 1 *Emerig.* 537, 538; *Marsh.* 434; *The Hiram*, 3 *Rob.* 180; *Scott v. Libby*, 2 *Johns.* 336; and *Barker v. Cheviott*, *Ibid.* 352; *Curling v. Long*, 1 *Bos. & Pul.* 634; *Cook v. Jennings*, 7 *T. R.* 381; *Miles v. Fletcher*, 1 *Doug.* 219; *Brewster v. Kitchell*, 1 *Salk.* 198; *Case of the Colomb*, 1 *Emerig.* c. 12, § 31, p. 542-4; *Roccus*, not. 63; 1 *Johns.* 301; *Symonds v. Union Ins. Co.* 4 *Dall.* 417; *Barker v. Blakes*, 9 *East* 283; 1 *Emerig.* 508; *Schmidt v. United Ins. Co.* 1 *Johns.* 249; *Driscoll v. Bovil*, 1 *Bos. & Pul.* 200; *Driscoll v. Passmore*, *Ibid.* 213.

*Binney and Hopkinson*, contrà.—The assured, at the time of abandonment, must state a good cause of abandonment. The only causes assigned by the plaintiff are those stated in the special verdict, none of which are sufficient.

The special verdict finds, matters of law, which ought not to have been submitted to the jury, viz., that the voyage was broken up, and that the master was justified in returning. He was opposed by no physical or legal impediment. The jury have found that the arrest was not as prize, but only to prevent the prosecution of the voyage. The exemption from the general operation of the orders in council of the 11th of November, embraces the case of a vessel sailing from a neutral port direct to an enemy's colony. The words are: "Nothing herein contained shall \*extend to subject to capture or condemnation any vessel," "belonging to any country not declared by this order to be subjected to the restrictions incident to a state of blockade, which shall have cleared out" "from some port" "of the country to which she belongs," "direct to some port" "in the colonies of his majesty's enemies." The expression "shall have," must, in grammatical construction, allude to a time which was future when the order was passed, and also to a time which should have passed, before the arrival of that future time. "Which shall have cleared out." That is, which shall *then* have cleared out. When? At the time of the seizure. If, at the time of seizure, the vessel shall have cleared out from a neutral port, direct to an enemy's colony, she is within the exception to the general order. If it had been intended to except only those which had cleared out before the 11th of November, the date of the order, the expression would have been, which have cleared out, &c.

If the *Venus* was within the exception to the order, the officer of the *Wanderer* had no right to prohibit her from proceeding on her voyage; and his prohibition was no justification to the master in returning to Philadelphia.

(a) 2 W. C. C. 61.

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But even if the order did include this vessel, yet the prohibition was no justification to the master; because the Isle of France was only nominally, not actually blockaded. A constructive blockade, if it be a peril insured against, must be considered as within the denomination of restraints, but, from the terms of the policy, it must be a restraint which comes to the hurt, damage or detriment of the thing insured. It must, therefore, have been either an actual or a legal restraint. A constructive blockade is not known to the law of nations; our courts reject it. It is not a legal restraint. 2 Caines 11; 1 Johns 253.

If the circumstances of the present case are a justification, \*then [\*\*78 every ill-founded apprehension of a timorous man may justify an abandonment. There must be peril, in point of fact. The misapprehension of a weak man is not sufficient. 3 Bos. & Pul. 392; 5 Esp. 50; Park 226. The master ought to have proceeded, that he might himself see whether the port was actually blockaded, or not. He ought not to have depended upon the information he received from the Wanderer.

*Harper*, in reply.—The master was under a moral incapacity to proceed on his voyage, and was, therefore, justified in returning. The policy of Great Britain was to interdict this neutral commerce; it was the great object of the order of the 11th of November 1807. The words shall have cleared out, mean, shall have *now* cleared out, *i. e.*, before the date of the order. It is immaterial, whether this order was warranted by the law of nations, because it was still within the peril of restraint of princes. A probability of capture and condemnation was sufficient. Such a reasonable apprehension as a man of firmness might indulge.

February 17th, 1810. MARSHALL, Ch. J., delivered the opinion of the court, as follows:—This suit was instituted on a policy insuring the freight of the *Venus*, from Philadelphia to the Isle of France. The vessel sailed, early in December 1807, before the British orders in council, of the preceding November, were known in the United States. On the afternoon of the 16th of January 1808, while prosecuting her voyage, she met the British ship of war *Wanderer*, by whom she was arrested and detained, until the morning of the 18th, when she was restored to the master, her papers being first indorsed with these words,

“Ship *Venus* warned off, the 18th of January 1808, by H. M. S. *Wanderer*, from proceeding \*to any port in possession of his majesty’s enemies. [\*\*79 Edward Medley, second lieutenant.

The master was verbally informed by an officer of the *Wanderer*, that the Isle of France was blockaded, and that the *Venus* would be a good prize, if she proceeded thither. The master returned to Philadelphia, where he was disabled from prosecuting his voyage by the embargo. Considering the voyage as broken up, by the arrest and detention of his vessel by the *Wanderer*, he, on that account, abandoned to the underwriters.

The principal question arising on this case is, was the master of the *Venus* justified in returning to Philadelphia, after having proceeded about 1000 miles on his voyage, either by the indorsement on his papers, or the verbal information given by an officer of the *Wanderer*?

A point preliminary to the examination of this question on its merits, has

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been made by the plaintiff in error. The jury have found, that "by the interruption, detainment, and warning off of the British force, the voyage of the said ship Venus was broken up." After stating the verbal information given by the British officer, respecting the blockade of the Isle of France, is this further finding, "We find, in consequence thereof, that the said Elisha King was fully justified in returning to the port of Philadelphia." These findings, it is urged, conclude the court, and render this special verdict equivalent to a general one.

But this court is not of that opinion. It has been truly said, that finding the breaking up of the voyage finds nothing. The question recurs, was <sup>\*80]</sup> the voyage broken up by one of the perils insured against, or by the fault of the master? The answer to this question determines the liability of the underwriters. It has been also truly said, that the question of justification is a question of law, not of fact. If, as in this case, the jury find the fact specially, and draw the legal conclusion that the fact amounts to a justification, the court is not bound by that conclusion. The case, then, is open to examination on its real merits, unaffected by the particular findings which have been noticed.

In proceeding to inquire whether the circumstances which actually occurred, justified the master of the Venus in returning to Philadelphia, it becomes important to ascertain the real hazard of prosecuting his voyage. This essentially depends on the construction of the British orders of council issued in November 1807. By the plaintiff in error, it is insisted, that these orders extend to the direct trade between a neutral port and the colony of an enemy. In support of this construction, a very acute and elaborate criticism has been bestowed on those orders, which appears to the court merely to furnish additional proof of the imperfection of all human language. The intent of the orders to exclude from their operation this direct trade, an intent alike manifested by the context, and by the particular words forming the exception, the universal understanding of both countries, which has been, on more than one occasion, publicly and officially expressed, are too conclusive on this point, to render it necessary that the court should proceed to review that analysis of this document, which has been so well made at the bar.

According to the construction contended for by the plaintiffs in error, an exception professedly made to mitigate the rigor of the general rule, "and still to allow to neutrals the opportunity of furnishing themselves with colonial produce for their own consumption and supply," would be more rigorous than the rule itself, and would interdict that trade by which <sup>\*81]</sup> <sup>\*they were to be supplied with this produce for their own use, with</sup> as jealous circumspection as the trade professedly prohibited by the general rule.

It is, then, the clear and unanimous opinion of the court, that the words "shall have," which are used in the exception, relate as well to the time of capture, as to the time of issuing the orders, and that a direct voyage from the United States to a colony of France, was not prohibited.

It being found that the Isle of France was not actually blockaded, and the orders not prohibiting the voyage, it remains to inquire, whether the apprehension excited by the warning, or by the verbal communication of a British officer, justified the return of the Venus to Philadelphia. It has

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been very truly observed, that, in this case, the Venus was not physically incapacitated from prosecuting her voyage. With equal truth, has it been observed, that there was no legal impediment to her proceeding, because the voyage was not prohibited by the orders of November 1807; and consequently, the indorsement on her papers would not have increased the danger.

There did not, then, at the time the voyage was abandoned, exist, either in fact or in law, the restraint or detention, against which the underwriters insured. From fear, founded on misrepresentation, the voyage was broken up, and the vessel returned to her port of departure. Whether this might be justified, under any circumstances, it is unnecessary to determine. But the court is of opinion, that the circumstances of this case did not justify it. The Venus might have proceeded, and ought to have proceeded, until she could obtain further information. It would be dangerous in the extreme, if any false intelligence, received on a voyage, <sup>\*</sup>might justify a [\*\*82 master in acting as if that intelligence were true.

The case of *Blackenhagen v. The London Assurance Company*, has a strong bearing on this case, and though that was a decision at *nisi prius*, it is entitled to all the respect which is due to the court of common pleas. After the same opinion had been successively given by Lord ELLENBOROUGH, and by Sir JAMES MANSFIELD, it was affirmed by the whole court, and the jury having found against the opinion of the judge, a new trial was granted.

The court gives no opinion on the question how far the underwriters would have been liable, had the orders of council prohibited the trade to the Isle of France. This decision is not intended in any manner to affect that question.

Judgment affirmed, with costs.

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LEWIS v. HARWOOD.*Assignment of bonds*

A bond, in an action upon which it would be necessary to assign breaches, and call in a jury to assess damages, is not assignable, under the statute of Virginia.

ERROR to the Circuit Court for the district of Virginia, in an action of debt upon a bond, dated February 3d, 1784, the condition of which was, that if the obligor should pay to William Wheteroft, his attorney, heirs, executors, administrators or assigns, the sum of 3000*l.* current money of Virginia, on or before the 1st of January 1785, then the obligation to be void. Provided, that if the obligor, on application by the obligee, at the town of Fredericksburg, on or after the 1st of January 1785, should pay to the obligee 3000*l.* in officers' certificates of a certain description, or should pay the interest of six per cent. from the date of the bond, on such certificates, if not paid, and should annually and punctually pay the said six per <sup>\*</sup>cent. [\*\*83 when applied to, as before mentioned, in doing of which the condition of the bond was to be dischargeable by payment of the 3000*l.* officers' certificates, otherwise, the bond was to have its full force and effect.

Upon the pleas of payment, and conditions performed, the verdict and judgment below were for the plaintiff. The defendant brought his writ of error.