Maryland Insurance Company *v.* Le Roy, Bayard and McEvers. (*a*)

Marine insurance.—Deviation.

The discharge of underwriters from their liability, in case of taking on board an additional cargo, not authorized by the policy, depends, not upon any supposed increase of risk, but wholly on the departure of the insured from the contract of insurance.

The consequences of such a violation of the contract are immaterial to its legal effect, as it is, *per se*, a discharge of the underwriters; and the law attaches no importance to the degree, in cases of voluntary deviation.

Necessity alone can sanction a deviation, in any case; and that deviation must be strictly commensurate with the *vis major* producing it.[1]

Error to the Circuit Court for the district of Maryland, in an action of covenant, brought by Le Roy and others against the Maryland Insurance Company, upon a policy of insurance upon the ship John, from New York to five ports on the coast of "Africa, between Castle D'Elmina and Cape Lopez, including those ports, and at and from them, or either of them, back to New York, with liberties, as per order for insurance."

The order of insurance was as follows, viz: "At what rate will you insure $3500 upon freight of the ship John, of New York, valued at that sum, at and from New York to Castle D'Elmina, on the gold coast of Africa, with liberty for the vessel to touch at the Cape de Verd Islands, for the purchase of stock, such as hogs, goats and poultry, and taking in water?

*27] *Also, $9000 on the American ship John, valued at this sum; and $11,800 on cargo by said ship, consisting of wine, rum, beef, geneva, dry-goods, tobacco, molasses, &c., at and from New York to five ports on the coast of Africa, between Castle D'Elmina and Cape Lopez, including those ports, with liberty of touching and trading at all or any of said ports, backwards and forwards, and at and from her last port on the coast, to New York, with liberty of touching at the Cape de Verds, on her return-passage, for stock and take in water. It is understood, that the captain returning to one or more ports that he had touched and traded at before, shall not be considered a deviation. The John was ready and expected to sail the 13th inst. There are no contraband goods on board, and the ship is armed with eight carriage-guns, with ammunition in proportion, and is an excellent vessel, and Captain Lawrence, who commands her, is a native of New York, well acquainted on the coast of Africa, and has been at most of the places it is intended the vessel is to stop at, and is a careful experienced seaman."

The declaration was for a total loss by the perils of the sea. The cause was tried upon the issue of *non infregit conventionem*, and the verdict and judgment were for the plaintiffs, with $5476 damages.

Upon the trial of this issue, the defendants (the plaintiffs in error) took twelve bills of exception, but as the opinion of this court was given upon the 7th only, it is deemed unnecessary to state the others.

1. The first bill of exceptions stated not only the facts which the plaintiffs and defendants offered to prove, but detailed at great length the testimony and circumstances tending to prove those facts, or from which they might be inferred. Among other facts, it stated, that the ship, in the prose-

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(*a*) February 11th, 1810. Absent, Marshall, Chief Justice.

[1] The Paul Sherman, Pet. C. C. 98. See Hughes *v.* Union Ins. Co., 3 Wheat. 159.

cution of her voyage, arrived at the island of Fogo, one of the Cape de Verd islands, on the 7th of May 1805, where the master received on board four bullocks and four jack-asses, besides water and other provisions, and unstowed the dry-goods, and broke open two *bales, and took out 40 pieces of each for trade. That the ship remained there until the 24th [*28 of May. That the time generally employed by a vessel in taking in stock and water, at the Cape de Verd islands, is from two to three days, unless the weather should be very unfavorable; that the weather was good; and that the bullocks and jack-asses incumbered the deck much more than small stock would have done.

7. The 7th bill of exception stated, that the defendants gave in evidence all the facts detailed in the preceding bills of exception, and thereupon prayed the court to direct the jury, that if they believed the same, then the taking the said jack-asses on board the said ship John, while she lay at the Island of Fogo, was not within the privilege allowed to the plaintiffs in this cause, to touch at the Cape de Verd Islands, in the performance of the voyage insured, for the purchase of stock, and to take in water, and therefore, vitiates the policy, which direction the court refused to give; but the court was of opinion, and accordingly directed the jury, that the taking in the four jack-asses at the Isle of Fogo as aforesaid, did not avoid the policy, unless the risk was thereby increased; whereupon, the counsel for the defendants excepted.

Martin, for plaintiffs in error, as to the 7th exception, contended, that the liberty to touch at the Cape de Verds, to purchase stock and take in water, did not authorize the taking the jack-asses on board. The natural tendency was to increase the risk; and it was immaterial, whether the risk was, in fact, increased.

Winder, contrá. The question upon the 7th bill of exceptions is only whether the court did right in leaving it to the jury to decide, whether the risk was increased by taking in the jack-asses. It is like the case of *Livingston* v. *Maryland Insurance Company*, 6 Cranch 274, where this court decided, that the question whether a fact was material to the risk, was a question to be decided by a jury, under the direction of a court.

**Harper*, on the same side, as to the 7th bill of exceptions, contended, that it was a question of fact, to be decided by the jury, [*29 whether the taking in the jack-asses increased the risk. This court has so decided, in the case already alluded to of *Livingston* v. *Maryland Insurance Company*. The principle of the case of *Rayne* v. *Bell*, is, that there was no increase of risk and no delay. The case of *Sheriff* v. *Potts*, is overruled by that of *Rayne* v. *Bell*. But the license to take in stock included jack-asses.

Pinkney, Attorney-General, in reply.—The 7th bill of exceptions states in effect that the court refused to say, that the taking in of the jack-asses discharged the underwriters, although it might produce delay. It is not stated, that it did not produce delay; and the evidence shows, that it did. The principle of deviation is not increase of risk, but delay. If, therefore, here was any delay, the policy was void from that time.

But it is said, they had license to take in jack-asses, because they were

stock. But the order for insurance upon the vessel refers to the preceding order for insurance on the freight, which was written on the same paper, and connected by the word "also." In the order for insurance upon the freight, the stock is particularly stated to be "such as hogs, goats and poultry." They could no more take jack-asses, under this license, than they could take plows, horses, carts, or goods and merchandise, which are also stock.

The ship had a special license to touch, for a special purpose, and *expressio unius est exclusio alterius.* The contract of insurance is upon a voyage specific as to its nature, destination, &c. If the act done be calculated to tend to increase the risk, it is immaterial, whether the risk be actually increased. The case of *Rayne* v. *Bell*, 9 East 195, in some respects, is not law; but in this respect it is good law, and supported by analogy. It goes on the ground of delay or risk. The case of *Sheriff* v. *Potts*, cited in the late edition of Marshall, is not overruled by *Rayne* v. *Bell*, although *Stitt* v. *Wardell* is.

*30] *February 22d, 1810.—All the judges being present, JOHNSON, J. delivered the opinion of the court, as follows:—In deciding on this cause, the court will confine itself to the case made out on the 7th exception. Its decision on the point presented by that exception disposes of the case finally. The opinion prayed for was, that, by taking in, at Fogo, an additional cargo, not sanctioned by the contract of insurance, the insurers were discharged from their liability under the policy. The charge, delivered by the court, was, that the subsequent liability of the underwriters must depend upon the question, whether any increase of risk resulted from the shipping of that additional cargo.

In this charge, this court are of opinion, that the court below erred. The discharge of the underwriters from their liability, in such cases, depends, not upon any supposed increase of risk, but wholly on the departure of the insured from the contract of insurance. The consequences of such violation of the contract are immaterial to its legal effect, as it is, *per se*, a discharge of the underwriters, and the law attaches no importance to the degree, in cases of voluntary deviation; necessity alone can sanction a deviation, in any case; and that deviation must be strictly commensurate with the *vis major* producing it.

The case of *Rayne* v. *Bell* has been cited as supporting a contrary doctrine. Without being understood to acquiesce in the correctness of that decision, it may be remarked, that the question was not, in that case, whether the lading, taken in at Gibraltar, was within the terms of the policy, as in the present, but what acts were lawful to be done, during the delay occasioned by a justifiable cause of deviation. On the contrary, the case of *Sheriff* v. *Potts* was a case of voluntary departure from the stipulations of
*31] the policy, and the decision supports the opinion we now give. *It may also be remarked, that, in the case of *Rayne* v. *Bell*, the notice which Lord ELLENBOROUGH takes of the case of *Sheriff* v. *Potts*, virtually admits the doctrine upon which this court founds its decision.

The terms of this policy so far as connected with this decision, are, "with liberty of touching at the Cape de Verd islands, on her outward passage, for stock, and to take in water." Touching, in its nautical sense, is known to be the most restrictive word that can be adopted in such a case.

Construing the license according to the subject-matter, and in its necessary connection with the offer on the freight, it could mean no more than permission to provision the vessel with live stock, such as is usual on a voyage, and may be procured at the Cape de Verds. It might, indeed, admit of a doubt, whether any of the larger animals used for food, were included within the policy. The words of the first offer certainly were intended to confine the permission to the smaller animals. Stock is a term of the most general import: in its present extended application, it would include a great variety of subjects that never could have entered into contemplation of the parties.

In what sense was the term used? is the question to be decided: not what uses it might have been applied to in other contracts, or between other parties. The general want of precision in the language of maritime contracts, is an endless source of litigation among mercantile men. Courts of justice are, therefore, obliged to resort to such reasons as the nature, object and terms of the contract present, to determine the precise extent of the obligation of the parties.

We feel no inclination to add to the number of causes which vitiate a policy; but the amount of the premium depends upon such a variety of considerations (as often suggested by caprice as by judgment), that the contract, whatever it is, must be substantially adhered to.

Judgment reversed.

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*United States *v.* Hudson and Goodwin. (*a*) [*32

Criminal jurisdiction.—Contempts.

The courts of the United States have no common-law jurisdiction, in cases of libel against the government of the United States.[1]

But they have the power to fine for contempts, to imprison for contumacy, and to enforce the observance of their orders, &c.

This was a case certified from the Circuit Court for the district of Connecticut, in which, upon argument of a general demurrer to an indictment for a libel on the president and congress of the United States, contained in the Connecticut Currant, of the 7th of May 1806, charging them with having in secret voted $2,000,000 as a present to Bonaparte, for leave to make a treaty with Spain, the judges of that court were divided in opinion upon the question, whether the circuit court of the United States had a common-law jurisdiction in cases of libel?

Pinkney, Attorney-General, in behalf of the United States, and *Dana*, for the defendants, declined arguing the case.

The Court, having taken time to consider, the following opinion was delivered (on the last day of the term, all the judges being present) by Johnson, J.—The only question which this case presents is, whether the circuit courts of the United States can exercise a common-law jurisdiction in criminal cases. We state it thus broadly, because a decision on a case of

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(*a*) February 13th, 1812. Absent, Washington, Justice.

[1] See note to United States *v.* Worrall, 2 Dall. 384.