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Hughes v. Union Ins. Company.

[INSURANCE.]

HUGHES v. The UNION INSURANCE COMPANY OF BALTIMORE.

Insurance for 18,000 dollars on vessel valued at that sum, and 2000 dollars on freight valued at 12,000 dollars, on the ship Henry, "at and from Teneriffe, and at and from thence to New-York, with liberty to stop at Matanzas; the property warranted American." The policy was executed in 1807; and in the same year another policy was made, by the same underwriters, on freight for the same voyage, to the amount of 10,000 dollars, and the property was also warranted American, but there was no liberty to stop at Matanzas. The following representation was made to the underwriters on the part of the plaintiff, who was both owner and master of the ship: "We are to clear out for New-Orleans, the property will be under cover of Mr. John Paul, of Baltimore, who goes supercargo on board, yet Mr. Paul will only have part of the cargo to his consignment. There will be three other persons on board, that will have the remainder of the cargo in their care. We are to stop at the Matanzas, to know if there are any men of war off the Havanna." The vessel sailed from Teneriffe on the 17th of April, 1807, with a cargo belonging to Spanish subjects, but appearing to be the property of John Paul Dumeste, a citizen of the United States, and the same person called John Paul in the representation. The cargo was shipped under a charter party executed by the plaintiff and Dumeste, representing New-Orleans as the place of destination. The ship arrived at the Havanna on the 7th of July, having put into Matanzas to avoid British cruisers, and unladed the cargo, which was there received by the Spanish owners, and the freight, amounting to 7000 dollars, paid to the plaintiff, who received it "in full of all demands, for freight or otherwise, under or by virtue of the aforesaid charter party and cargo." At the Havanna the ship took in a new cargo, belonging to merchants in New-York, and was lost, with the greater part of the cargo, on the voyage from Havanna to New-York. An action of debt was brought on the first policy for the value of the ship and freight. The sum demanded in the writ was 20,000 dollars, but the plaintiff

limited his demand at the trial to 18,000 dollars on the ship, and 420 dollars for the freight actually earned on the voyage from Havanna to New-York: *Held*, that he was entitled to recover.

In debt, a less sum may be recovered than that demanded in the writ, where an entire sum is demanded, and it is shown by the counts to consist of several distinct accounts, or where the precise sum demanded is diminished by extrinsic circumstances.

ERROR to the Circuit Court of Maryland. This was an action of debt, upon a policy of insurance, in the usual form, dated on the 27th of May, 1807, on the ship Henry, "lost or not lost," "at and from Teneriffe to Havanna, and at and from thence to New-York, with liberty to stop at Matanzas." Eighteen thousand dollars were insured on the ship, valued at that sum, and two thousand dollars on the freight, valued at twelve thousand dollars; and the property was warranted American.

On the 1st of June, in the same year, a policy was executed on the freight of the ship Henry, by the same Company, for the same voyage, to the amount of 10,000 dollars; the whole freight being valued at 12,000 dollars. In this policy also, the property was warranted American; but there was no liberty to stop or touch at Matanzas, or any other place.

Both these policies were effected under an order for insurance, by Henry Thompson, of Baltimore, as agent for the plaintiff, an American citizen, who was master for the voyage, as well as owner. The order bears date on the 18th of May, 1807, and is in the following words:

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"Baltimore, May 18th, 1807.

"GENTLEMEN,

"Insurance is wanted on 18,000 dollars, on the American ship Henry, Capt. Henry Hughes, and 12,000 dollars on her freight, each valued at the same; at and from Teneriffe to Havanna, and at and from thence to New-York, against all risks.

"The Henry was expected to sail on or about the 12th ult.; she is a remarkably good vessel, about 270 tons burthen, and now on her first voyage. Said ship and freight are the sole property of Capt. Hughes, who gives the following particulars in his letter of instructions to N. Talcott, of New-York.

"'We are to clear out for New-Orleans; the property will be under cover of Mr. John Paul, of Baltimore, who goes supercargo on board, yet Mr. Paul will only have part of the cargo to his consignment. There will be three other persons on board, that will have the remainder of the cargo in their care. We are to stop at the Matanzas, to know if there are any men of war off the Havanna.

"'When you make insurance, which I expect will be done low, you will state the whole of this business; so that there will be a right understanding of the voyage.'

"At what premium will you insure the above risks?

(Signed) HENRY THOMPSON."

The Henry sailed from Teneriffe on the 17th of April, 1807, with a cargo for the Havanna,

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which belonged to Spaniards, but appeared as the property of John Paul Dumeste, (the person mentioned in the order for insurance by the name of John Paul,) a citizen of the United States, who went as supercargo. She took a clearance for New-Orleans. This cargo was laden at Teneriffe, under a charter party, which bore date the 10th of March, 1807, and represents New-Orleans as the port of destination, without any mention or notice of the Havanna. The parties to it were Dumeste, and Henry Hughes, the master. The freight mentioned was 11,000 dollars; of which it was stipulated that 5000 dollars should be paid at New-Orleans, and the remaining 6000 dollars at New-York.

The ship proceeded to the Havanna, where she arrived on the 7th of July; having put into Matanzas on the 2d of June, to avoid British cruisers then in sight, and unladed the cargo, which was there delivered to the real Spanish owners. The real freight to the Havanna, amounting to 7000 dollars, was paid at Matanzas to the plaintiff, who received it "in full of all demands for freight or otherwise, under or by virtue of the aforesaid charter party and cargo." It was proved that this unlading did not produce any additional delay or increase of risk; for the ship left Matanzas and proceeded to Havanna in ballast, as soon as there was any reasonable prospect of escaping the cruisers stationed in the way, and was enabled to proceed sooner and more safely, by being in ballast, which put it in her power to keep closer in shore. At the Havanna she took in a new cargo, belong-

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ing to persons in New-York, and consisting of 120 boxes of sugar, at a freight of 3 dollars and 50 cents the box. On the voyage she sprung aleak, soon after which she transhipped a part of her cargo, consisting of 60 boxes, into the Rising Sun, a vessel bound to Norfolk, where the property was safely landed. Within about two days after the transhipment, the Henry sunk, and was totally lost, with the rest of the cargo. The master and crew escaped in their boat. In attempting to make their way to New-York, they were taken up at sea, in an almost desperate situation.

The freight was abandoned to the underwriters, and a demand was made of payment for that and the ship; which being refused, this action was brought to recover both. The sum demanded by the writ and declaration was 20,000 dollars, and the loss declared on was by the dangers of the seas, one of the perils mentioned in the policy. On the plea of *nil debet*, issue was joined, and the case went to trial.

At the trial, the plaintiff gave the charter party in evidence, as one of the documents necessary or proper for establishing the neutral character of the vessel and freight; but there was no evidence of its having been at any time produced or mentioned to the defendants, or in any manner known to them. He also proved his own national character, and that of the ship, his interest in the ship and freight, the commencement and prosecution of the voyage, and the loss and abandonment. By an admission at the bar he expressly limited his demand of freight to that earned on the 120 boxes

of sugar, amounting to 420 dollars; and renounced all claim to any further or other sum on that account.

The defendants then gave in evidence the separate policy on the freight, which is mentioned above; and also produced evidence tending to show, that the plaintiff, in his management respecting the said ship, after the leak was discovered, was guilty of gross negligence, in not using such means as were in his power for conducting the said ship into a place of safety in the Delaware; and that he might have conducted her into a place of safety there, had he used those means.

The plaintiff then gave evidence of the causes, nature, and duration of the delay at the Matanzas, as stated above, and of the effect produced on the risk by unlading the cargo there. He also gave in evidence, that after the said leak was discovered, the plaintiff did all in his power, according to his skill and ability, to save the said ship, and to conduct her safely to her port of destination; and that there was no place of safety in the Delaware to which the said ship could have been conducted, nearer, or more easily reached, in the state of the wind and weather at that time, than New-York.

The defendants then prayed the opinion of the Court, and their direction to the jury:

1. That if the jury should be of opinion, from the evidence, that the cargo shipped at Teneriffe, which the order for insurance of the 18th of May, 1807, mentions, and which the charter party, and the policy of insurance upon freight of the 1st of June, 1807, read in evidence on this trial, also

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mentions, was landed, and finally separated from the ship at Matanzas, and was there delivered by the plaintiff, at the instance of the freighters, and accepted by the freighters, the plaintiff receiving from the said freighters 7000 dollars, in lieu of all demands upon the said charter party, including the whole freight to the Havanna; and that a cargo of sugar, for an entirely new account and risk, to wit, for the account and risk of Le Roy, Bayard & M'Evers, of New-York, was, by the plaintiff, taken in at the Havanna, with which the ship sailed upon her voyage to New-York, as proved by the plaintiff's testimony, then the plaintiff is not entitled to a verdict for any freight, upon the issue and pleadings in this cause.

2. That if the jury should find, from the plaintiff's declaration, and the evidence, that the cargo shipped at Teneriffe, which the order for insurance of the 18th of May, 1807, mentions, and which the charter party, and the policy of insurance upon freight of the 1st of June, 1807, read in evidence on this trial, also mention, was landed, and finally separated from the ship, at the Matanzas, by the freighters and the plaintiff, and was there delivered by the plaintiff, and accepted by the freighters, and their contract of freightment abandoned, the plaintiff receiving from the said freighters the sum of 7000 dollars, in lieu of all demands upon the said charter party, including the whole freight to the Havanna; and that a cargo for an entirely new account and risk, to wit, for the account and risk of Le Roy, Bayard & M'Evers, of New-York, was, by the plaintiff, taken in at the Havanna,

with which the ship sailed to New-York, as proved by the plaintiff's testimony; and further, that in the course of her said voyage to New-York, a part of the said cargo was transhipped into the Rising Sun, as stated in the plaintiff's evidence; and if they also find, that the risk was increased by taking in the new cargo aforesaid, and the transhipment aforesaid, beyond what it would have been, had the said ship proceeded in ballast from the Havanna to New-York, then the policy was wholly discharged, and the plaintiff cannot recover as to the vessel, on the issue and proceedings in this case.

3. That if the jury should be of opinion, from the evidence, that the plaintiff had an opportunity of causing the said ship, after the discovery of the leak, to be carried into the Delaware, or elsewhere, and there saved from the total loss which afterwards happened, and that he did not act with proper and reasonable care, in forbearing to do so, he is not entitled to recover in this action.

These directions were given by the Court, who further instructed the jury, that this was a valued policy, on which an action of debt lies; the sum claimed being specified by an agreement of the parties. But the whole must be recovered, or no part of it can be recovered. In this suit, the action is for two distinct sums, 18,000 dollars on the ship, and 2000 dollars on the freight. The party can recover either entire, and not the other; but not a portion of either, without accounting for the residue.

To these opinions and directions, the plaintiff

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took a bill of exceptions, on which judgment was rendered for the defendants, and the cause was brought by writ of error to this Court.

Feb. 6th.

Mr. *Harper*, for the plaintiff, made the following points:

1. That there was no connexion whatever between the policy and the charter party; which not having been made known to the underwriters, can make no part of the contract, nor in any manner affect it.

2. That the policy on the freight alone, however it might have been affected by the payment at the Havanna, had an action been brought on it, cannot affect the present case; the policy in which expressly declares, that the whole freight on the whole voyage insured, should be valued at 12,000 dollars, of which only 2000 were to be covered by that policy; a declaration entirely conformable to the order on which both policies were made.

3. That the receipt of 7000 dollars at the Havanna, if it had been in full of all claims under the charter party, could not affect the plaintiff's claim in this case; because the policy has no connexion with the charter party, and the freight now claimed arose on a voyage entirely different from the one described in that instrument.

4. That the receipt of the 7000 dollars at the Havanna was not in full satisfaction of all claims and rights under the charter party; but merely "in full of all demands for freight or otherwise, under or by virtue *of the aforesaid charter party and cargo;*" that is, in full payment of the freight

due, under the charter party or otherwise, on the cargo brought from Teneriffe, and landed at Matanzas.

5. That although the action brought is debt, and the sum declared for on account of freight is 2000 dollars, yet less may be recovered in such a case as the present; where the right to recover depends not on the contract alone, but on matter *dehors* and independent.[a]

6. And, consequently, that the first direction was wrong, and also the third, which applies to the form of the action; a point equally open under the first application.

And as to the second instruction,

1. That for the true construction and character of this contract, we are to look to the policy alone, or at most to that and the order for insurance. The charter party not being referred to in the order, or in any manner made known to the defendants, cannot be taken into view.

2. That the policy and the order make two distinct voyages, or one voyage divided into two distinct parts; so that, at the termination of the first voyage, or of the first section, the first cargo might be discharged, and a new one taken in for the second section.

3. That the plaintiff thus having a right to take in a new cargo at the Havanna, for the residue of the voyage, it was his duty to use all proper means for the preservation of that cargo; and, conse-

a Incledon v. Crips, 2 *Salk.* 658. S. C. under the name of Ingledew v. Crips, 2 *Lord Raym.* 814.

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quently, no delay, deviation, or increase of risk, arising from the use of such means, can affect his claim on the underwriters on the ship.

4. And, consequently, that the second direction also was erroneous.

Mr. *D. B. Ogden*, contra, argued, that the insurance was altogether restricted to the voyage mentioned and stipulated in the charter party, and that the voluntary surrender of that contract at the Matanzas, annihilated the contract of insurance on the freight. That the receipt of a compensation by way of compromise for the freight, as stipulated, on the voyage from the Havanna to New-York, was, in fact, the receipt of the whole freight for that voyage. And that taking in a cargo at the Havanna, not provided for by the charter party, or mentioned in the representation to the underwriters, terminated the insurance on the vessel, and discharged the underwriters altogether.[a] He also insisted, that the direction of the Court, as to the form of action, was correct.[b]

Feb. 15th. Mr. Justice JOHNSON delivered the opinion of the Court. This suit was instituted on a policy of insurance on the ship Henry, and on the freight to be earned by her, on a voyage from Teneriffe to Havanna, and thence to New-York. Eighteen thousand dollars on the ship, and two thousand

a 1 *Marsh. on Ins.* 92, 93. Thompson v. Taylor, 6 *Term Rep.* 478. Horncastle v. Stewart, 7 *East's Rep.* 400.

b The United States v. Colt, 1 *Peters'* jr. *Rep.* 145. and the authorities there cited.

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dollars on the freight, were insured in this policy; and another sum of ten thousand dollars on the freight, was insured in a distinct policy, by the same Company. At the trial, the defendants prayed certain instructions to the jury, which the Court gave, and added a further instruction in their favour, in pursuance of which, the jury found for the defendants below. The question is, whether the instructions so given were conformable to the law of the case.

This must depend upon the construction of the policy, as modified by the representations made at the time of the contract.

The vessel, it appears, was at Teneriffe when the order for insurance was written, and had engaged in the transportation of Spanish property, to be covered as American, in the manner specified in the representation. By the charter party, John Paul Dumeste appears as the owner and affreighter of the goods, and the voyage stipulated for is precisely that insured against, to wit, from Teneriffe to Havanna, (under the disguise of New-Orleans,) with liberty to put into Matanzas, and from Havanna to New-York. There is no imputation of unfairness; the nature of the voyage was distinctly understood between the parties; and the only question which goes to the negation of the right of recovery of freight altogether, is raised upon the supposed termination of the voyage insured against at Matanzas, and the actual receipt there of the whole freight insured. And as against the sum insured on the vessel, the defendants insist, that the act of taking in a cargo at

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the Havanna, which was not permitted by the contract of insurance, avoided the contract.

The argument is, that the insurance was altogether confined to the voyage stipulated for under the charter party.

And it has been contended, that the voluntary surrender of that contract at the Matanzas, put an end to the voyage, or to the adventure insured.

That the receipt of a compensation, by way of compromise, for the 7000 dollars freight, stipulated for on the voyage from Havanna to New-York, was in fact the receipt of the whole freight on that voyage.

And, lastly, that taking in a cargo at the Havanna, not in contemplation under the charter party or representation, put an end to the insurance on the vessel, and discharged the underwriters altogether.

It is obvious, that if this case be disposed of upon the contract, as exhibited on the face of the policy, the right of the plaintiff to recover would be unquestionable. The defendants, however, avail themselves of the right of insisting on the contract, such as it really was in the intendment of the parties, whatever the policy might purport on the face of it.

The benefit of the same principle, therefore, cannot be withheld from their adversary; and, accordingly, the existence of a charter party becomes altogether an immaterial circumstance in the case. No mention of it was made in the representation; and the voyage might have been prosecuted without it. The representation was

the document to which the parties were referred for their respective undertakings. Engaging in a voyage different from that, whether with or without a charter party, would have vitiated the contract. But a charter party so strictly conforming to that representation, would only leave the parties where it found them; and answered no other purpose than to furnish the authentic evidence of freight engaged, in case of loss, while sailing under it. And this is the whole effect of the cases cited to sustain this supposed intimate and mutual dependence between policies and charter parties.

Has, then, the representation been complied with substantially?

This depends upon the real nature of the voyage insured; in considering which, it is obvious, that although it was indispensable that the American mantle should be thrown over the cargo, it was by no means so that the cargo should continue to need the protection of that mantle. It would be as reasonable to contend, that, if Spain had ceased to be a belligerent, or John Paul Dumeste, instead of being the nominal, had become the real owner of the cargo, the contract of insurance would have been avoided. We consider a representation of property, being covered as American, as substantially complied with, if the property be actually American: And as the presence and agency of John Paul Dumeste, had the cloaking of the property as their sole object, that his presence was dispensed with when the cargo became actually American.

So much for the national character of the shipper. And as to his identity, we see nothing in

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the contract to prevent the change which took place under the transactions at Matanzas and the Havanna. It is very clear, that, provided John Paul Dumeste had continued in the capacity of supposed owner, the representation would have admitted of taking in a cargo from the Havanna, belonging to any other Spanish subjects than the shippers from Teneriffe. The plaintiff, then, was not bound by any thing in the representation, to hold the original shippers to their contract, but was left at large, as in all such carrying voyages, to do the best he could for himself in earning freight; provided the cargo still continued covered as American. He was, then, at liberty to change the actual shipper; and he has done nothing more in compounding with the Spanish charterers, and putting his vessel up as a general ship at the Havanna.

But, it is contended, that by the composition made at the Matanzas, the plaintiff has actually received what he is now suing for, to wit, his freight from Havanna to New-York.

Plausible as this argument appears, we are of opinion, that the facts will not sustain it. The sum received in composition, to wit, 7000 dollars, (from which, we presume, was deducted both primage and specific compensation, as stipulated for under the charter party,) could not have been for the hire of the vessel to New-York. To say nothing of the difference in amount, what interest could the first charterers have had in sending her empty to New-York? The true understanding of the arrangement is, that those shippers pur-

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chased a release from the obligation to find a cargo for New-York, and thus avoided paying the sum of 7000 dollars. The master then took the risk of not being able to procure a freight for the last port of his voyage. This was the consideration of the composition paid him, and events proved, that he made a very hard bargain for himself, and a very beneficial one for the underwriters. Had the vessel taken in full freight from the Havanna for New-York, it might have been a question, upon the loss happening, whether the underwriters were entitled to deduct the 7000 dollars so received; but in the present state of facts, no question can be raised upon it, but that which has been raised, to wit, whether it operated as a receipt in full to the underwriters for all freight that might, by possibility, be engaged on the remaining voyage. We have expressed our opinion that it did not.

With regard to that part of the instruction which was voluntarily given by the Court, it is necessary to remark, that although it does not appear to have been moved by the defendants' counsel, yet it was on a point certainly presented by the case; and as it is one on which this cause may, by possibility, be again brought up to this Court, it is proper now to decide it.

So far as relates to the policy on the ship, there can be no difficulty. The plaintiff is entitled to the whole, or nothing. We are of opinion, that he was entitled to the whole. But as the plaintiff demands only the sum of 420 dollars for freight from the Havanna, the question arises, whether, in this form of action, he could recover less than the

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2000 dollars specified in the contract, and claimed by the writ. On this point the Court charged the jury, "that the whole must be recovered, or no part of it could be recovered; that the party could recover either of the two sums claimed, entire, without the other, but not a portion of either without accounting for the residue."

On this subject, this Court is satisfied, that the law of the action of debt is the same now that it has been for centuries past. That the judgment must be responsive to the writ, and must, therefore, either be given for the whole sum demanded, or exhibit the cause why it is given for a less sum. Otherwise *non constat*, but the difference still remains due. That this is the law where an entire sum is demanded in the writ, and shown by the counts to consist of several distinct debts, is established by the case of *Andrews* v. *De la Hay*; (*Hobart*, 178.) that the law is the same where an entire sum is demanded, and only half of it established, is laid down expressly in the case of *Speak* v. *Richards*, in the same book, (209, 210.) and adjudged in the case of *Grobbam* v. *Thornborough*, (82.) and in the more modern case of *Ingledew* v. *Crips*, (2 *Lord Raym.* 814—816.) Our own Courts, in several of the States and Districts, have also recognised and conformed to the same doctrine.

And the same cases establish, that the requisite conformity between the writ and judgment, in the action of debt, may be fully complied with, either by the pleadings, the finding of the jury, or a remit-

ter entered by the plaintiff, either before or after verdict, or even after demurrer.

If, therefore, the instruction to the jury on this point, was intended to intimate, that they could not find for the plaintiff any less sum than the 2000 dollars valued on the freight, we deem it exceptionable ; inasmuch as the plaintiff had a right to claim a verdict for the freight established by the evidence, and enter a remitter for the difference.[a]

There was another question made by the defendants' counsel, on the argument, which had relation to the quantum of the sum to be recovered for freight under this policy. It was contended, that it ought to be reduced by reference to the ratio which it bears to the other policy executed on the same freight. But we decline deciding the point, as well because it is not brought up under the bill of exceptions, as because we cannot discover how it can affect the interests of the parties, since both policies were executed between the same parties upon the same representation.

Judgment reversed, and a *venire de novo* awarded.

JUDGMENT. This cause came on to be heard on the transcript of the record of the Circuit

a This question respecting the action of debt, is so fully discussed and settled in the case of the United States v. Colt, 1 *Peters'* jr. *Rep.* 145. that the editor has taken the liberty of subjoining, in the Appendix to the present volume, Note II., the very able judgment of Mr. Justice WASHINGTON in that case.

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Court of the United States for the District of Maryland, and was argued by counsel. On consideration whereof, this Court is of opinion, that the said Circuit Court erred in the first and second instructions given to the jury, as prayed for by the defendants' counsel, and in the voluntary opinion of said Circuit Court, so far as the said opinion was intended to instruct the jury, that they could not find any less sum than two thousand dollars valued on the freight.

It is, therefore, ADJUDGED and ORDERED, that the judgment of the said Circuit Court of the United States for the District of Maryland, in this case, be, and the same is hereby reversed and annulled: and it is further ORDERED, that said cause be remanded to said Circuit Court, with instructions to issue a *venire facias de novo*.

[CONSTITUTIONAL LAW. PRACTICE.]

BUEL v. VAN NESS.

The appellate jurisdiction of this Court, under the 25th sec. of the Judiciary Act of 1789, c. 20., may be exercised by a writ of error issued by the clerk of a Circuit Court, under the seal of that Court, in the form prescribed by the Act of the 8th of May, 1792, c. 137. s. 9.; and the writ itself need not state that it is directed to a *final* judgment of the State Court, or that the Court is *the highest Court* of law or equity of the State.

The appellate jurisdiction of this Court, in cases brought from the State Courts, arising under the constitution, laws, and treaties of the union, is not limited by the value of the matter in dispute.