

Ocean Insurance Co. v. Polleys.

case of *Crowell v. Randell*, 10 Pet. 368; and the rules there stated must be considered as too firmly settled to be shaken. The writ of error in this case must, therefore, be dismissed.

THIS case came on to be heard, on the transcript of the record from the supreme court of the state of Ohio, in and for the county of Scioto, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the writ of error be and the same is hereby dismissed for want of jurisdiction.

\*157] The OCEAN INSURANCE COMPANY, Plaintiffs in error, v. WILLIAM POLLEYS, Defendant in error.

*Error to state courts.—Illegal contracts.*

The settled construction given by the supreme court to the 25th section of the judiciary act of 1789, is, that to bring a case within the reach of that section, it must appear on the face of the record of the state court, either by express terms, or by clear and necessary intendment, that the question of the construction of a clause of a statute of the United States, did actually arise in the state court (not that it might have arisen or have been applicable to the case), and that the question was actually decided; not that it might have been decided by the state court against the title, right, privilege or exemption set up by the party. If, therefore, the decision made by the state court, upon the face of the record, is entirely consistent with the construction of the statute contended for by the party appellant, no case is made out for the exercise of the appellate jurisdiction of the supreme court.

In the exercise of the appellate jurisdiction of the supreme court on the decisions of state courts, the supreme court is not at liberty to resort to forced inferences and conjectural reasonings, or possible, or even probable, suppositions of the points raised and actually decided by those courts. The court must see, plainly, that the decision was either directly made of some matter within the purview of the 25th section of the act of 1789; or that the decision could not have been such as it was, without necessarily involving such matter.

It is to the record, and to the record alone, that the supreme court can resort, to ascertain its appellate jurisdiction, in cases decided in the supreme or superior court of a state.

A policy of insurance on a vessel, sailing under a register which has been obtained without conforming to the requisitions of the laws of the United States relative to the registry and enrolling of vessels of the United States, is not void; and an action may be maintained on such a policy, to recover a loss sustained by the assured. The policy may not have been designed to aid, assist or advance any unlawful purpose; it is a lawful contract in itself, and only remotely connected with the use of the certificate of registry. There are cases in which a contract may be valid, notwithstanding it is remotely connected with an independent illegal transaction; which, however, it is not designed to aid or promote. Suppose, a vessel had been actually forfeited, for some antecedent illegal act, are all the contracts of her future employment void, although there is no illegal object in view, and the forfeiture may never be enforced? <sup>1</sup>

ERROR to the Supreme Judicial Court of the state of Maine. The original action was *assumpsit* on a policy of insurance, dated July 17th, 1833, upon the schooner *Mary*, owned by said Polleys, for the term of one year, commencing on the 11th of said July: sum insured \$3000. The schooner, during the said year, on June 10th, 1834, was totally lost. The general issue was pleaded.

It appeared on the trial, that a sloop was built in 1816, and enrolled by the name of the *Sophronia*, and was again enrolled in the custom-house, in Portland, by the same name, March 24th, 1822. That the schooner *Mary*

<sup>1</sup> See notes to *Armstrong v. Toler*, 11 Wheat. 253.

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was built upon the keel, floor timbers and naval timbers of the said sloop *Sophronia*, and the size enlarged nearly twelve tons ; that the name of the *Mary* given to her, after being so enlarged, and that this was known to the defendants, at the time of executing the policy ; also that the certificate of *Mark Leavit* was procured by said *Polleys*, and presented to the custom-house, to obtain the enrolment of the schooner *Mary*, without any fraudulent intent to deceive or defraud, but with a fair and honest intention, as the jury believed. But that the enrolment of the sloop \**Sophronia* [\*158 was not first surrendered and delivered up at the custom-house, before the issuing of the enrolment of the *Mary*, which was on the 3d day of June 1833.

The counsel for the original defendant, on the trial, objected to the admission in evidence of the enrolment of June 3d, 1833, as contrary to the laws of the United States ; but the judge overruled the objection, and it was admitted : and the counsel further insisted, that the schooner, on the voyage in which she was lost, was sailing under circumstances rendering her liable to forfeiture for a violation of the laws of the United States, and that, therefore, a policy on a vessel pursuing such a voyage was not valid, or legal and binding ; but the judge also overruled this objection, as insufficient to bar the action. The cause was, thereupon, submitted to the jury, who returned a verdict for the original plaintiff. The defendant prosecuted this writ of error.

The case was argued by *Fletcher*, for the plaintiffs ; and by *Webster*, for the defendant.

For the plaintiff, the following points were submitted.

1. That the certificate of enrolment of the schooner named in the policy of insurance, enrolled by the name of *The Mary*, was procured by said *Polleys* but a short time before the commencement of the year for which she was insured, knowingly, in direct violation of the statute of the United States then in full force ; of which statute he was bound to take notice.

2. That the enrolment of said schooner, thus procured by said *Polleys*, by a new name, was entirely illegal, and wholly null and void.

3. That said *Polleys*, by not delivering up the original certificate of registry, incurred a penalty of \$500 ; and by being registered by a new name, the schooner lost her national character, and could no longer be deemed a ship or vessel of the United States.

4. That said certificate of enrolment was knowingly used for the schooner on the voyage upon which she was lost, during the year for which she was insured, she not being then actually entitled to the benefit thereof. That such use of said enrolment was illegal, and a direct violation of the 27th section of the act aforesaid ; and the schooner was thereby rendered liable to forfeiture.

5. That a policy of insurance on a vessel prosecuting a voyage under a false and unlawful enrolment and certificate thereof, and in violation of a statute of the United States, in the manner aforesaid, is not a binding contract ; and cannot be enforced in a court of law.

6. That the said certificate of registry being a void, useless and illegal document, the schooner, while sailing under its pretended sanction, was not

seaworthy ; and that the implied warranty of seaworthiness was on that account violated.

\**Fletcher*, for the plaintiffs in error, said, that on the question \*159] whether this court had a right to entertain jurisdiction of this writ of error to the supreme judicial court of Maine, all the cases were collected in the opinion of this court, in the case of *Crowell v. Randell*, 10 Pet. 368. To give the court jurisdiction, under the 25th section of the judiciary act of 1789, by which a writ of error is authorized to the supreme court of the state, the plaintiff must claim some privilege or exemption under an act of congress, which has been denied to him by a misconstruction of the act. There is no necessity that the claim shall appear on the face of the record ; if it appear that, unless by a misconstruction of the act, the court could not have made the decision, or given the judgment complained of. The record, in the case before the court, shows more than is required by the decisions of this court. The counsel for the defendants in the state court, now the plaintiffs in error, objected to the admission in evidence of the enrolment of the vessel insured, as the enrolment was contrary to the laws of the United States, and the vessel was liable to forfeiture. A vessel sailing in violation of the law of the United States, could not be insured by a valid policy. The record shows that this position was denied, and thus the jurisdiction exists in this court.

The law applicable to the facts of this case is clear and explicit. By the act of congress of December 31st, 1792 (1 U. S. Stat. 287), when a ship or vessel is altered or increased in burden, or changed from one denomination to another, she must be registered anew, but by the same name, and the original register must be delivered up ; a penalty of \$500 is imposed for the violation of this provision of the law : and by the 27th section of the act, using a register, falsely or fraudulently obtained, if used knowingly, forfeits the vessel. The act of February 8th, 1792, puts coasting vessels under the same regulations as those provided by the act of December 31st, 1792, "concerning the registering and recording of ships and vessels." By a circular letter from the secretary of the treasury, providing for the execution of these laws, the collector is prohibited licensing, or enrolling or registering, a ship or vessel, unless her previous register is delivered up.

The registering of vessels has been required by all commercial nations. The object of those regulations is the encouragement of ship-building, and to prevent frauds on individuals. 3 Kent's Com. 139. The conduct of the defendant in error was contrary to the policy of the law, and in violation of it. No justification is offered for this act ; and it is certain, that if the collector had known of the proceeding, he would not have given the register. By the register, a character was given to the vessel to which she was not entitled. She was, in fact, liable for foreign duties. What are the legal consequences of such proceeding ? These are stated in the points submitted to the court. The schooner was entitled to a register as the

\*160] *Sophronia*, not as the *Mary* ; the register \*originally granted to her should have been delivered up to be cancelled, and when registered anew, her enlarged capacity, and the other alterations which had been made in her, should have been stated. The defendant in error was answerable for those violations of the law ; and he cannot be permitted to recover on

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a contract growing out of this conduct. There is a penalty of \$500 imposed for these violations of the law. Imposing a penalty, is equivalent to an express prohibition of the act for which the penalty is imposed. Knowingly using a false register, subjects the vessel to forfeiture. Knowing, as meant by the statutes, is a knowledge of the facts, and does not require a knowledge of the law. In a former act of congress, "fraudulently using" a false register, was the language of the statute; but the act of 1792 contains the term "knowingly." Cited, Carth. 252; 1 Kent's Com. 467; 1 Binn. 10; 5 Barn. & Ald. 335.

The contract, not being binding, cannot be enforced in a court of law. 1 Kent's Com. 291. The *Mary* was constantly violating the laws of the United States. Every voyage was such a violation, and no policy of insurance could protect her in such proceeding. 12 East 303; 1 Bos. & Pul. 272; 1 Marsh. on Ins. 52; 6 Mass. 101; 1 Emerigon 542, ch. 12, 14; 2 Bos. & Pul. 35; 2 Doug. 467; 7 T. R. 187; 1 Taunt. 241; *The Julia*, 8 Cranch 181; *The Aurora*, Ibid. 203; *The Hiram*, 1 Wheat. 440; 15 Johns. 25; 12 East 200; 17 Mass. 258; 2 Bos. & Pul. 370; 1 Maule & Selw. 593. The implied warranty of seaworthiness was violated by the vessel sailing with false papers. The loss from another cause has no influence on this principle. The vessel was insured as the *Mary*, when her real name was *Sophonra*. This is a breach of warranty. Cited, 6 Mass. 220; 7 T. R. 105; 4 Taunt. 373; 3 Kent's Com. 257; Marsh. on Ins. 221.

*Webster*, for the defendants in error, objected to the jurisdiction of the court. It does not appear, that any statute of the United States was misunderstood. Suppose, the court had said the vessel is forfeited, but the insurance is valid; does this give jurisdiction? The enrolment, although imperfectly made, was in evidence. Has the superior court of Maine decided on the effect of an act of congress? This does not appear, because one of the parties has a defence connected with the statute. It does not give this court jurisdiction to revise the decision of the court before which the defence was made. If the court have decided wrong on the facts, yet it does not appear, the statute has been misinterpreted.

The enrolment, although irregularly obtained, was a legal paper. The parties could be visited by a penalty, but this was not a forfeiture of the vessel. To maintain, that a contract made for the protection of the property of the owner of such a vessel is void, it must \*be shown that, by the manner of obtaining the enrolment, the party was deprived [\*161 of any and all property in the vessel; or that the contract was made in aid of an illegal act. The case agreed exempts the assured from all fraud. The contract of insurance was legal. It had nothing to do with the act of the owner in obtaining an enrolment. It stood separate and apart from all the former transactions. It was not like a contract of insurance on a vessel carrying an enemy's license, where the license makes the property enemies' property. In reply to the cases cited by the counsel for the plaintiff in error, Mr. Webster said, they all established that the contract was itself unlawful. In such a case, a court of law will give no assistance to enforce such an agreement.

But the acts of congress did not make the forfeiture of the vessel, under

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such circumstances, absolute, even if any forfeiture could be enforced. Proceedings against her were necessary. The government could alone enforce the law, and until this was done, the sailing of the vessel was lawful. The power to remit for any penalty or forfeiture, under such circumstances, is given by the statute. Thus, until the government had fully manifested its claim, and had refused a remission, no one could allege anything against the vessel. The *Mary* was a registered vessel of the United States, and had a right to protection as such. If a revolt had been committed on board of her, it would have been punished. If she had been attacked by a foreign military force, the government of the United States would have interfered. Cited, 13 Pick. 518 ; 15 East 364 ; 4 Taunt. 589 ; 13 Mass. 589 ; 6 Greenl. 68.

STORY, Justice, delivered the opinion of the court.—This is a writ of error to the supreme judicial court of the state of Maine. The original action was *assumpsit* on a policy of insurance, dated the 17th of June 1833, whereby the Ocean Insurance Company insured \$3000 on the schooner *Mary*, owned by Polleys, at sea or in port, for the term of one year, commencing the risk on the 11th of July 1833, at noon, and ending the 11th of July 1834, at noon. The schooner was totally lost by the perils of the sea, on the 10th of June 1834, while the policy was in force. At the trial, on the general issue, it appeared in evidence, that a sloop was built in 1816, and enrolled by the name of *Sophonria*, and was again enrolled in the custom-house in Portland, by the same name, on the 24th of March 1822. The schooner *Mary* was built upon the keel, floor timbers, and naval timbers of the said sloop *Sophonria*, the size was enlarged nearly twelve tons, and the name of *Mary* was given to her, after being so enlarged ; and this was known to the insurance company at the time of executing the policy. A certificate of one Mark Leavit was procured by Polleys, and presented to the custom-house to obtain an enrolment of the schooner *Mary*, without any fraudulent intent \*162] to deceive or defraud, but with \*fair and honest intentions, as the jury believed. But the enrolment of the *Sophonria* was not first surrendered and delivered up at the custom-house, before the issuing of the enrolment of the *Mary*, on the 3d of June 1833. Upon these facts, which appear upon the bill of exceptions taken at the trial, the counsel for the insurance company objected to the admission in evidence of the said enrolment of the *Mary* of the 3d of June of 1833, as contrary to the laws of the United States ; but the judge who sat at the trial overruled the objection, and the enrolment was admitted. The same counsel further insisted, that the said schooner, on the voyage on which she was lost, was sailing under circumstances rendering her liable to forfeiture for a violation of the laws of the United States ; and that, therefore, a policy on the vessel pursuing such a voyage, was not valid, or legal and binding. But the said judge also overruled this objection as insufficient to bar the action. Other points arose at the trial, upon which, however, it is unnecessary for us to dwell ; because they are in no shape cognisable by this court in the exercise of its appellate jurisdiction over the judgments and decrees of the state courts, under the 25th section of the judiciary act of 1789, ch. 20. The jury found a verdict for the plaintiff (Polleys), which was confirmed by the whole court ; and judgment passed thereon, accordingly, for him.

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Two questions have been argued before us. The first is, whether, upon the face of the record, any case is made out for the exercise of the appellate jurisdiction of this court, under the 25th section of the act of 1789, ch. 20? The next is, whether the state court has in fact misconstrued the laws of the United States, upon the points in controversy at the trial, to the prejudice of the insurance company?

In our judgment, it is wholly unnecessary to consider the last question, because we are of opinion, that upon the face of the record, no case is shown for the exercise of the appellate jurisdiction of this court. The only clause of the 25th section of the judiciary act of 1789, ch. 20, conferring this appellate jurisdiction, which is applicable to the present case, is that where there is drawn in question in the state court the construction of a clause of a statute of the United States, and the decision of the state court is against the title, right, privilege or exemption set up or claimed by either party, under that clause of the statute; the settled construction of this court is, that to bring any case within the reach of the 25th section, it must appear upon the face of the record of the state court, either by express terms, or by clear and necessary intendment, that the question did actually arise in the state court, not that it might have arisen, or have been applicable to the case; and that the question was actually decided, not that it might have been decided by the state court, against the title, right, or privilege, or exemption set up by the party. If, therefore, the decision made by the state court is, upon the face of this record, entirely consistent with the construction of the statute contended for by the party appellant, no case is made out for the exercise of the appellate jurisdiction of this court.

\*Let us now apply this doctrine to the circumstances of the present case. The first objection was to the admission of the enrolment [\*163 of the *Mary* as evidence to the jury, upon the ground, that it was "contrary to the laws of the United States;" meaning, undoubtedly, that it was obtained contrary to the requirement of the act of congress concerning the registering and recording of ships or vessels, passed on the 31st of December, 1792, ch. 45. That act, in the 14th section, provides, among other things, that when any ship or vessel which shall have been registered pursuant to the act, shall be altered in form or burden, by being lengthened or built upon, or from one denomination to another, by the mode or method of rigging or fitting, the ship or vessel shall be registered anew, by her former name, otherwise she shall cease to be deemed a ship or vessel of the United States: and upon her being registered anew, the former certificate of registry is to be delivered up to the collector; and if not so delivered up, except where it is destroyed or lost, or unintentionally mislaid, the owner is made liable to the forfeiture of \$500. Now, it is observable, that the present policy contains no warranty or representation of the national character of the *Mary*; and therefore, the only assignable reason for offering the new enrolment (as it is called), meaning the new certificate of registry, in evidence was, to establish the ownership of the vessel to be in Polleys. For this purpose, it was clearly admissible, however irregularly or wrongfully this enrolment may have been obtained at the custom-house. The court, might, therefore, very properly have admitted the paper in evidence for this purpose, and, for aught that appears on the record, actually did so, without in the slightest degree contesting that it had been obtained con-

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trary to the laws of the United States. In this view, as a matter of evidence proper for the consideration of the jury on the question of ownership, it is clear, that the decision does not fall within the appellate jurisdiction of this court, under the 25th section of the act of 1789, already referred to.

Then, as to the other point. The objection made by the counsel for the insurance company was, that the schooner (Mary), on the voyage on which she was lost, was sailing under circumstances rendering her liable to forfeiture for a violation of the laws of the United States; and that, therefore, a policy on a vessel pursuing such a voyage was not valid, or legal and binding. But the judge also overruled this objection, as insufficient to bar the action. The objection was founded on the 27th section of the ship registry act of 1792, ch. 45, above referred to; which declares, that if any certificate of registry or record shall be fraudulently or knowingly used for any ship or vessel, not then actually entitled to the benefit thereof, according to the true intent of this act, such ship or vessel shall be forfeited to the United States, with her tackle, apparel and furniture. The objection, then, as insisted on by the counsel for the insurance company, involved two distinct propositions. The first was, that the schooner was sailing on the voyage, under circumstances which rendered her liable to forfeiture. The

\*164] second was, that the policy on her was, therefore, void. Now, the first might have been most fully admitted by the court, and yet the second have been denied, upon the ground that the policy was a lawful contract in itself, and only remotely connected with the illegal use of the certificate of registry; and in no respect designed to aid, assist or advance any such illegal purpose. We all know, that there are cases where a contract may be valid, notwithstanding it is remotely connected with an independent illegal transaction, which, however, it is not designed to aid or promote. The case of *Armstrong v. Toler*, 11 Wheat. 258, presented a question of this sort, and was decided in favor of such a contract. But cases might easily be put, where the doctrine itself would admit of a far more simple and easy illustration. Suppose, the Mary had been repaired in port, and the shipwrights had known the circumstances under which she had obtained the new certificate of registry; would they, in consequence of such knowledge alone, have lost their title to recover for their own work and labor? Suppose, a vessel had been actually forfeited by some antecedent illegal act, are all contracts for her future employment void; although there is no illegal object in view, and the forfeiture may never be enforced?

In order to bring the present case within the jurisdiction of this court, it must clearly appear on the face of the record, that the state court did decide against the construction of the laws of the United States, insisted on by the insurance company; for if the court did decide in favor of that construction, and yet held the policy valid upon other grounds, consistently with that decision, we have nothing to do with the latter point, and have no right to inquire, whether it was a just application of the general principles of commercial law, or not. Now, so far is it from appearing on the face of the record, that the state court decided against the construction of the laws of the United States, insisted on by the insurance company; the contrary may be fairly inferred, from the language of the court in overruling the objection. The objection was overruled as "insufficient to bar the action;" that is, the action on the policy was still maintainable, notwith-

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standing the Mary "was sailing under circumstances rendering her liable to forfeiture for a violation of the laws" of the United States.

In the exercise of the appellate jurisdiction of this court over the decisions of state courts, we are not at liberty to resort to forced inferences and conjectural reasonings, or possible or even probable suppositions of the points raised and actually decided by those courts. We must see plainly that the decision was either directly made of some matter within the purview of the 25th section of the act of 1789; or that the decision could not have been what it was, without necessarily involving such matter. In the present case, we can arrive, upon the record, at no such conclusion. The consequence is, that the cause must be dismissed for want of jurisdiction.

We have been furnished with a copy of the opinion of the learned judges in the state court in this very case; and we are gratified in finding [\*165 that it abundantly confirms the deductions which we have drawn from the record. But it is proper to add, that that opinion, if it had been otherwise, could not have any influence upon our present opinion; since it constitutes no part of the record; and it is to the record, and the record only, that we can resort to ascertain our appellate jurisdiction in cases of this sort. The writ of error is, accordingly, dismissed, for want of jurisdiction.

Writ of error dismissed.

\*JOHN WALKER, Appellant, v. GEORGE PARKER and others, [\*166 Appellees.

*Construction of will.*

A testator devised to his wife one-third of his personal estate for ever, for her own proper use and benefit, and also one-third of all his real estate, during her lifetime, and in the event of her death, all the right in real property bequeathed to her should be, and by the will was, declared to be vested in his infant son; the testator then proceeded to devise sundry lots and houses to his mother, his sisters, his brothers, separately, and his son; these were given to the respective devisees "as their property for ever;" he then devised the balance of his real estate to his infant son, "for ever," believed to be certain lots specified in the will: *Held*, that the wife took, under the will, one-third of all the real estate of the testator, during her life, and that his son took a fee-simple in one-third of the property given to the brothers and sisters of the testator, subject to the devise to his mother, and a fee-simple in all the real estate, specifically devised to him, subject to the devise of one-third to his mother, during her life.

The devise of one of the lots devised to him for ever, which the court held was subject to the right to one-third in the wife of the devisor, and one-third after her decease, in fee to the son of the devisor, cannot by a proceeding in chancery, compel a sale of the property devised, or a partition; without the court are satisfied it would be for the benefit of the infant son to make such sale, and without the consent of all the other parties interested in the property.

APPEAL from the Circuit Court of the District of Columbia, and county of Washington. The appellant, John Walker, filed a bill in the circuit court of the county of Washington, stating that James Walker, late of Washington, by his last will and testament, had bequeathed to him and to his then wife, Ann Sophia Walker, since intermarried with George Parker, one-third of his real estate, during her life, and in the event of her death, all the right bequeathed to her was declared to be vested in his infant son, James Walker. James Walker, the son, claimed the right in fee-simple, after her