

## Symonds v. Union Insurance Co.

away and destroyed. 5th. That if the vessel were feloniously destroyed, the evidence does not prove the prisoner to be the felon. (a)

THE COURT, in the charge to the jury, having reviewed and commented upon the facts, observed, that the objections, in point of law, would appear on the record, and might be taken advantage of, upon a motion in arrest of judgment. On the law, therefore, the court avoided giving any opinion at present, except in relation to the question, what constituted the destruction of a ship or vessel, within the meaning of the act of congress? On this question, they had deliberated much; and as the result, reduced to writing [417] an opinion, which they delivered, in charge to \*the jury, in these words: "To destroy a vessel, is to unfit her for service, beyond the hopes of recovery, by ordinary means. This, in extent of injury, is synonymous with cast away. It is the generical term: casting away is a species of destroying, as burning is. Both mean such an act, as causes a vessel to perish, or be lost, so as to be irrecoverable by ordinary means."

The defendant was acquitted, owing, it is believed, to a doubt, whether he had bored himself, or directed any other person to bore, the auger-holes in the bottom of the vessel; which was a new vessel, picked up at sea, after she was abandoned, carried into St. Jago de Cuba, and there (the holes being discovered) soon repaired, and fitted again for sea.

## SYMONDS v. UNION INSURANCE COMPANY. (b)

*Marine insurance.—Total loss.*

If a vessel be prevented, by a blockading squadron, from entering any of the enumerated ports, the voyage is broken up, and the assured may abandon, and recover for a total loss.

Insurance was effected by the plaintiff, who was the owner of a vessel, on her freight and cargo, by separate policies, "at and from New York to Cape Frangois, with liberty to proceed to another port, should Cape Frangois be blockaded;" the vessel sailed from New York, with instructions where to proceed, if she could not enter Cape Frangois; she was prevented from entering that port, or any other designated in the instructions given to the master, and was obliged by the blockading force to go to another place, where the master disposed of the goods and invested the proceeds in a return-cargo, with which the ship returned to New York: Held, that the insured might abandon, and recover as for a total loss.

THE plaintiff had effected, at the office of the defendants, three policies of insurance, dated the 12th of September 1803. The first on the schooner Diana, Nicholas, master, valued at \$4500; the second, on the freight of the schooner, valued at \$1500, and the third, on her cargo, valued at \$4000; on a voyage, "at and from New York to Cape Frangois, with liberty to proceed to another port, should Cape Frangois be blockaded, and the vessel prevented entering that port, from that, or any other cause, and at and from thence, back to New York." The order for the insurance declared, "that

(a) In the course of the defence, the following authorities were cited: 2 East P. C. 1097-8; Johnson's Dict. "Cast-away;" 8 Mod. 67, ca. 48; Ib. 74, ca. 52; 4 Hawk. 67, 62; 2 Burr. 1037; Plowd. 177; Rex v. Harrison, 1 Leach, 215; 2 Str. 1241; 8 Mod. 66; 1 Hale 635; 2 Id. 389; 3 Inst. 202; 4 Bl. Com. 881; Leach 109; Cow. Interp.; 2 Hawk. c. 25, § 82; 2 Rol. Abr. 30; 5 Mod. 137-8. The attorney of the district cited 1 Leach 215; 1 Bl. Com. 467; 2 Inst. 702; 1 Woodes. 195.

(b) s. c. 1 W. C. C. 382.

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the assured is not to abandon, if she cannot enter the Cape, from blockade or other cause, but liberty is given to proceed to some other port."

The schooner sailed from New York, on the 19th of September 1803, with instructions "to proceed to Cape Frangois; and if she could not enter, from blockade or other cause, to steer towards the Bite of Leogane, and enter either into Port-au-Prince, or some other port in the bite." On the 8th of October, she was boarded, off the island of St. Domingo, by an officer from the Blanche, a British frigate, who sent her papers on board the Bellerophon, another British ship of war. On the next day, Captain Nicholas was taken on board the Bellerophon, and was informed, "that the island of St. Domingo was blockaded by an English squadron, in consequence of which, no vessel would be permitted to enter any port or harbor in the said island;" and, to that effect, the register and papers of the schooner were indorsed. It appeared also from the master's testimony, "that he was told, he was not permitted to proceed on his intended voyage, nor to go to Cuba, but should proceed down to Kingston, Jamaica; that he was ordered to keep near the frigate Desire, until they had cleared the island of St. Domingo; that on his arrival at Kingston, he was also told by the custom-house officers, that he could not \*clear out for Cuba, whither he was still desirous of going; and that, finally, the cargo was landed and sold at Kingston. The proceeds were then invested in another cargo, with which the ship returned to New York. On her arrival there, about the 17th of December 1803, the plaintiff abandoned the cargo and freight to the defendants, and claimed as for a total loss; to recover which (deducting the proceeds of the cargo, and accounting for the profits on the investment homeward), the present action was instituted.

On the trial of the cause, these grounds of defence were taken; 1st. That upon the specific terms of the contract, the assured had not a right to abandon. The consequence of being turned aside by a blockading force was contemplated by the parties, but not insured against; for the voyage insured was to the Cape, or to another unblockaded port of Hispaniola. The whole island being blockaded, another port must be sought at the risk of the assured; the conduct of the British being neither capture, nor arrest; but simply precaution, to prevent a breach of blockade. 2d. That on general principles, it is not a case of abandonment for a total loss. The cargo was not prevented from arriving at its place of destination, by any risk insured against, acting upon the subject insured immediately, and not circuitously. There has been no capture, with a view to condemnation; no arrest, for the purpose of an embargo, in the service of a foreign prince; the cargo remains specifically the same; the ship has returned; wages have been paid, and of course, freight has been earned; nothing, in short, has affected the voyage insured, but the act of preventing a breach of blockade, and the low state of the Kingston market; and for neither of these is the underwriter liable. 2 Marsh. 434; 2 Burr. 1198; 1 T. R. 187; 2 Marsh. 482; 2 Burr. 696; 3 Atk. 195; 2 Str. 849; 2 Marsh. 496; Doug. 219; 1 Esp. 237; 3 Bos. & Pul. 388; 5 Esp. 50; Mill. 305-6; 5 East 388.

The answer, for the *plaintiff*, was, in general, that the voyage insured had been destroyed, by the superior force of a foreign power; and that, in-

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dependent of the means taken to prevent a breach of the blockade, the vessel had been constrained, against the express desire of the master, to proceed to a particular port, in exclusion of every other.

And THE COURT, in the charge to the jury, declared the law to be clearly with the plaintiff ; on which, a verdict was found in his favor for the goods and freight, at the value insured, subject to a deduction of the proceeds of the homeward investment.

*Ravole*, for the plaintiff. *Dallas*, for the defendant.

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\*CONFRAMP *et al. v. BUNEL. (a)*

*Lex loci contractus.*

A contract is governed by the law of the place where it was made.

Where the *lex loci contractus* protects a party from execution, on a judgment upon a contract, he will not be liable to arrest on mense process, out of this court, for the same cause.

CAPIAS. On a rule to show cause why the defendant should not be discharged on common bail, the following facts were established by the plaintiff : That in the year 1787, the defendant gave his note for 55,000 livres, to a person of the name of Horguetand, payable in two instalments, for value received in 55 negroes. On the 8th of February 1787, the note was assigned to the plaintiffs, and several partial payments were afterwards indorsed upon it. In November 1789, a suit was instituted at Port-au-Prince, to recover the balance ; and a judgment by default was entered for 38,666 livres ; to recover which was the object of the present action.

For the *defendant*, it was shown, that all the parties to the contract were French subjects, resident in the island of St. Domingo, at the time the contract was made ; that they continued French subjects at this time ; that in August of the year 1793, the French commissioners (Polverel and Santhorax) had proclaimed, at Port-au-Prince, the abolition of slavery, and the freedom of the negroes ; which the national convention ratified, in the February ensuing (4 Edw. Hist. West Ind. 146, 219) ; that, in consequence of this emancipation, the very negroes who had been purchased by the defendant, had been taken from him ; and that with a view to the calamitous situation of the colony, the following laws had been enacted by the French government :

1st. Extract from the law of the 6th of September 1802.

Sect. 1. Until the 1st of Vendemaire, 16th year, all suits are suspended as well against the principal debtors, as their securities, for debts contracted prior to the 1st of January 1792, for the purchase of real property, or of negroes.

Sect. 6. The creditors may, however, take all conservatory steps for the preservation of their rights, and even have the amount of their debts liquidated by judgments, but the execution thereof shall be stayed according to the first section.

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(a) s. c. 1 W. C. C. 340, reported as *Camfranque v. Burnell*.