

Graves v. Boston Marine Ins. Co.

MARSHALL, Ch. J.—The only doubt which the court had, was, whether, by the laws of Georgia, the land could be made liable, unless the heir was a party to the suit. We have received information as to the construction given by the courts of Georgia, to the statute of 5 Geo. II., making lands in the colonies liable for debts, and are satisfied, that they are considered as chargeable, without making the heir a party.

Decrees affirmed.<sup>1</sup>

\*419] \*GRAVES & BARNEWALL v. BOSTON MARINE INSURANCE COMPANY. (a)

*Marine insurance.—Reformation of policy.*

A policy in the name of one joint-owner, "as property may appear" (without the clause stating the insurance to be for the benefit of all concerned), does not cover the interest of another joint-owner.<sup>2</sup>

The interest of a copartnership cannot be given in evidence, on an averment of individual interest, nor an averment of the interest of a company be supported, by a special contract relating to the interest of an individual.

The evidence of the knowledge of the underwriters of the intention of the insured, at the time of making the policy, ought to be very clear, to justify a court of equity in conforming the policy to that intention.<sup>3</sup>

THIS was an appeal from the Circuit Court for the district of Massachusetts, on a decree in chancery, dismissing the plaintiffs' bill; the object of which was to charge the defendants upon a policy of insurance, and to obtain relief against a mistake alleged to have been made, by inserting only the name of Graves in the policy, whereas, the interest of both Graves & Barnewall was intended to have been insured.

The bill stated that Graves & Barnewall were equally and jointly interested in the ship Northern Liberties and her cargo; and that various sums of money were, by each of the partners, and at different places, procured to be insured upon the ship and cargo, from New York to Teneriffe, as well as from thence to La Vera Cruz, but in every instance, for their joint and equal benefit. That among other applications for insurance thereon, Graves, on the 24th of April 1800, wrote to Messrs. E. Sigourney & Sons, of Boston, inquiring of them at what rate of premium, insurance could be there obtained upon that risk, and therein describing himself as one of the parties interested in the property to be insured. Upon receiving their answer, he wrote again on the 5th of May 1800, saying, "Your office ask too high a premium for the risk I was inquiring after; the vessel cannot be out of time, as she sailed from hence for Teneriffe, in February, where we have not learned that she had arrived; less so, that she had sailed; but as it is my principle to run no risks, where I can help it, I have prevailed upon my copartner to anticipate her arrival and sailing again to Vera Cruz. To give you a perfect idea of the nature of the risk to be insured, you will find a

(a) Present, MARSHALL, Ch. J., PATERSON, WASHINGTON, CUSHING and JOHNSON, Justices.

<sup>1</sup> For a further decision on the tax-title of Elizabeth Course, see 4 Cr. 408.

<sup>2</sup> Turner v. Barrows, 5 Wend. 541; 8 Id. 144.

<sup>3</sup> See Snell v. Insurance Co., 98 U. S. 85.

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copy on the other side of the application, to our offices, who took a good deal at seventeen and a half per cent. ; we may be induced to give one or two per cent. more, to complete the business, and wish you to say, whether it could not be effected with you at seventeen and a half per cent. or near that ; if so, and we have not insured elsewhere, before a return of your answer, I may likely give you an order to effect twenty or twenty-five thousand dollars.

\*The copy of the application annexed to the letter, stated, that [ \*420 "on the 20th of February last, the ship Northern Liberties sailed from this for Teneriffe, commanded by Frederick King, a man of courage and good conduct ; she mounted sixteen six pounders, and had a crew of thirty in number. No vessel could have been more completely fitted ; is copper sheathed, and by the report of the pilot who carried her out to sea, sails remarkably fast. Upon this vessel's cargo, we want insurance at and from Teneriffe to La Vera Cruz. The ship and cargo really and truly belong to American citizens." That the said letter and copy of the application were, by E. Sigourney & Sons, as agents of the complainants, laid before the President and Directors of the Boston Marine Insurance Company, who, thereupon, offered to become insurers upon the property therein mentioned at a certain rate of premium then mentioned to the said E. Sigourney & Sons, which they communicated to Graves, who, by letter of 15th May 1800, with the concurrence of Barnewall, directed insurance to be made upon the cargo, to the amount of \$16,000 upon the best terms, within certain limits, which could be obtained. Whereupon, and in pursuance of such directions, E. Sigourney & Sons did cause such insurance to be made, and among others, the Boston Marine Insurance Company did, by policy of insurance, dated June 14th, 1800, become assurers in the sum of \$10,000 upon the cargo of the said ship, for the voyage mentioned in the said letter.

That previous to the date of the said policy, an alteration was made by the company in the common form of marine policies used in this country, by which alteration, the ordinary clause importing the insurance to be made as well for the benefit of the persons named in the policy, as for the benefit of all concerned, was omitted, and that such altered form was used by the company, in making the insurance for the complainants ; and that neither the complainants, nor their agents, the said E. Sigourney & Sons, had any notice or knowledge of such alteration.

That the said letter of Graves, and the copy of the application, were shown to the president and directors of the company, as the order for the said insurance, and were received and acted upon by them as the basis upon which such insurance was made. And that it was well understood, \*as [ \*421 well on the part of the said president and directors of the said company, as also on the part of the complainants, and their said agents, E. Sigourney & Sons, that the property intended to be insured by the said policy was the joint property of a certain company or copartnership, of which Graves was a member, and not his separate or individual property ; and that the object and intent of the said insurance was, to cover the interest of the concerned therein in general, and not his particular and separate interest. But that owing to ignorance on the part of the complainants, and of their agents, of such alteration or omission in the form of the printed policies used by the said company, and to inadvertence and mistake on the part of

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the company, or their president or secretary, in filling up the same, the name of Graves only was inserted.

That in the prosecution of the voyage insured, the ship and cargo were totally lost by the perils of the sea.

The answer of the company, by their president, under the corporate seal, admitted the execution of the policy, and that Graves had some interest in the property insured, but they did not know to what amount; that upon due proof of loss, they were bound, and were ready, to pay him the amount of loss which he had sustained. It admitted, that E. Sigourney, in the beginning of May, applied for insurance, but denied, that either of the letters of the 24th of April, or 5th of May, was shown to him, or left with the president or secretary of the company, or any other person, for their use. It admitted, that the copy of the application to the New York offices was left with the president, but averred, that the premium required was higher than E. Sigourney & Sons would give, and that no bargain or contract was, at that time, made, but the application was withdrawn. That no insurance was made by them, in pursuance of the letter of the 15th of May, or any other letter from Graves, and no further application was made, until the 14th of June, when Andrew Sigourney applied for the insurance of \$10,000 on the cargo of the ship Northern Liberties; whereupon, the policy was made for and on account of John Boonen Graves, and for account of no other person whatsoever. It denied, that before or at the time of making and subscribing the policy, it was mentioned by the said Sigourney & Sons, or either of them, or known or understood, or suspected, by the defendants, \*422] that the property \*proposed to be insured was the joint property of Graves & Barnewall, or of any company or copartnership of which Graves was a member, or that it was the object and intent of the said insurance to cover the interest of the concerned therein, in general, but only the separate and particular interest of Graves.

It denied all mistake or misunderstanding in inserting the name of Graves alone; but insisted, that his name alone was inserted, because the interest of no other person was intended to be insured. It averred, that after the policy was prepared and filled up, it was delivered to Andrew Sigourney, of the house of E. Sigourney & Sons, and by him read and approved, and that he thereupon gave his promissory note for the premium. It denied, that any alteration or omission in the form of policies had been made or adopted by the president and directors, subsequent to the form first adopted and agreed upon by them, after their incorporation, and averred, that the form, in the present case, was the same which was then adopted, and which was settled by the president and directors, upon mature advice and deliberation, and with the express intent, that the president and directors might know the nature, character, quality and condition of every person whose interest they might insure, and to protect themselves from all responsibility and hazard, on account of the interest of any person or persons not named in the policy; and that the said printed form had been openly and continually used by the company, of which all persons procuring insurance to be done at their office had notice; and that a like form had been used at the other offices in Boston, for more than a year before the 14th June 1800.

The deposition of Elisha Sigourney stated, that about the 12th of May 1800, he showed Graves's letter of 5th May, to a person writing as clerk in

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the office of the defendants, and left it with him, until the next morning, when the clerk informed him the terms on which the president and directors would insure. That at the time of effecting the insurance, he did not know that the form adopted by that insurance company \*differed from the usual form; but supposed the interest of all concerned was insured. [\*423

The deposition of Andrew Sigourney stated, that on the 14th of June, when he made application for insurance, he showed to Mr. May, the secretary of the company, only the instructions on the back of the letter of the 5th of May, and a memorandum to insert the words "as property may appear." That he did not read any but the written part of the policy, before he took it from the office. That at the time of making the application, he did not mention the name of any person as interested in that insurance, except the name of John Boonen Graves. He only showed the instructions. That he knew by the letter of Graves, that he had partners, but he did not know the name of any of them: he supposed, that the policy covered the interest of all concerned, and had no notice of any variation from the customary form of policies.

The deposition of Mr. May, the secretary of the company, stated, that the only paper which A. Sigourney showed him, on the 14th of June, when he applied for insurance, was a copy of a proposal made to some other offices, for insurance on the same risk; and that he did not leave it, but only showed it to the deponent. That he, the secretary, filled the policy; and understood the insurance was for Graves, and for no one else, as the policy purports. That he was not sensible of any error in the filling it; that he filled it, as he understood the intention of the parties in the contract. That A. Sigourney read it over deliberately, before he gave the premium note; and after reading it, went away. He afterwards returned, and requested the secretary to add to it the words "as property may appear," which, by permission of the president, were interlined. That the first policy written by the company was dated the 3d of April 1799. That the president and directors had made no alteration in the printed form of policies from their first commencing business, until the 14th of June 1800.

On the 9th of May, E. Sigourney & Sons, in answer to Graves's letter of the 5th, say, that the gentlemen will not insure under 20 per cent. premium. \*On the 15th of May, Graves, in answer, requested insurance to be made "for \$21,000 on the ship, valued at that sum; and \$16,000 on the cargo, as interest shall appear. The latter completes the sum intended to insure on the cargo. Your policy, therefore, being the last dated, it is understood that short interest (if any should appear) is to be settled with your underwriters."

On the 3d of June, E. Sigourney & Sons write to Graves that "\$5900 is done on your policy on the cargo. It goes on very heavily." Graves, in answer, on the 10th of June, says, "with much reluctance do I learn the little progress you have made in insuring the cargo. I hope by offering 2½ per cent. more, you may induce the companies, or solid individuals, to fill up the remainder. At any rate, it will not answer my purpose, to have the risk unaccomplished; you, therefore, on receiving these presents, will please to ascertain whether there is a prospect of succeeding. If not, give me immediate notice in order to propose it elsewhere."

The material words of the policy were, "This policy of assurance wit-

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nesseth, that the president and directors of the Boston Marine Insurance Company do, by these presents, cause John Boonen Graves to be assured, lost or not lost, ten thousand dollars on property on board the ship Northern Liberties, as property may appear, at and from Teneriffe to Vera Cruz."

"And it is hereby agreed, that if the assured shall have made any other assurance upon the property aforesaid, prior in date to this policy, then the said insurance company shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the property at risk. And the said insurance company shall return the premium (excepting half per cent.) upon so much of the sum by them assured, as they shall be exonerated from by such prior assurance. And in case of any assurance upon said property, subsequent in date to this policy, the said insurance company shall nevertheless be answerable to the full extent of the sum by them herein assured, without right to claim contribution from such subsequent \*425] quent \*assurers, and shall, accordingly, be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made."

It was fully proved, that Graves & Barnewall were jointly and equally interested in the ship and cargo. And the representation to the New York offices stated that fact. Four other policies, upon the same ship and cargo, and for the same voyage, were exhibited by the complainants, all of which had the usual clause, "as well in his own name, as for and in the name and names of every other person or persons to whom the same doth, may, or shall appertain, in part or in whole." Three of them were in the name of Graves, and one in the name of Barnewall. There was full proof of a total loss of ship and cargo.

A suit at law had been brought by Graves & Barnewall, upon the present policy, in which judgment was rendered against them, which judgment was affirmed in this court, at December term 1801.

This cause was argued, at February term 1804, by *Stockton*, of New Jersey, and *Martin*, of Maryland, for the appellants, and by *Harper*, of Maryland, and *Key*, of the district of Columbia, for the appellees; and at this term, by *Stockton*, for the appellants, and *Harper* and *Ingersoll*, of Pennsylvania, for the appellees.

*Stockton*, for the appellants, made three points: 1st. That Graves is to be considered either as a joint partner, having sufficient interest in the whole property to charge the defendants to the amount of their subscription: or 1. As insuring in his own right so far as his interest extended; and 2. As trustee for his partner for the residue of the interest; and that it is competent for him to charge the defendants on this policy, to the amount of his own interest, and also to the amount of the interest of him for whom he was agent or trustee. 2d. That at the time this policy was effected, it was the \*426] intention of both parties to insure the entire interest \*of both Graves and Barnewall; and if such is not the literal construction of the policy, the words whereby the policy is confined to the interest of Graves shall be considered as having been inserted by mistake. 3d. That if the intent of both parties cannot be said to be sufficiently manifest, still there is full proof of mistake on one side, and such conduct on the other as will prove

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the defendants to have acted *malá fide*; and they are chargeable on that ground.

I. That the entire property of Graves and Barnewall is covered by the policy, 1st. Because each has an insurable interest in the whole; and 2d. Because Graves had power to act for himself, and as agent for Barnewall. (a)

1. It is not necessary that the names of all concerned should be inserted in the policy: and such was the law in England, until the year 1785, when the statute of 25 Geo. III. was enacted, which rendered it necessary to insert the names of every person interested; but this was repealed by the statute of 28 Geo. III., which only makes it necessary to insert the name of one of the parties insured, or his agent. Nor is it necessary that the insured should have the absolute ownership of the thing. A mortgagor and mortgagee may both insure. Seamen on board the king's ships may insure their prize-money. A general property is one thing, an insurable interest, another. 1 Marsh. 212-14. A joint partner has an insurable interest in the whole mass of partnership property. He has a general right and authority over the whole, whether the partnership be general or special. They are jointly seized, *per my et per tout*. The joint effects and duties survive. The executor of a deceased partner has only a right to compel the survivor to account, and to recover the balance. \*Each has a power singly to dispose of the whole partnership effects. *Fox v. Hanbury*, Cowp. 445, 448. [\*427

The case of *Page v. Fry*, 2 Bos. & Pul. 240, is in point. There, the averment was, that Hyde & Hobbs were interested in the cargo insured, to the amount of all the money insured thereon; and although it was proved, that other persons had an undivided share of the cargo, yet it was held, that the averment was supported. Lord ELDON, Ch. J., was of opinion, that the plaintiff had a sufficient interest throughout the entirety of the cargo; and HEATH, J., said, he did not see why a joint-tenant, or tenant in common, has not such an interest in the entirety as will enable him to insure.

A French author is referred to, but the book has not been produced that we might see the contents, the limitation annexed to the opinion, and its bearing upon the present case. Perhaps it may be explained in 1 Marshall 212. At the time of Emerigon, it was the custom to execute blank policies. If the insured chose to insert only the name of one of the persons interested, perhaps, it might be considered, as estopping him from saying that others were concerned.

A policy is a contract of indemnity. It is not to enable the insured to make gain, but to avoid loss. One partner is not only formally, but substantially, owner of the whole, especially as to strangers. If it be said, that he cannot be damnified in the whole, we answer that one partner has only a right to the balance of account. Suppose, Graves had advanced the whole outfit, the whole joint effects are his security, and he will be entitled to hold, if Barnewall should become insolvent. A creditor partner has a specific lien, on the whole. The loss of Graves, therefore, might extend to the whole

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(a) *Ingersoll* referred to Emerigon, as an authority, that in such a policy as this neither the joint property of both, nor the share of either in the joint property, is insured; but that it covers only the separate property of Graves. But the book was not produced.

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amount insured. *West v. Skip*, 1 Ves. 242 ; *Jackey v. Butler*, 2 Ld. Raym. 871 ; *Fox v. Hanbury*, Cowp. 449.

Suppose, the interest of both to be \$10,000. The defendants say, that Graves has only the benefit of his share, say \$5000. But Graves and Barnewall were to share in all cases. \$5000 are lost, so that, in fact, Graves would \*428] be insured only \$2500. \*There is no case where a joint partner has been held to be insured for his share only. How can the contract be limited to half the amount stipulated ? If it should be said, that the other partner might have insured elsewhere, the answer is, that it would only be the common case of a double insurance, and so a contribution.

But 2d. Graves might insure personally for his own share, and as agent for Barnewall as to his share. A general agent may insure, without orders. 1 Marshall 218. It is not necessary that it should appear on the face of the policy, that the principal was interested ; but the policy may be in the name of the agent, and the interest of the principal may be averred and proved ; even under the statute of 28 Geo. III. 1 Marshall 219. One partner is a general agent for the whole. Especially, in a court of equity, where one person may be considered as trustee for another, if the justice of the case requires it.

II. There is sufficient evidence, to prove that it was the intent of both parties, that the joint interest of Graves and Barnewall should be insured, and if the policy is not so expressed, it is a mistake, and ought to be so construed. The form of the policy was framed in old times. It is imperfect and incoherent. It is not a specialty, and is always construed according to the intention of the parties. The joint property is proved, and therefore, it is natural to suppose, that it was intended by Graves as a joint insurance. The conduct of Graves and Barnewall also proves such to be the intent on their part. There were four other policies, in all of which their joint interest is \*429] est is insured. The letter of the 5th of May, and the representation annexed, show a plurality of owners.

The words "as interest may appear" were inserted by desire of E. Sigourney, the agent of Graves. For what reason ? It was not necessary for Graves to insert them, to oblige himself to prove his interest. They are part of the usual clause which had been omitted in this policy, and by which the benefit of the insurance is usually extended to all concerned. The insertion of those words shows the intention of Graves to insure for those in whom the interest should appear to be. This intent was known to the underwriters. The letter of the 5th of May was left a whole day in the office. If they did know it, they must either be presumed to have assented to that intention, or are chargeable with fraud in not explaining themselves. It was not important to them, who were the owners. It was sufficient to them, to have a warranty that the property was neutral. Whether it belonged to one or to twenty persons, was not of the least importance. They were willing to insure \$10,000 upon that risk, and all that they could require was, that property to that amount should be actually exposed to the risk.

There is a variance between the representation made to the New York offices and that made to the Boston office. In the former, the property is said to belong to Graves & Barnewall ; in the latter, to citizens of the United States. If any argument should be attempted from this circumstance, the answer is, that at New York, Graves & Barnewall were known to be citizens

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of the United States ; at Boston, they were not. The risk or contract was not in the least varied. If the assured had intended to impose names upon the underwriters, they would have used that of Barnewall and not Graves. The former was well known in Boston as a man of great respectability of character, and as president of an insurance company in New York. The latter was scarcely known at all, being a naturalized Dutch merchant.

\*If, then, it was the intention of both parties, to insure the joint interest of Graves & Barnewall ; or, which amounts to the same thing, if such was the intent of one of the parties, and that intent was known to the other, who did not object, nor explain himself, then, it is but the common case of a mistake in using inapt words to express the meaning of the parties, which is one of the most usual grounds of equitable jurisdiction. *Joynes v. Statham*, 3 Atk. 388 ; *Langley v. Brown*, 2 Ibid. 203 ; *Simpson v. Vaughan*, Ibid. 31 ; *Baker v. Paine*, 1 Ves. 456 ; *Motteux v. London Assurance Company*, 1 Atk. 545. [\*430]

It is objected, that no application was made to rectify this mistake, until the loss had happened. The answer is, that Graves did not know of the mistake. The policy remained in the hands of Sigourney, who swears, he did not know it ; and the loss happened before the premium note became due.

III. That if the intent of both parties cannot be said to be sufficiently manifest, still there is full proof of mistake on one side, and such conduct on the other, as will show that the defendants have acted *malâ fide* ; and they are chargeable on that ground. To maintain this ground, we rely on the following facts which appear in evidence.

1. The knowledge the defendants had of the intention of Graves to insure the joint interest of Graves & Barnewall. The company's departing from the common form of policies which cover the real interest of all concerned, without having intimated this circumstance to the plaintiffs' agent ; and without giving any public notice ; but keeping it secret even from their own stockholders.

This notice of our intentions, and of the mistake we labored under, and their silence ; this deviation from the accustomed forms of business, without notice or explanation, though they saw the complainants acting under a delusion, is such a notice of our understanding of \*the business, and such a concealment of theirs, as will amount to fraud in point of law. [\*431] What ought to have been their conduct, knowing our intentions and their own? They should have said, you speak of your copartner ; name him. You mean to cover the whole ; disclose who are the owners. We have departed from the accustomed form of policies, and the interest of no person will be covered whose name is not inserted in the policy ; but all was silence.

When an insuring company depart from the accustomed form, and the principles universally adopted in this business, they should give notice. Otherwise, every man has a right to deal with them, on the presumption that they do business in the same manner as others, and in the old and established forms. And when they see, that he is evidently acting upon this principle, it is due to good faith, to apprise him of his mistake. To withhold information, to suffer him to proceed in his mistake, and pay his money under delusion, when a word would have saved him, has every ingredient of deceit. It is *suppressio veri* ; it is, by silence and concealment, to draw a man to conclude an agreement contrary to his intent.

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They who demand good faith, should practise it. He who exacts equity, should do it. The underwriter demands and receives it, at the peril of the premium. The insured shall enforce it against him, by obliging him to execute the contract as he had a right to understand it. Each ought to know all. *Seaman v. Fonereau*, 2 Str. 1183; Park 200, 201; *Ibbottson v. Rhodes*, 2 Vern. 554; Park 208, 213; *Maanss v. Henderson*, 1 East 335; *Carter v. Boehm*, 3 Burr. 1905.

If an explanation had taken place, it would have made no alteration of the risk or the premium; for Barnewall is also an American citizen. If they had disclosed their secret regulations and intentions, it would have added a name to the policy. What, then, is it but treasuring up an unimportant circumstance until the event happens, taking the premium, and yet defeating the very contract of which it was the price. 1 Marshall 216.

\*It is, therefore, contended, that if the intention of both parties \*432] has not been fully proved, the defendants are chargeable on the ground of fraud. This gives the court full jurisdiction; and this court will enforce the contract against them, as it ought to have been fulfilled. It will consider Graves as acting for both, and the restriction as happening by mistake or fraud.

*Harper*, contra, considered, 1st. The law upon which the plaintiffs rely. 2d. The equity of the case.

1. As to the law. It is *res judicata*. This very case has been decided at law.

MARSHALL, Ch. J.—The case at law was decided on a defect in the declaration.

*Harper*.—That gives them no equity. They were bound to make out their case at law; they ought to have made a good declaration.

Why is this court applied to? To cure some defect or mistake in the policy. But for this there was a remedy at law. A court of law will construe the policy according to the intent. If they are not estopped from proceeding at law, by the judgment at law, let them begin again. But if they are barred by the judgment at law, and this is a question to which a court of law is competent, they have no remedy in equity.

But let us consider the law which has been urged. A partner has a right to use the partnership name for joint purposes; but he cannot bind the firm in his own name. He cannot, in his own name, transfer the joint property. His interest is different from his power. If he make a will, nothing but his share of the joint property passes. He may, in his own name, insure his individual share of the joint property. Perhaps, his partners do not choose to insure their interest. Shall he, in his own name, bind them to pay the premium? Individual partners often underwrite upon the risks of their own house.

\*There is good reason why the names of all the owners ought to be \*433] known to the underwriters. If a man has been detected in a covered trade, the risk is greater, than if he had always been known to carry on a fair trade. One of the secret partners may, perhaps, be a subject of a beligerent power.

This is not a case of general partnership. It is a particular adventure.

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It is not such a partnership as is mentioned in the books. One joint-tenant, or tenant in common, cannot dispose of the interest of the co-tenant. There are joint-tenants of ships as well as of land. In a particular transaction of this kind, one cannot sell the whole ship. As agent, he could not do it, without a special power. One partner cannot, as agent, without a special power, sign any paper to bind his copartner, nor can he contract as agent. He can only use the name of the firm.

The words "as interest shall appear," are said to be tantamount to the whole omitted clause. But they only make the difference between an open and a valued policy. The statute of 25 Geo. III. says, the names of all concerned shall be inserted in the policy, and yet, after that statute, the words "as interest shall appear," were still used.

2. As to the equity of the case. We admit, that a policy is a contract of indemnity, and that what the parties meant at the time, ought to be carried into effect; and that *suppressio veri* will avoid it. All this results from the nature of contracts, which requires the assent of two minds. We admit also, that it may have been the intent of Graves to insure the joint interest of Graves & Barnewall. But was that intent known to us? *Hic labor, hoc opus*. It is true, they acted as joint-owners, to each other, and to their agent; and in some cases, they made insurances jointly, but not in this case.

\*Why is there a variance between the representation made to the New York offices, and that made to the Boston office? Why is the [\*434 name of Barnewall omitted in the latter? Why, in the letter of the 5th of May, is it not said, who were meant by the expressions "we," "partners," "citizens of the United States?"

The letter of the 5th of May is only an application to know the premium, not a request to make insurance. It states his *maximum*, and therefore, it is not probable that Sigourney would make it known. He is probably mistaken in his deposition. He might, and probably did, give a copy of the representation. But the original representation is on the back of the same leaf on which the letter of the 5th of May was written. The letter of the 15th of May requests Sigourney to have insurance made on \$21,000, as interest shall appear. This shows that he did not mean absolutely to insure and pay the premium for \$21,000, but only so much thereof as his uncovered interest should amount to. This explains also the meaning of the words "I request," &c.

As to the alteration of the form of the policy. The answer states, that they never had used any other. Sigourney ought to have read it, before he agreed to it. It was his own folly, that he did not. It was not, therefore, *suppressio veri*.

*Ingersoll*, on the same side.—If there was a mistake on the side of the insured, yet the written policy is superior to parol testimony. If the knowledge of that intent cannot be brought home to the insurers, the parol testimony is of no avail. Here is a written instrument, and if it is not in itself doubtful, you cannot resort to parol testimony. You cannot resort to extraneous circumstances, to create a doubt, when the instrument itself is clear and explicit. All persons have a right to make such contracts as they please; and they will be bound by them, unless they are contrary to law; or unless fraud can be shown.

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\*If double insurance is made, the insured may resort to either policy. The forms of policies, as to the necessity of naming all the persons concerned, and as to double insurance, are often varied. Here, Graves agrees that if double insurance should have been made before, he will resort to this policy for so much only as shall remain uncovered by other policies; and it is to be "as interest shall appear." It contains also several other special agreements.

From the time of the incorporation of the Boston Marine Insurance Company, by the form of policies which they adopted, they declared to the world the terms of their contract. They say, we will not insure the interest of persons not named; we will not contribute with prior underwriters on the same risk; we will be answerable only for so much as shall be uncovered by preceding policies. By the terms of this policy, the interest of Graves only is insured. By accepting the policy, he agreed to it, and is bound, as if he had signed it.

The policy is also altered from the old form in other respects. It relinquishes the right of contribution in case of subsequent double insurance. Graves would have held them to this stipulation; and if they were bound by the alterations, he must be bound by them too. The number of this policy is 649; in so many instances, therefore, they had declared to the world their terms of insurance.

If the policy does cover Barnewall, the remedy of the plaintiffs is at law. If it does not, then Barnewall is excluded, unless they can show a different intent of the parties. 1. On general principles, does insurance by one partner, in his own name only, cover the joint interest of both? 2. If not, do the particular circumstances of this case form an exception to the general rule?

\*436] \*1. One part-owner cannot insure the share of the other part owner, without special authority. If not concerned in the sale of the cargo, they are not joint partners, but joint-owners. 5 Burr. 2729. One joint partner can insure only his share. The others may choose to insure elsewhere. The insurance company had a right to say they would not insure a person not named. If, by law, the insurance by one covers both, there is no remedy in equity.

2. The whole extent of Elisha Sigourney's powers, by the letter of 5th of May, was to inquire the rate of the premium. He never made any application for insurance. The only application for insurance was made by Andrew Sigourney, on the 14th of June (not grounded on the letter of the 5th of May), and after insurance had been made at other offices. The insurance was made on a copy of instructions for insurance at other offices, which contained the name of no person to be insured but Graves. This is a sealed instrument, and yet it is attempted to set it aside, on the ground of mistake, in the omission of a name, when the only name given by the plaintiffs' agent was inserted. It appears by May's deposition, that Andrew Sigourney read the policy deliberately, before he gave the premium note. But if he did not read it, it was his own neglect. He says, he did read the written part. But the name of Graves was written, and he must have seen that his name alone was inserted.

The case of *Page v. Fry*, 2 Bos. & Pul. 240, was a valued policy. It was, therefore, sufficient, if any interest appeared. The only object was to

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show it not to be a wagering policy. The legal property was in the plaintiffs, and it appeared that the house of Hacks had only a beneficial interest, so that the averment in the declaration was not falsified by the evidence.

The only effect of the words "as interest may appear," was, to make it an open policy. They do not refer to the persons concerned who are not named. The meaning is, that the underwriters will insure the whole interest which Graves shall prove he had at risk, provided it did not exceed \$10,000.

\*If they could be construed to mean the interest of all persons concerned, whether named or not, they would open the door to all the frauds intended to be guarded against by the terms of the policy. [\*437]

The case cited from Park 3, does not show the power of a court to modify a policy, according to the recollection of witnesses, as to what passed six weeks before the policy was agreed upon. On the contrary, Lord HARDWICKE, in Park 2, says, that to show that a policy, which is a contract in writing, has been framed contrary to the intent and real agreement, requires the "strongest proof possible."

*Stockton*, in reply.—We admit, that if we have a clear remedy at law, we have none in equity. But this objection does not apply to our second point, which considers Graves as a trustee or agent for his partner.

It is said, that in the case of joint-tenants there is a difference between their power and their interest. But joint-tenants are seized *per my et per tout*. The interest of each extends over the whole, and in chattels the power is equally extensive. A distinction is also taken between joint partners and joint-owners. But there is no difference. So far as the partnership extends, it is governed by all the principles of a general partnership. Each part-owner is possessed *per my et per tout*. Watson 78.

The presumption, however, is, that Graves & Barnewall were general joint partners. There is no evidence to the contrary. It is in evidence, that in many cases respecting this ship and cargo, Graves acted for Barnewall, as well as for himself, and that Barnewall assented to such acts, and never questioned the authority. \*It seems to be admitted, that it was the intention of Graves to insure for his partner as well as for himself. And we say, that the evidence is strong, that his intention was known to the underwriters. The question of fraud depends upon their knowledge of our intention, and not informing us of the alteration in their policy. The general practice of that office was not in itself notice; and there is no evidence of actual notice. (a) [\*438]

MARSHALL, Ch. J., delivered the opinion of the court.—The points made by the plaintiffs in this case, are, 1st. That the policy does really insure their joint property on board the ship Northern Liberties, so far as the same was at the time uncovered by prior assurances. 2d. That if the property be not insured at law, yet it was intended to be insured, and this court will relieve against the mistake in the agreement.

1st. That the policy does really insure the joint property of Graves &

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(a) This case was argued at February term 1804, by *Stockton* and *Martin*, for the plaintiffs in error, and by *Harper* and *Key*, for the defendants; but as the arguments did not essentially vary from those urged at the present term, it has been thought unnecessary to report them.

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Barnewall. The words are, "the President and Directors of the Boston Marine Insurance Company, do, by these presents, cause John Boonen Graves to be assured \$10,000, on property on board the ship Northern Liberties, as property may appear." These words, it is contended by the counsel for the plaintiffs, insure the joint property of Graves & Barnewall, so as to cover the interest of each.

The operation of the words themselves, taken in their ordinary sense, would certainly not extend beyond the interest held by Graves in the cargo. \*439] The words "as property \*may appear," seem to restrict the general terms of the policy to the interest of the person named in it. Admitting this to be true, it is still contended, that the interest of each partner in the whole partnership stock is an insurable interest; and as it was obviously the intention of Graves, to insure for his partner as well as for himself, the policy ought to receive a construction which will effect this intent. The reasoning in support of the power of each partner to insure the joint property, if certainly strong and well founded. But the doubt in this case is, not whether Graves could have insured the interest of his partner, but whether he has insured it.

It is true, that Barnewall need not have been named in the policy; but the contract ought to have been so expressed (since it is an open policy) as to show that the interest of some other person than Graves was secured, if such was to be the effect of the instrument. It is a good general principle, that written agreements ought to be expounded by themselves. But if the same words are to be considered as insuring the interest of Graves only, or the interest of Graves & Barnewall, according to extrinsic circumstances, the certainty expected from a written agreement will be very much impaired. The interest of Barnewall, therefore, cannot be considered as insured by this policy, under the power of one partner to insure the share of his copartner. If it is insured, it must be as the interest of Graves.

Several cases have been stated, in which Graves might sustain a loss by the loss of Barnewall's part of the cargo, and therefore, it has been contended that he may be indemnified against that risk, in a policy professing to cover only his own interest. The case put is, that Graves might have paid for the whole cargo, and have retained a lien upon it for his reimbursement. But in that case, his interest would not be the result of his character as a partner, but would be in the nature of a mortgage. The question would not be, generally, whether the interest of a copartner may be said to comprehend all the partnership effects, but whether a mortgagee, or other person having a lien upon property, may be said to have an interest in the whole of it. As \*440] a claim so \*founded would rest, not on the general principles of partnership, but on the particular circumstances of the case, those circumstances ought to be made out, in order to entitle the plaintiffs to avail themselves of the argument. Not being made out, they do not belong to the case.

If a suit at law had been brought on this policy, it would only have been brought in the name of Graves, and he must have averred property on board the vessel. He could only have been entitled to recover to the amount of property uninsured. Would it have been sufficient, under such an averment, to have shown, that the interest of his partners and himself amounted to the sum he claimed, or if he had averred property in himself and another to the

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amount of \$10,000, would such an averment have entitled him to a judgment for the whole sum. In ordinary transactions, the plaintiff would certainly fail in an attempt founded on similar principles.

A policy, though construed liberally, is still a special contract, and under no rule for proceedings on a special contract, could the interest of a copartnership be given in evidence, on an averment of individual interest, nor an averment of the interest of a company be supported, by a special contract relating in its terms to the interest of an individual.

But it is contended, that an insurable interest is distinct from interest, in the ordinary acceptation of the word ; and several cases have been cited in support of this doctrine. Those cases generally appear to be answered, by a distinction taken by the defendants' counsel, between the interest and the power of a copartner. But the case of *Page v. Fry*, reported in 2 Bos. & Pul. 240, certainly countenances the doctrine maintained by the plaintiffs, and ought to be particularly considered. But before that case is adverted to, it may be proper to mention, what appeared to be the opinion of Judge BULLER, in the case of *Perchard v. Whitmore*, reported in the same book, in page 155. In that case, it appears to have been considered as a clear principle, that if, in an action on a policy, and on an averment of interest in the plaintiffs, it should appear, that the plaintiffs and another were interested, the action would not be maintainable. That opinion would apply to the case at bar ; but as the question \*was not directly decided, and [441 was the opinion of a single judge, it may be supposed to yield to the case of *Page v. Fry*, where it is said, that question came directly before the court.

The case of *Page v. Fry* was an action brought by an agent, on a policy signed by himself, and in the declaration, he averred an interest in the whole cargo insured, in Messrs. Hyde & Hobbs. It appeared in evidence, that after the purchase of the cargo, and before the insurance was made, a house by the name of Hacks had taken an interest in it, and for this variance between the averment and the proof, the defendants moved for a nonsuit. It is worthy of remark, that no doubt was entertained of the right of the plaintiffs to recover the whole sum, had the declaration stated the truth of the case. And that the counsel in support of the action did not allege that the interest of Hacks was insured as the interest of Hyde & Hobbs, or that on an averment of a particular interest, a joint interest might be given in evidence ; but that the averment was immaterial, under the acts of parliament, and being alleged under a *scilicet*, would not vitiate. The invoices having been made out in the name of Hyde & Hobbs, who paid for the cargo, he also contended, that the *prima facie* right was in them, and that Hacks had only an equitable interest. The argument goes upon the admission that the variance, under the circumstances which attend the case at bar, would be fatal. The same remark applies to the argument in support of the nonsuit. This deserves consideration, since it certainly warrants an opinion, that previous to that case, the law was generally understood to require that the averment of interest in an action on a policy, should be supported by testimony corresponding with that interest, according to the general acceptation of the term.

Lord ELDON certainly states his opinion in favor of the action, to be founded on the interest of the plaintiffs in the entirety of the cargo. But

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in examining that opinion, \*it does not appear to be supported by the authorities he cites, and the words he uses in the conclusion, would seem to imply that, contrary to his reasoning, he paid some respect to the circumstances, under which Hacks had become concerned. "I think," says his lordship, "the plaintiff had a sufficient interest in the entirety of this cargo, notwithstanding other persons had a beneficial interest in a part." The word "beneficial" seems to imply something distinct from a legal interest, and to correspond with the terms equitable interest, which had been used by the plaintiffs' counsel. The opinions of Justices HEATH and CHAMBERE seem to be founded on this being a valued policy, and on the plaintiff's having such an interest as would entitle him to insure under the act of parliament, and that the substance of the averment was nothing more than that the plaintiffs had an interest in the cargo, which would satisfy the act. The opinion of Judge ROOKE is accompanied with no explanation whatever. This case, even was the decision an authority, is too imperfectly reported, to be permitted to overthrow a system which was previously established.

It is the opinion of the court, that, on the legal construction of this policy, John Boonen Graves is insured to the extent of his own interest in the cargo, but that the interest of his copartner is not insured. Were it otherwise, the remedy would be complete at law, and of consequence, the plaintiffs could not maintain their bill in a court of equity.

2d. It remains to inquire, whether, under the circumstances of the case, a court of equity will relieve the plaintiffs against the mistake alleged to exist in the contract, and extend the insurance to the whole partnership interest. That Graves intended to insure the whole, is proved in a manner which is perfectly satisfactory. That the company believed themselves to be insuring the property of Graves only, is probable. Certainly, such is the evidence in the cause. There is no ground for imputing to the company a knowledge that the policy did not correspond with the intentions of the insured.

\*443] \*If, then, the relief which they ask should be granted to the plaintiffs, it must be on the principle, that the information laid before the insurance company was sufficient to apprise them of the fact, and to require that, on the principles of good faith, they should suggest to the agent of the plaintiffs the departure of their policy from the ancient form.

This information is in writing, and is contained in the letter of the 5th of May, and in the representation of the risk which accompanied it. The letter must be considered as having been seen by the officers of the company; but as it was shown, not for the purpose of commencing a contract, but of inquiring into the terms on which a contract might probably be made, it is reasonable to suppose, that the nature of the risk was the only subject of consideration, and that the question whether the property belonged to one or more persons, never occurred. A month elapsed before a second application was made, and as the description of the risk was again laid before the president, it could not be required from him, to retain in his mind a circumstance casually suggested in a letter seen so long before, to which circumstance there was nothing to direct his particular attention.

It is, then, on the representation of the risk, and on the verbal communications of Andrew Sigourney, that the case must depend. The representation contains an averment that "the ship and cargo really and truly

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belong to citizens of the United States." But as only a small part of the cargo was insured by the Boston company, this averment contains no information that any other than John Boonen Graves was interested in the particular policy then to be entered into. In the letter, there is another expression which has been much relied on. It is, "on this vessel's cargo *we* want insurance." This expression has been considered as sufficiently indicating that the application was made in behalf of more than one person; and this expression has produced the principal difficulty of the case; \*but on reflection, it has been thought too ambiguous, to authorize [ \*444 a change in the legal import of a written contract.

The description obviously relates to the whole cargo; but the application for insurance was only for a part of it. If that application was made, in the name of Graves only, it was no unreasonable supposition, that the other parties concerned might be separately insured, and that the policy then required was designed to cover Graves only. That the application was so made, must be inferred from the circumstance, that the policy was so framed, at a time when there could be no motive for varying it from the insurance applied for; and that Sigourney does not allege himself to have made any communications to the president, indicating a wish to insure others than Graves.

These grounds are too equivocal, to warrant the court in varying a written contract, in a case attended with the circumstances which appear in the present. The policy was in the possession of the agent for the plaintiffs, and ought to have been understood by him, before it was executed; he retained it in his possession for several months, before a mistake was alleged. Under such circumstances, the information given to the insurance company ought to be very clear, to justify a court of equity in conforming the policy to the intention of one of the parties, which was not communicated to the other, until the loss had happened.

Under the circumstances of the case, a court of equity cannot relieve against the mistake which has been committed; and as the remedy of the plaintiff, Graves, on the policy, to the extent of his interest, is complete at law, the decree of the circuit court, dismissing his bill, must be affirmed.

Judgment affirmed.

\*HEPBURN &amp; DUNDAS v. ELLZEY. (a)

[\*445

*Jurisdiction.—Citizenship.*

A citizen of the District of Columbia cannot maintain an action against a citizen of Virginia, in the circuit court for the Virginia district. A citizen of the District of Columbia is not a citizen of a state, within the meaning of the constitution.<sup>1</sup>

THIS was a question certified from the Circuit Court for the fifth circuit, holden in the Virginia district, on which the opinions of the judges of that court were opposed. (2 U. S. Stat. 159, § 6.)

(a) Present, MARSHALL, Ch. J., CUSHING, PATERSON, CHASE and WASHINGTON, Justices.

<sup>1</sup> Wescott v. Fairfield Township, Pet. C. C. citizen of a territory. New Orleans v. Winter, 45; Vane v. Miffin, 4 W. C. C. 519. Nor the 1 Wheat. 91.