DUNCAN v. KOCH.

Case No. 4,136.
[Wall. Sr. 33.][1]

Circuit Court, D. Pennsylvania. May 16, 1801.

MARINE INSURANCE—ABANDONMENT—EFFECT OF DELAY—UNCERTAIN INFORMATION.

[1. A vessel and cargo from Baltimore to Kingston, Jamaica, in 1797, was captured by a French privateer, and taken to Cape Francois, where she was acquitted by the admiralty court, but the cargo was afterwards seized by the government. The cargo was insured, and in the latter part of April the owner thereof received a letter from his correspondent giving information of the acquittal, but stating that the government "will take the cargo for which they propose bills on France, drawn at 40 days' sight." The owner answered that this would cause considerable loss, and that he must abandon to the insurers. He also promptly communicated his information to the insurers, stating that if the cargo was taken as expected he would he under the necessity of abandoning. The vessel returned to Baltimore early in June, and the owner then promptly abandoned to the insurers. *Held* that in the absence of definite information that the cargo had been seized, the owner was not required to abandon on receiving his first information; that there was no reason to infer that he delayed with a view of speculating on the result; and that, therefore, the abandonment was good.]

[2. When a loss is well authenticated or well-known, abandonment should be at once tendered. But if it is not certainly known, but from strong evidence is fully believed, and the assured suspends his option with a view to avail himself of some favorable contingency, this might turn the property on him at its full or supposed value. But such intent must be certainly and clearly proved, not inferred from slight circumstances, or from the probability that such would naturally be a motive with the assured for delaying an abandonment]

A verdict in this cause was found for the plaintiff, on the 16th April, 1800, subject to the opinion of the court on the following case:

The plaintiff had insured the schooner Mary and her cargo, at and from Baltimore in Maryland to Kingston in Jamaica and brought this action against the defendant for the amount of his subscription to the policy, as for a total loss of her cargo. The facts agreed were, that the Mary, on her voyage out, was taken by a French privateer, and carried into Cape Francois, and with her cargo, after being libelled in the admiralty, acquitted. After the acquittal, but it did not appear on what day, the cargo was, forcibly and against the will of the captain, taken by the French administration at the Cape. The proceedings relative to the capture, acquittal, and seizure, were communicated to-Duncan in Baltimore, as follows: On the 2d of April, 1797, Thompson, the captain, wrote to him thus: "Mr. Duncan, I send this to let you know that I am captured by a French privateer and brought in here (Cape Francois). I am now waiting for my trial, which. I do expect will be to-morrow. If the Mary is cleared, the administration will take the flour and the bread; the flour they take at twenty dollars per barrel; the corn and staves and shingles they do allow me to

have. I am in great expectation of her being restored again; and if she is, Mr. Hussey will freight her home, &c.

On the 5th of April, 1797, Mr. Hussey, who appears as the friend and correspondent of the plaintiff at the cape, writes to him thus: "Dear Sir, I wrote to our friend, Mr. Garts, under date of the 29th ultimo, relative to the situation of the schooner Mary; since when I beg leave to acquaint of her acquittal. Whether this will tend to your advantage or no, I cannot judge. At the period I wrote the letter, it was my opinion it would be better to make no appeal;[2] but at the request and opinion of your friend Captain Green, who was here almost in the same situation, I used my endeavour for her restitution. She was delivered up yesterday morning (4th April) to the captain; but I am sorry to say the government will take her cargo; that is, the flour and bread, for which they propose bills on France, drawn at 40 days sight. Those bills will be accompanied by a copy of the minister of marine's letter from France, authorizing the commissioners here to draw on the treasury in Paris for any.

provisions, &c. I presume this is far better than a colony debt; God only knows when they would pay here. I hope still it will be to the interest of all the parties. The bills shall be drawn in your name, and every paper sent to enable you to recover of the underwriters. I am in hopes to obtain 100 or 120 hhds. freight for the Mary, &c. In a few days I will inform you fully on the prospects of the Mary, &c." This letter was received by Duncan in Baltimore, between the 21st and 28th April, 1797.

On the 28th of April, 1797, Duncan writes to Hussey thus: "I did myself the pleasure of writing to you under the 21st current, and am favored with yours of the 5th, informing me of the schooner Mary and cargo being acquitted; but that government would take her cargo. This is a most iniquitous proceeding, and will at any rate be a considerable loss to me and the others concerned. We are insured, as you would see by my letter to Thompson; but there was every prospect of her making a good voyage, had the Mary got to her port of destination. In this situation, must abandon to the underwriters, and expect you will send me the protest, as mentioned in my last. Since the administration will give no satisfaction but by bills on France, see these bills are accompanied with every proper document; and you will, if possible, get a freight for the Mary. I doubt not in a few weeks will expect her, &c." On the 30th of April, 1797, Duncan writes to his correspondents, Philips, Cramond & Co. in Philadelphia, informing them of the capture and acquittal of the Mary, and adds, "But I am sorry to say that government will take her cargo, at least, he (Hussey) expects this will be the case; and if so, I will be under the necessity of abandoning. Be pleased to communicate this to the underwriters on that vessel and cargo, for their government." Philips, Cramond & Co. received this letter on the 2nd May, and immediately sent it to Wharton and Lewis, the insurance brokers who effected the insurance; the answer returned by them was, "that it was very well." The vessel returned to Baltimore on the 7th of June, and on the 8th the plaintiff wrote to Philips, Cramond & Co. as follows: "The schooner Mary has arrived at Baltimore from Cape Francois, after being taken and sent in there by a French privateer on her passage to Jamaica. Through the influence of my friend, Mr. James Hussey, the vessel and cargo were acquitted, but the administration would not allow the cargo to be taken away, so that Mr. Hussey was under the necessity of doing the best he could, and taking the treasurer of the "colony's draft on Paris, at 40 days sight for $12,462.03. You have likewise the protest taken at Cape Francois, with a copy of the account sales of the cargo, all which you will please to lay before the underwriters, and claim the amount of the policy, which I presume there will be no hesitation in settling, &c."

This letter was received by Philips, Cramond & Co., on the 10th June, and immediately sent to a notary, with the other papers, to be adjusted, translated, &c, in order to lay before the underwriters a claim for the insurance. These papers were not prepared until the 20th June, and were then sent to the insurers. The jury (who found the facts,

or some of them, stated in the case) found that the insured abandoned on the 20th June, 1797. The question submitted in this cause was, whether the abandonment should not have been made on the first receipt of the letter from Hussey, of the 5th April, 1797. If the court were of that opinion, then a non-suit to be entered.

Ingersoll and Rawle, who argued for the defendant, premised, that it was to be regretted, the jury had not been put to find whether the abandonment was "in time or not." They considered this as the province of the jury, upon a full consideration of the fact and law, and so was the practice, as Rawle stated, on trials of this kind in England.[3] It was argued:

1st That the capture and detention of the vessel and cargo, under the circumstances, of which the plaintiff had full notice, both from Thompson, the captain, and from Hussey, by the letters of the 2nd and 5th of April, amounted to a total loss, and called for an immediate abandonment. But this was not much pressed by Rawle, and not insisted on by Ingersoll; the court inclining to think on the opening, that this was not a capture, but a mere arrest and detention of a neutral vessel by a belligerent, for the purpose of legal adjudication, it could not authorize an abandonment on the part of the insured.

2nd. But the great point labored by the counsel for the defendant, was, to show from the case, that the plaintiff, in respect to the cargo, had full notice of a total loss by the seizure of the administration, from the letters of the 2nd and 5th of April; and not having abandoned then, he took the risk on himself. They contended, that the information of the seizure was positive, and so understood by the plaintiff. Every sentence of Thompson and Hussey's letters represented the loss of the cargo as inevitable: they speak of the taking of the flour; the price to be given; the freighting the Mary back; and the propriety of abandoning, in terms so positive, as to have left no rational doubt of the loss on the mind of the plaintiff. Under these circumstances, he was bound by law to relinquish to the underwriters; or by declining it, to take the risk of loss or gain upon himself. The law is settled, that in cases of total loss, or what amounts to it, the insured must abandon in the first instance, and not wait to take the

benefit of contingencies in his favour, and elect only to give tip, and put the adventure and chance of recovery upon the underwriter, when his projects of advantage have proved hopeless. In this case, Duncan kept the underwriters ignorant of the full contents of his information. His letter of the 28th April does not disclose what he knew, that the cargo was inevitably lost, to the purposes of the voyage. He did not inform them of the bills to be drawn on France for the flour, at 20 dollars per barrel. This might be a very advantageous speculation; by suspending an abandonment, he secured to himself the chance of payment in Paris, or the sale of those bills at par. He had a right to say at the time, "The bills are my own; I do not look to the indemnity;" or to say, "The risk insured against has happened, the voyage is defeated, and the cargo lost. You must pay the invoice value, and accept my abandonment of the property, its proceeds, and whatever chances of loss or gain from it may exist." His conduct was diametrically opposite to it; and having kept the property after a loss in its nature entire, he cannot afterwards, when he finds it unproductive, throw it upon the insurers. They cited upon this and other points, Park, Ins. (4th Ed.) 171, 172, 150, 161, 81, 103; 1 Term R. 608; 6 Term R. 413.

E. Tilghman and Lewis, for plaintiffs, said there was no ground to contend that a total loss arose from the capture, and for that cause the insured ought to have abandoned.

1st. The insured heard of her capture, of her being libelled, and the probability of an acquittal, at the same time. Had the capture even worked, a total loss, so as to enable the insured to abandon, that information coming alone; yet hearing at the same time of her being libelled and like to be acquitted, it was not optional to abandon, or they might waive their right. 2nd. The capture in this case worked no loss; no risk in legal contemplation occurred. A neutral taken by a belligerent into port for adjudication, is not a ground for abandonment, unless condemnation follows. In such case, the abandonment is good if condemned—bad if not. It was argued on the other side, that the capture and the seizure of the cargo was one continued act, and so a total loss ab initio; but the fact on the face of the statement is otherwise. The case expressly states, that the vessel and cargo were acquitted in the admiralty, and the cargo afterwards forcibly seized by the administration; so that the seizure by the government, was after the 4th of April, the day of acquittal, and wholly a distinct risk and loss.

2nd. The only question is on the abandonment of the cargo. It is certainly true that the insured, upon information, certain information, of a total loss having actually happened, must make his election in a reasonable time, to keep the property, or throw it up. In this case, Duncan had no information from the letters of the 2nd and 5th of April, of the actual seizure of the cargo; and until that arrived, was not bound to abandon. As to all the reasoning to prove that Duncan withheld a surrender of the cargo and its proceeds from the underwriters, with a view to speculate on the bills, there is no foundation for it; and a bare inspection of his letters, from first to last, proves that he considered it as an

injury from the beginning. He never had but one intention, which was to give up to the underwriters as soon as he could assure them of an actual loss.

TILGHMAN, Chief Judge. In considering this question, it is necessary to distinguish between the capture of the vessel and cargo, and the seizure of the cargo by the administration. I shall throw out of the question all idea of loss by the capture; the counsel for the plaintiff have declared that they do not rely upon it and that they rest their claim solely on the seizure. There is no doubt but the seizure was one of the risks insured against by the policy. Tis so conceded by the counsel for the defendant. The only question, then, is, whether the letters from the captain of the 2nd of April and from Mr. Hussey, of the 5th, gave information to the plaintiff that the loss by seizure had actually happened. If they did, the case is with the defendant; for I take the law to be well settled, that the insured must abandon within a reasonable time from his notice of the loss. This reasonable time, generally speaking, should be a short time, a much shorter time than that which elapsed between the receipt of the letter of the 5th of April, and the 20th of June, when the abandonment was made. With respect to this point upon which the cause turns, I must first remark, that it does not appear the defendant has suffered any injury from the delay of the abandonment. There is no reason to suppose the underwriters could have taken any effectual means to procure payment of the French bills, if the abandonment had been made at the time they contend it ought to have been. I must also remark that the plaintiff acted candidly. His communication in his letter of 30th April to Philips, Cramond & Co. contained every thing material that he knew; that is to say, the acquittal of vessel and cargo, and the opinion of his agent Mr. Hussey, that the cargo would be taken by the government. There was no occasion to mention the letter of the captain, because it was two days prior to Hussey's, and because it was evident that the information of Hussey, who had been principally instrumental in procuring the acquittal of the vessel and cargo, was more to be relied on than that of the captain.

Now we will consider those two letters of the 2d and 5th of April. It is evident the letter of the 2d contained no account of the seizure; because at that time the trial had

not taken place; and it was more than possible, that the vessel and cargo might be condemned as prize. Then what information was contained in the letter of the 5th? Why, substantially this, that the government would take the cargo. At what time they did take it, we know not. The case states that it was taken after the acquittal, which took place about the 4th of April. But there is no proof that the seizure had taken place on the 5th. Then ought we to presume, can we presume this essential fact, to the prejudice of the plaintiff, who has acted in all respects fairly and openly? It is said his own letters show, that he considered the loss as having taken place. His letters show, that he confidently expected the loss had taken place on the 28th of April, when he wrote to Hussey; and he well might expect it. The underwriters, no doubt, had the same expectation from the communication made to them by Philips, Cramond & Co.: but there is no ground to say the plaintiff ever lay by one moment with the view of taking the chance of what might turn up with the French government on the contrary, his letter to Hussey of the 28th of April is decided, that he shall at all events suffer a considerable loss, and that he must abandon. And every man of intelligence must have known, that at the period of those transactions, the chance of bills by the administration drawn on France, was a bad one. I take for granted from the whole correspondence, that the only reason why the plaintiff did not abandon on receipt of the letter of the 5th of April, was, that he did not consider that letter as a document sufficient to entitle him to abandon. Nor do I think that the underwriters would have paid, without further proof that a loss had actually taken place. I am therefore of opinion that it was not incumbent on the plaintiff to make an abandonment on the first receipt of the letter of the 5th April from James Hussey.

BASSET, Circuit Judge, was absent.

GRIFFITH, Circuit Judge. I lay out of the case what has been said of the first capture amounting to a total loss, or the taking by the administration a continuance of the loss. It will not bear an argument, and was fully answered by the counsel for the plaintiff. Then as to the seizure of the cargo, by the administration: this to be sure was in its nature a total loss: not only defeating the voyage, but an actual conversion of the property. In these circumstances, the insured had a right to abandon, and ought so to have done. Nothing is truer or more reasonable, than that the insured should, in such cases, act fairly. He is not to play at fast and loose; to keep the insurer at bay, while he avails himself of the chances of gaining by the loss. What Lord Kenyon says in Allwood v. Henchell, cited in Park, Ins. 280, is very reasonable, "He must make his election speedily, whether he will abandon or not, and put the underwriter into a situation to do all that is necessary for the preservation of the property, whether sold or unsold. He cannot lie by and treat the loss as an average loss, and take measures for the recovery of it, without communicating that fact to the underwriters, and letting them know the property is abandoned to them." But this election to abandon, (for it is optional in the assured,) cannot be made until the

calamity has happened; nor to give it effect, is it necessary on the part of the assured, to give notice of it until he has received certain information of it. The only question here is, whether from the letter of the 5th April, 1797, the plaintiff had received such certain information of the loss by seizure of the cargo, as to make it incumbent on him to give notice of abandonment. By adverting to the case stated, it appears that the actual seizure, and the loss consequent thereon, had not happened when Hussey wrote this letter. It is a fair presumption that it did not happen until after the 5th; for in that letter he says, "The vessel was delivered up to the captain yesterday (the 4th of April) but government will take the cargo," not that it was taken. And the case further states, that it was after the acquittal in the admiralty that the cargo was seized. When Duncan received this letter, it gave him no certain account that the loss had happened, in the event of which he intended or was entitled to abandon. The utmost he could collect from either or both the letters, was, a high probability, and almost certain conviction, that this would be the issue. He seems, indeed, by his letters of the 28th to Hussey, and 30th of April to Philips, Cramond & Co. to have made up his mind that this was to be the fate of the cargo. Still however, as a ground to abandon, he had not received information of an actual loss. Indeed, the probability is, the seizure was not made on the 5th. It cannot be collected from Hussey's letter, that the administration had then fixed its "fangs" (to use the expression of one of the counsel,) upon the cargo. Thompson and Hussey, indeed, considered it as a thing in course, and spoke of events to come, as if they had already transpired; under a full conviction they would happen: but the "forcible seizure" mentioned in the case was not then made. Duncan could, therefore act no otherwise than he did act; to tell the insurers what had happened; what was likely to happen; and that if the impending loss did happen, he would abandon in toto. All this he told them immediately on receipt of Hussey's letter on the 5th of April, in his to Philips, Cramond & Co. of the 30th. What if he had gone to the underwriters and showed his letters, and offered to abandon. They might have said, "You are too hasty; your cargo does not appear to be lost; you call for the insurance money before it is certainly payable; your agent may have so managed

things that the Mary may now be on her voyage to Kingston; we will not accept your abandonment and pay the loss, before we know it has happened."

In the circumstances of this case, the plaintiff was justifiable in writing for the confirmation of the loss. His idea, indeed, seems to have been, that he ought to have a protest of the loss before he could abandon. It was argued against the plaintiff, that he was fully convinced of the loss; that he was mentally as certain of it, as if the protest had been in his hand; and that it was with a view to see what would come of the French bills, (which were nominally a great price for his flour,) that he delayed an immediate abandonment. I should perhaps agree, though I speak not with certainty on this point, that though his information was not certain, yet if he firmly and undoubtedly believed a loss had happened, and so it afterwards appeared, and he deferred an abandonment with a view to take the chance of the bills, if good, or abandon them to the underwriters, if bad; in such case he ought not to recover for a total loss, but the bills would be considered as his own. But there is not the least evidence of his delaying to surrender on any calculations of this kind. On the contrary, from the first moment, he considered the seizure as injurious, and resolved to come on the underwriters. On hearing the government would take the cargo, he writes to Hussey on the 28th of April, "That it was a most iniquitous proceeding, and would at any rate be a considerable loss to him and others concerned," and adds, however, that they were insured, and requests him to send a protest. But what is decisive as to the intent of the plaintiff in not making a formal abandonment on the letter of the 5th of April, is his communication to the underwriters on the 30th. He informs them of the situation of the cargo, that government would seize it, at least Mr. Hussey expected it, and in that case, he should abandon. If he designed to keep them at bay, and take the chance of a market for the bills, he would not have written this letter. In fact, by this letter he precluded himself from the possible contingency of gain in the alternative of the bills proving good; for I consider, that on this letter the underwriters would have been entitled to the proceeds. It was a conditional abandonment, and if the loss happened by the seizure as contemplated, the abandonment in favour of the underwriters would have related to the 5th of April, 1797, upon the contents of his letter of the 30th, which says positively, "If the loss happens, I must abandon," and desires this to be communicated to them, "for their government"

Upon the whole, I consider this a very plain case for the plaintiff. He was not bound to relinquish, nor could he with propriety have relinquished the cargo to the insurers, on the letter of the 5th of April; because this letter did not give an account of an actual loss. Nor ought he to lose, his assurance upon the ground that in fact the loss had happened, and he was fully convinced of it, though not positively informed; but delayed with a view to speculate on the bills, considering them as his own: for no such intent appears; but the contrary. From the first he resolved to abandon; and as soon as he received certain

notice of the loss did do it All the acts of Hussey must be taken in this case for the common interest, and not done as by the special agent of Duncan. In cases of this kind, it is difficult to propose a rule, by which to determine what shall be notice of a loss, to the assured: much must depend on circumstances. If the loss be well authenticated or well known, immediate dereliction should be tendered by the assured. If not certainly known, but from strong evidence fully believed, and the assured suspends his option with a view to avail himself of some favorable contingency for the disposition of the property insured on his own account, this might, if the loss had in fact happened, (though I do not say it would,) turn the property upon him, at its full or supposed value. But such intent must certainly be proved, and clearly proved—not inferred from slight circumstances, or from the probability that such would naturally be a motive with the assured for delaying a surrender to the underwriters. In this case there was neither full notice of the loss on the 5th of April; nor has any artifice or improper procrastination appeared on the part of the plaintiff. Judgment must therefore be entered for the plaintiff.

[1] {Reported by John B, Wallace, Esq.}

[2] Meaning "no opposition," as was understood by the counsel.

[3] Quaere. Whether the "time" in which an abandonment ought to be made after notice, is not a question of law? When notice was received and understood by the party is matter of fact, and to be decided by the jury.

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