

Case No. 7,168.

[19 Hunt, Mer. Mag. 183.]

JACQUES V. COLLINS ET AL.

Circuit Court, S. D. New York.

1848.

SHIPPING—FALSE REPRESENTATIONS—DESCRIPTION IN INVOICE.

[1. Shippers for the account and risk of another, having had no opportunity of examining the goods, are not liable to the consignee for a false description thereof in the invoice upon the faith of which the consignee has made advances to the owner, when such false description has been ignorantly copied by the shippers from the invoice under which the goods were imported into the port of shipment.]

[2. False representations afford no cause of action, unless it appears that plaintiff relied upon them.]

[This was an action at law by Jean Jacques, an alien, against Edward K. Collins and others, for false representations. A petition by the defendants for the discovery of certain papers in the possession of the plaintiff was granted. Case No. 7,167.]

Early in September, 1835, Messrs. E. K. Collins & Co., of this city, received a letter from one S. X. Barnard, of New Orleans, informing them that he had shipped to their order 14 bales of sarsaparilla belonging to his friend J. B. De Goer, of Mexico, which he requested E. K. Collins & Co. to store in a dry place until the arrival of De Goer, who was coming on to New York with 73 ceroons of cochineal, which he was about to ship to London. The sarsaparilla arrived, and was stored by E. K. Collins & Co. according to the order of Barnard. With Barnard, the defendants had no acquaintance; the name was printed in the bill of lading, giving the impression of an established house.

About the same time, when the said letter purported to have been written, a person of very gentlemanly address and appearance, apparently a Mexican, presented himself on board the *Arkansas*, Rice, master, at New Orleans, and wished to engage freight for 73 ceroons of merchandise, declaring also his intention to come to New York as passenger. He accordingly, after some negotiation, engaged his passage and freight, and the 73 ceroons were shipped, and bills of lading signed, calling them 73 ceroons merchandise. On the voyage to New York, De Goer inquired of the captain the standing of the defendants, and also of Goodhue, & Co., and Howland & Aspinwall, being anxious to make up his mind to which house he would consign his ceroons. He also, at the same time, told the captain that the ceroons contained cochineal. On the arrival of the *Arkansas* in New York, and somewhere about the 4th of October, 1845, Mr. De Goer presented himself at the counting house of E. K. Collins & Co. with a letter of introduction from S. X. Barnard. He also brought with him about \$1,000, which he placed in their hands for safe keeping. A few days after this, he caused the 73 ceroons of cochineal to be advertised for sale. The ceroons remained on board the *Arkansas*. A box however containing 73 small tin boxes, said to be samples from each ceroon, was exposed at the store of the

defendants to the examination of purchasers. The quality was highly approved of by the brokers who examined it, but no sales took place, the price being above the market. The reason assigned by De Goer for this was the expected war with Mexico, which would, in his judgment, much enhance the value. Having failed to make any sales, De Goer resolved to send his cochineal to London, and accordingly requested Mr. Collins to ship for him. He engaged freight on board the British bark *Cosmo*, bound to Bristol, of which vessel the plaintiff was the consignee.

The defendant's cartmen, under the direction of De Goer, conveyed the goods from the *Arkansas* to the *Cosmo*. The bills of lading were filled up in the name of the defendants, as shippers, describing the article as 73 ceroons of merchandise. The invoice was a copy of the one brought on by De Goer, naming the article cochineal, the weights were Spanish, and at the foot the foreign expenses and charges, together with those in New York, were entered. The defendants, by this invoice, appeared as the shippers for the account and risk of De Goer. They, at the request of De Goer, insured the article with several companies as cochineal, loss payable to themselves or order. They also cleared the article at the custom-house in New York as cochineal. The only service for which they charged any commission was the insuring. After the ceroons had been about ten days on board the plaintiff's vessel, he advanced to De Goer \$11,500 on the cochineal, and had the same consigned to one Bushnell, in Bristol. To Bushnell, De Goer wrote full instructions, and, among others, bound him, on account of the expected war, not to sell under forty days; and, if a proper price could not be obtained at Bristol, to send the article to London. The *Cosmo* arrived at Bristol early in December, and, the market not affording a purchaser, it was sent to London. There, under some direction in relation to the separation of qualities, the ceroons were opened, and were all found to contain Indian corn. De Goer has never since been heard of.

The plaintiff set up a custom among

merchants to advance and loan money on the production of the bill of lading, invoice, and policy of insurance, and insisted that under this usage the defendants ought to have examined the article before they signed an invoice which represented it as cochineal. That, having made a false representation negligently, it was a fraud in law, and they were bound to reimburse the plaintiff, who had sustained a loss by their improper act. The usage to advance on such papers when the goods were on the high seas was not contested, nor when the goods were here, and a well-known resident merchant asked the advance; but it was fully proved that, when a stranger appeared to be the owner, it was the usage of merchants to call personally on the shipper and learn his history and standing. The defendants also proved that it was the usage of forwarding merchants to copy the invoice sent to them by the principal when they failed to sell, and were directed to ship the article to another port, without examining the contents or packages, confining themselves merely to the examination of the numbers and marks.

The defendants also proved, by several highly respectable merchants, that cochineal is put up in a peculiar way; that it is first contained in a linen bag called a "shirt," that this is secured by an outer case of ox hides, closely sowed with thongs, and this is again contained in a covering of grass matting; that each ceroon, on account of the peculiarity in the packing, is accompanied by a tin box containing the sample, by which it is uniformly sold; that when a consignee fails to sell, and is directed to send it elsewhere, he copies the original invoice, and ascertains that the number of ceroons is right, but never examines the contents to see whether the ceroons truly contain cochineal; that after sale, and at no other time, the purchaser opens a triangular space in the hide, and so ascertains the quality.

Cutting & Lord, for plaintiff.

Anthon, Staples & Wood, for defendants.

NELSON, Circuit Justice, charged the jury that as to the custom proved by the plaintiff it did not go far enough,—it did not show that it was the usage of merchants to hold the shipper responsible for advances, when the article so shipped proves to be an imposition; that, to make the defendants responsible, the plaintiff was bound to prove that he knew the ceroons did not contain cochineal, and fraudulently represented that they did, or, if they did not know what the contents were, that they, with the like intent to defraud, represented as a fact a matter of which they had no knowledge; that the only representation alleged in the case was the description in the invoice; that no verbal representation was proved; that, as they were under no obligation to examine the article, the false statement in the invoice would not charge them, unless they had made up the invoice with intent to defraud; that, also, it did not appear that the plaintiff had loaned upon the inspection of the papers,—he might have relied on the appearance of Mr. De Goer and on

JACQUES v. COLLINS et al.

the possession of the goods; that, as the claim here was highly penal, most unquestionable evidence was necessary to affect the defendants.

The jury returned a verdict for defendants.