

Fuller Vs. Mccall

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Court : US Supreme Court

Decided On : 1794

Appeal No. : 2 U.S. 219

Appellant : Fuller

Respondent : Mccall

Judgement :

FULLER v. MCCALL - 2 U.S. 219 (1794)

U.S. Supreme Court FULLER v. MCCALL, 2 U.S. 219 (1794)

2 U.S. 219 (Dall.)

Fuller

v.

M'Call

Supreme Court of Pennsylvania

January Term, 1794

This was an action on a Policy of Insurance, upon the cargo of the Sloop Mary, William Southern master, at and from Philadelphia to Trinidad, in which the plaintiff declared against the defendant, one of the underwriters, as for a total loss. On the trial the following facts appeared: The plaintiff having shipped goods on board the

sloop to the invoice amount of L 931, she sailed from Philadelphia on the 5th of May 1789, and soon afterwards encountered a gale of wind, during which she sprung a leak, that obliged her on the 20th of June, to make St. Bartholomews, the nearest port. A survey was there immediately had upon the sloop, which was found incapable of continuing longer at sea; and also on the cargo, which proved to be very much damaged; and on the 3rd, 7th, 20th & 27th of July, N. Dawes of St. Bartholomews communicated these circumstances, by letters, to the plaintiff, and further informed him, that as the cargo was not fit to be re-shipped, it had been sold for 3067 pieces of eight, which (together with the account sales) N. Dawes sent in specie by Capt. Southern, to the plaintiff. When the first account of the sloop's putting into St. Bartholomews arrived at Philadelphia (on the 23rd of July) the plaintiff was at Cape May; but his clerk (who had general instructions to transact his business) opened Mr. Dawes's first letter, and by the instructions of Mr. Fisher, whom the plaintiff had directed him to consult, he shewed it to the defendant, and to such other of the underwriters as were in the city, on the day it was received, or on the ensuing day. These gentlemen expressed no opinion upon the occasion; but the clerk, by the advice of Mr. Fisher, opened a policy upon the return cargo, for the benefit of whom it might concern, and the former underwriters

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were first offered the choice of also underwriting this policy. On the 28th of July, the plaintiff came back to the city, and approved what his clerk had done. On the 29th of July captain Southern arrived in the sloop at Philadelphia, bringing with him Mr. Dawes's last dispatches, but no money. The plaintiff thereupon called a meeting of all the underwriters, submitted the facts and papers to them; made a verbal claim as for a total loss, and it was agreed, on all hands, that without prejudice to either party, Capt. Southern should be arrested, to compel him to account for the money. It was not, however, 'till the 6th of November 1789, that the plaintiff addressed a letter to the underwriters, making a formal abandonment of all the property in the sloop; and, on the same day, they answered, that they did not think it proper to accept the abandonment, but offered to pay an average loss.

Upon these facts, a verdict was taken for the plaintiff, subject to the opinion of the Court, whether they established a total, or an average, loss?

On the argument, however, two positions were asserted, by the defendant's counsel; 1st. That the circumstances of the case did not warrant an abandonment, as for a total loss: And 2nd. That even if the plaintiff had a right so to abandon, he had not exercised that right in due time.

On the 1st position, they stated the general doctrine to be clearly established, that the owner of goods cannot abandon, unless at some period or other of the voyage, there has been a total loss; and where the loss is not an absolute destruction of the property, an abandonment will not be allowed, unless the damage amounts to a moiety of the value. Parke Inf. 164, 165, 188. This was not the fact in the present instance; the goods were not destroyed; they were not damaged to near the amount of a moiety of their value; nor can it be said, that the voyage was defeated, since the sloop, by returning to Philadelphia, has proved that she might have gone to Trinidad, where the superior price would have compensated for every expence. What, indeed, constitutes the defeating of a voyage must depend on the circumstances of each case; and notwithstanding the generality of the expression in Parke 164, it will be found, that when he, as well as other writers on the subject, enters into an exemplification of the rule, it is done by specifying instances of a total loss of the vessel, by tempest, capture, or decay, and by instances of a total destruction of the cargo, or, at least, of such damage, as does not leave sufficient to defray the expence of repair, &c.; Parke Inf. 165. 174. 176. 187. 189.

On the second position they urged, that the abandonment was neither compleat, nor in time. The indulgence allowed under any circumstances to the insured, to convert a partial, into a

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total, loss, is a great one, and ought to be fairly merited by a candid and explicit conduct: To observe a cautious silence, in expectation of events, is not the characteristic of such conduct. The insured has, unquestionably, a right to say in

all cases, that he will not abandon; while he remains silent, he cannot be presumed to have abandoned; it is a matter of election on his part, and he must do some act, in due time, in order to manifest his election. In short, he must unequivocally, and on the first opportunity after information of the loss, abandon the whole property, before he can recover for a total loss. Parke Inf. 161. 162. 1 T. Rep. 615. 613. Doug. 220. 2 Burr. 1119. 1 T Rep. 608. 2 T. Rep. 407. In the present case, there was no positive act of abandonment 'till the 8th of November 1789; the communication made by the plaintiff's clerk to the underwriters was unaccompanied with any declaration of abandonment, and the same communication would have been made, whether a partial, or a total loss, is claimed; and the claim for a total loss made by the plaintiff, after the return of captain Southern, and without any abandonment of property, was clearly irregular and inoperative. Besides, the second policy was opened for the benefit of whom it might concern, by the express advice of the plaintiff's agent; at that time, therefore, he did not chuse to make an election; and as there was no moment, previous to the 6th of November, when any act was done by him to vest the property in the insurers, they could have no interest in it, at the time of the loss, and therefore, could derive no indemnity from the second policy. 1 Burr. 490. 7. 1 Wils. 10. The acts of Fisher were the acts of the plaintiff's agent, approved by, and obligatory upon him. 1 T. Rep. 115. 116. 2 T. Rep. 189. in not.

For the plaintiff it was premised, on the 1st position, that this was an undertaking by the underwriters, that the cargo of the sloop Mary should be safely carried to Trinidad; and if it does not arrive at the destined port, they undertake to pay the value insured. It is also a natural construction of the contract, that if the voyage is defeated, though there is no destruction of the ship or cargo, the underwriters must answer, as for a total loss; and the principle is recognized and exemplified by a variety of authorities in the most unqualified terms. Parke Inf. 164. 5. 7. 174. 5. 6. 180. 7. 9. 1 T. Rep. 191. 615. The plaintiff had a right to have his goods carried to Trinidad; and that they were not carried thither, is an incontestible proof, that the voyage was defeated. It is true, that the sloop was not totally wrecked, nor the cargo totally destroyed; but the surveys shew, that both were in such a condition, as to render it not worth while to prosecute the voyage, and that is a sufficient

ground, agreeably to the authorities cited, upon which the insured may abandon, and convert a partial, into a total, loss.

On the second position, the plaintiff's counsel admitted, that the insured must make and declare his election to abandon within a reasonable time after knowledge of the loss; but they urged, that what constitutes a reasonable time has never been specifically defined; it must depend on the particular circumstances of each case; and it has been said to be something like notice on bills of exchange. Parke. Inf. 92. 192. 3. 1 T. Rep. 616. 614. The communications made to the underwriters, during the absence of the plaintiff, were as prompt as could be exacted; and his approbation of the conduct of his clerk, cannot certainly be considered as a waiver of his right of abandonment. It was reasonable for him to wait 'till he knew the issue of the sales at St. Bartholomews, before he exercised that right; and in the precaution of opening the second policy (which it was insisted would be valid, whether the plaintiff, or the underwriters, should ultimately be deemed interested in the property) he acted with candor and prudence. But the moment captain Southern arrived, the plaintiff claimed as for a total loss; and though the underwriters refused to admit the claim, they cooperated with him in the subsequent measures to recover the money: He steered a middle course, for their mutual benefit, and shall not be prejudiced by it. 2 T. Rep. 407. Parke Inf. 173. It is true, the authority says, that 'unless the owner does some act signifying the intention to abandon, it is only a partial loss:' 1 T. Rep. 615. but the early claim for a total loss was a sufficient manifestation of the plaintiff's intention; and no form of abandonment is prescribed by any law, or authority, extant. The plaintiff's conduct on the 29th of July, was tantamount an abandonment; but even if the formal act of the 6th of November was necessary, it will be remembered, that the underwriters have suffered no inconveniency, or injury, by the delay.

The Court, on the 24th of January 1794, delivered their opinion, 'that the plaintiff cannot recover in this action, as for a total loss;' and judgment nisi was, thereupon, entered for the defendant. *

E. Tilghman, and Lewis for the plaintiff. Ingersoll, and M. Levy for the defendant.

Judgment for the defendant. Footnotes

[[Footnote *](#)] A motion, on behalf of the plaintiff, was made and granted, for re-argument, which took place on the 10th of September 1794.

The Court, however, adhered to their former opinion; and, on the 22nd of January 1795, gave

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