Gustavus Couturier v Robert Hastie [1856] Int.Com.L.R. 06/26

HOUSE OF LORDS before Mr. Baron Alderson, Mr. Justice Wightman, Mr. Justice Creswell, Mr. Justice Erle, Mr. Justice Williams, Mr. Baron Martin, Mr. Justice Crompton, Mr. Justice Willes, Mr. Baron Bramwell,: 26th June 1856

The Plaintiffs were merchants at Smyrna; the Defendants were cornfactors in London; and this action was brought to recover from them the price of a cargo of Indian corn, which had been shipped at Salonica, on board a vessel chartered by the Plaintiffs for a voyage to England, and had been sold in London by the Defendants in Error, upon a *del credere* commission. The purchaser, under the circumstances hereafter stated, had repudiated the contract. In January 1848, the Plaintiffs chartered a vessel at Salonica, to bring a cargo of 1180 quarters of corn to England. On the 8th of February a policy of insurance was effected on "*corn, warranted free from average, unless general, or the ship be stranded.*" On the 22d of that month, the master signed a bill of lading, making the corn deliverable to the Plaintiffs, or their assigns, "*he or they paying freight, as per charterparty, with primage and average accustomed.*" On the 23d February the ship sailed on the homeward voyage. On the 1st May 1848, Messrs. Bernouilli, the London agents of the Plaintiffs, and the persons to whom the bill of lading had been indorsed, employed the Defendants to sell the cargo, and sent them the bill of lading, the charterparty, and the policy of insurance, asking and receiving thereon an advance of £600.

On the 15th May the Defendants sold the cargo to A. B. Callander, who signed a bought note, in the following terms: "*Bought of Hastie and Hutchinson, a cargo of about 1180 (say eleven hundred and eighty) quarters of Salonica Indian corn, of fair average quality when shipped per the Kezia Page, Captain Page, from Salonica; bill of lading dated twenty-second February, at 27s. (say twenty-seven shillings) per quarter, free on board, and including freight and insurance, to a safe port in the United Kingdom, the vessel calling at Cork or Falmouth for orders; measure to be calculated as customary; payment at two months from this date, or in cash, less discount, at the rate of five per cent per annum for the unexpired time, upon handing shipping documents.*"

In the early part of the homeward voyage, the cargo became so heated that the vessel was obliged to put into, Tunis, where, after a survey and other proceedings, regularly and *bona fide* taken, the cargo was, on the 22d April, unloaded and sold. It did not appear that either party knew of these circumstances: at the time of the sale. The contract having been made on the 15th of May, Mr. Callander, on the 23d of May, wrote to Hastie and Hutchinson: "*I repudiate the contract of the cargo of Indian corn, per the Kezia Page, on the ground that the cargo did not exist at the date of the contract, it appearing that the news of the condemnation and sale of this cargo, at Tunis, on the 22d April, was published at Lloyd's, and other papers, on the 12th instant, being three to four days prior to its being offered for sale to, me.*"

The Plaintiffs afterwards brought this action. The declaration was in the usual form. The Defendants pleaded several pleas, of which the first four are not now material to be considered. The fifth plea was that before the sale to Callander, and whilst the vessel was on the voyage, the Plaintiffs sold and delivered the corn to other persons, and that since such sale the Plaintiffs never had any property in the corn or any right to sell or dispose thereof, and that Callander on that account repudiated the sale, and refused to perform his contract, or to pay the price of the corn. Sixthly, that before the Defendants were employed by the Plaintiffs, the corn had become heated and greatly damaged in the vessel, and had been unloaded by reason thereof, and sold and disposed of by the captain of the said vessel on account of the Plaintiffs at Tunis, and that Callander, for that reason, repudiated the sale, etc.

The cause was tried before Mr. Baron Martin, when his Lordship ruled, that the contract imported that at the time of the sale, the corn was in existence as such, and capable of delivery, and that as it had been sold and delivered by the captain before this contract was made, the Plaintiffs could not recover in the action. He therefore directed a verdict for the Defendants. The case was afterwards argued in the Court of Exchequer before the Lord Chief Baron, Mr. Baron Parke, and Mr. Baron Alderson, when the learned Judges differed in opinion, and a rule was drawn up directing that the verdict found for the Defendants should be set aside on all the pleas except the sixth, and that on that plea judgment should be entered for the Plaintiffs, *non obstante veredicto*. That the Defendants should be at liberty to treat the decision of the Court as the ruling at *Nisi Prius*, and to put it on the record and bring a. bill of exceptions (8 Exch. 40). This was done, and the Lord Chief Baron sealed the bill of exceptions, adding, however, a memorandum to the effect that he did so as the ruling of the Court, but that his own opinion was in opposition to such ruling.

The case was argued on the bill of exceptions in the Exchequer Chamber, before Justices Coleridge, Maule, Creswell, Wightman, Williams, Talfourd, and Crompton, who were unanimously of opinion that the judgment of the Court of Exchequer ought to be reversed (9 Exch. 102). The present writ of error was then brought.

The Judges were summoned, and Mr. Baron Alderson, Mr. Justice Wightman, Mr. Justice Creswell, Mr. Justice Erle, Mr. Justice Williams, Mr. Baron Martin, Mr. Justice Crompton, Mr. Justice Willes, and Mr. Baron Bramwell, attended.

Sir F. Thesiger and Mr. James Wilde for the Plaintiffs in Error: The purchase here was not of the cargo absolutely as a thing assumed to be in existence, but merely of the benefit of the expectation of its arrival, and of the securities against the contingency of its loss. The purchaser bought in fact the shipping documents, the rights and interests of the vendor. A contract of such a kind is valid, ***Paine v. Meller*** (6 Ves. 349); *Cass v. Rudele* (2 Vern. 280). The language of the contract implies all this. The representation that the corn was shipped free on board at Salonica, means that the cargo, was the property of, and at the risk of the shipper, ***Cowasjee v. Thompson*** (5 Moo. P.C. 165). The Court of Exchequer proceeded on the words of this contract, and gave the correct meaning to them. Mr. Baron Parke (8 Exch. 54) said, " *There is an express engagement that the cargo was of average quality when shipped, so that it is clear that the purchaser was to run the risk of all subsequent deterioration by sea damage or otherwise, for which he was to be indemnified by having the cargo fully insured; for the 27s. per quarter were to cover not merely the price, but all expenses of shipment, freight, and insurance.*" In a contract for the sale of goods afloat, there are two periods which are important to be regarded, the time of sale and the time of arrival. If at the time of the sale there is anything on which the contract can attach it is valid, and

the vendee bound, ***Barr v. Gibson*** (3 Mee. and Wels. 390). The goods are either shipped, as here, "*free on board,*" when it is clear that they are thenceforward at the risk of the vendee, or they are shipped *"to arrive,"* which saves the vendee from all risk till they are safely brought to port, ***Johnson v. Macdonald*** (9 Mee. and Wels. 600). The intention of the parties is understood to be declared by different terms of expression, and the judgment of the Exchequer Chamber here really violates that intention. The case of ***Strickland v. Turner*** (7 Exch. 208), which was referred to by the Lord Chief Baron (8 Exch. 49), is not in point, for there the annuity, which was the subject of the sale, had actually ceased to exist when the sale took place; there was nothing whatever on which the contract could attach; and the principles therefore on which all contracts of sale must proceed, as explained and illustrated by ***Pothier***,[1] whose definitions of a sale are literally adopted by Mr. Chancellor Kent (2 Kent's Com. 468), applied there, but they do not apply here, for here the parties were dealing with an expectation, namely, the expectation of the arrival of the cargo. As Lord Chief Baron Richards said, in ***Hitchcock v. Giddings*** (4 Price, 135), " *If a man will make a purchase of a chance, he must abide by the consequences.*" Here, however, the chance was only that of the arrival of the cargo, and that chance was covered by the policy, for the cargo, itself, as stated in the contract, had been actually shipped. Had the cargo been damaged at the time of this contract, the loss thereby arising must have been borne by the purchaser. Suppose the corn had been landed at Tunis, and had remained in the warehouse there, it would have ceased to be a cargo in the strict and literal meaning of the word, but the purchaser would still have been bound by his contract.

The Court of Exchequer Chamber, admitting that the vendee might have recovered an average loss under the policy on this cargo, said that he could not have recovered if a total loss had occurred, and referred to, an admission to that effect supposed to have been made by the present Baron Martin when arguing ***Sutherland v. Pratt*** (11 Mee. and Wels. 296). That admission does not mean what is thus supposed; and after the case of ***Roux v. Salvador*** (3 Bing. N.C. 266), where there was a total loss, and the Plaintiff recovered on the policy, it is difficult to understand how such an opinion could be entertained. A technical objection arising on the form of the policy would not affect this question. The purchaser's right on this policy would have been complete, Phillips (1 Phill. Ins. 438), Marshall (1 Marsh. Ins. 333), and ***March v. Pigott*** (5 Burr. 2802). By what has happened here, the purchaser has been saved the payment of freight, ***Vlierboom v. Chapman*** (13 Mee. and Wels. 230); and ***Owens v. Dunbar*** (12 Ir. Law. Rep. 304) shows that he would have been bound to accept the cargo. The contract here was, that the cargo was shipped "free on board." To that extent the vendor was bound, but he was not bound by any farther and implied warranty, ***Dickson v. Zizinia*** (10 Corn. Ben. 602). Mr. Butt and Mr. Bovill for the Defendants in Error were not called on.

The Lord Chancellor: My Lords, this case has been very fully and ably argued on the part of the Plaintiffs in Error, but I understand from an intimation which I have received, that all the learned Judges who are present, including the learned Judge who was of a different opinion in the Court of Exchequer, before the case came to the Exchequer Chamber, are of opinion that the judgment of the Court of Exchequer Chamber sought to be reversed by this writ of error was a correct judgment, and they come to that opinion without the necessity of hearing the counsel for the Defendants in Error. If I am correct in this belief, I will not trouble the learned counsel for the Defendants in Error to address your Lordships, because I confess, though I should endeavour to, keep my mind suspended till the case had been fully argued, that my strong impression in the course of the argument has been, that the judgment of the Court of Exchequer Chamber is right. I should therefore simply propose to ask the learned Judges, whether they agree in thinking that that judgment was right.

Mr. Baron Alderson said: My Lords, Her Majesty's Judges are unanimously of opinion that the judgment of the Exchequer Chamber was right, and that the judgment of the Court of Exchequer was wrong; and I am also of that opinion myself now, having been one of the Judges before whom the case came to be heard in the Court of Exchequer.

The Lord Chancellor: My Lords, that being so, I have no hesitation in advising your Lordships, and at once moving that the judgment of the Court below should be affirmed. It is hardly necessary, and it has not ordinarily been usual for your Lordships to go much into the merits of a judgment which is thus unanimously affirmed by the Judges who are called in to consider it, and to assist the House in forming its judgment. But I may state shortly that the whole question turns upon the construction of the contract which was entered into, between the parties. I do not mean to deny that many plausible and ingenious arguments have been pressed by both the learned counsel who have addressed your Lordships, showing that there might have been a meaning attached to that contract different from that which the words themselves impart. If this had depended not merely upon the construction of the contract but upon evidence, which, if I recollect rightly, was rejected at the trial, of what mercantile usage had been, I should not have been prepared to say that a long continued mercantile usage interpreting such contracts might not have been sufficient to warrant, or even to compel your Lordships to adopt a different construction. But in the absence of any such evidence, looking to the contract itself alone, it appears to me clearly that what the parties contemplated, those who bought and those who sold, was that there was an existing something to be sold and bought, and if sold and bought, then the benefit of insurance should go with it. I do not feel pressed by the latter argument, which has been brought forward very ably by Mr. Wilde, derived from the subject of insurance. I think the full benefit of the insurance was meant to go as well to losses and damage that occurred previously to the 15th of May, as to losses and damage that occurred subsequently, always assuming that something passed by the contract of the 15th of May. If the contract of the 15th of May had been an operating contract, and there had been a valid sale of a cargo at that time existing, I think the purchaser would have had the benefit of insurance in respect of all damage previously occurring. The contract plainly imports that there was something which was to, be sold at the time of

[1] Pothier, Contrat de Vente, pt. 1, s. 2, art. 1. *"Il faut en premier lieu, une chose qui soit vendue, et qui fasse l'objet du contrat. Si donc, ignorant que mon cheval est mort, je le vends a quelqu'un, il n'y aura pas un contrat de vente, faute d'une chose qui en soit l'objet. Par la meme raison, si, me trouvant avec vous a Paris, je vous vends un maison que j'ai a Orleans, dans l'ignorance ou nous sommes, l'un et l'autre, que cette maison a ete incendiee pour le total, ou pour la plus grande partie, ce contrat sera nul, parceque la maison qui en faisoit l'objet n'existoit pas; la place et ce qui restoit de cette maison, n'etoient pas tant la chose qui faisoit l'objet de notre contrat, que des restes de ces choses. L. 57,ff. de Contr. Empt."*

the contract, and something to be purchased. No such thing existing, I think the Court of Exchequer Chamber has come to the only reasonable conclusion upon it, and consequently that there must be judgment given by your Lordships for the Defendants in Error.

Judgment for the Defendants in Error, with costs. Lords' Journals, 27 June 1856.