

## *Gregson v. Gilbert*

GREGSON *v.* GILBERT. Thursday, 22d May, 1783. Where the captain of a slaveship mistook Hisaniola for Jamaica, whereby the voyage being retarded, and the water falling short, several of the slaves died for want of water, and others were thrown overboard, it was held that these facts did not support a statement in the declaration, that by the perils of the seas, and contrary winds and currents, the ship was retarded in her voyage, and by reason thereof so much of the water on board was spent, that some of the negroes died for want of sustenance, and others were thrown overboard for the preservation of the rest.

This was an action on a policy of insurance, to recover the value of certain slaves thrown overboard for want of water. The declaration stated, that by the perils of the seas, and contrary currents and other misfortunes, the ship was rendered foul and leaky, and was retarded in her voyage; and, by reason thereof, so much of the water on board the said ship, for her said voyage, was spent on board the said ship: that before her arrival at Jamaica, to wit, on, &c. a sufficient quantity of water did not remain on board the said ship for preserving the lives of the master and mariners belonging to the said ship, and of the negro slaves on board, for the residue of the said voyage; by reason whereof, during the said voyage, and before the arrival of the said ship at Jamaica — to wit, on, &c. and on divers days between that day and the arrival of the said ship at Jamaica — sixty negroes died for want of water for sustenance; and forty others, for want of water for sustenance, and through thirst and frenzy thereby occasioned, threw themselves into the sea and were drowned; and the master and mariners, for the preservation of their own lives, and the lives of the rest of the negroes, which for want of water they could not otherwise preserve, were obliged to throw overboard 150 other negroes. The facts, at the trial, appeared to be, that the ship on board of which the negroes who were the subject of this policy were, on her voyage from the coast of Guinea to Jamaica, by mistake got to leeward of that island, by mistaking it for Hispaniola, which induced the captain to bear away to leeward of it, and brought the vessel to one day's water before the mistake was discovered, when they were a month's voyage from the island, against winds and currents, in consequence of which the negroes were thrown [233] overboard. A verdict having been found for the plaintiff, a rule for a new trial was obtained on the grounds that a sufficient necessity did not exist for throwing the negroes overboard, and also that the loss was not within the terms of the policy.

Davenport, Pigott, and Heywood, in support of the rule. — There appeared in evidence no sufficient necessity to justify the captain and crew in throwing the negroes overboard. The last necessity only could authorize such a measure; and it appears, that at the time when the first slaves were thrown overboard, there were three butts of good water, and two and a half of sour water, on board. At this time, therefore, there was only an apprehended necessity, which was not sufficient. Soon afterwards the rains came on, which furnished water for eleven days, notwithstanding which more of the negroes were thrown overboard. At all events the loss arose not from the perils of the seas, but from the negligence or ignorance of the captain, for which the owners, and not the insurers, are liable. The ship sailed from Africa without sufficient water, for the casks were found to be less than was supposed. She passed Tobago without touching, though she might have made that and other islands. The declaration states, that by perils of the seas, and

contrary currents and other misfortunes, the ship was rendered foul and leaky, and was retarded in her voyage; but no evidence was given that the perils of the seas reduced them to this necessity. The truth was, that finding they should have a bad market for their slaves, they took these means of transferring the loss from the owners to the underwriters. Many instances have occurred of slaves dying for want of provisions, but no attempt was ever made to bring such a loss within the policy. There is no instance in which the mortality of slaves falls upon the underwriters, except in the cases of perils of the seas and of enemies.

Lee, S.-G., and Chambre, contra.— It has been decided, whether wisely or unwisely is not now the question, that a portion of our fellow-creatures may become the subject of property. This, therefore, was a throwing overboard of goods, and of part to save the residue. The question is, first, whether any necessity existed for that act. The voyage was eighteen weeks instead of six, and that in consequence of contrary winds and calms. It was impossible to regain the island of Jamaica in less than three weeks; but it is said that [234] other islands might have been reached. This is said from the maps, and is contradicted by the evidence. It is also said that a supply of water might have been obtained at Tobago; but at that place there was sufficient for the voyage to Jamaica if the subsequent mistake had not occurred. With regard to that mistake, it appeared that the currents were stronger than usual. The apprehension of necessity under which the first negroes were thrown overboard was justified by the result. The crew themselves suffered so severely, that seven out of seventeen died after their arrival at Jamaica. There was no evidence, as stated on the other side, of any negroes being thrown overboard after the rains. Nor was it the fact that the slaves were destroyed in order to throw the loss on the underwriters. Forty or fifty of the negroes were suffered to die, and thirty were lying dead when the vessel arrived at Jamaica. But another ground has been taken, and it is said that this is not a loss within the policy. It is stated in the declaration that the ship was retarded by perils of the seas, and contrary winds and currents, and other misfortunes, &c. whereby the negroes died for want of sustenance, &c. Every particular circumstance of this averment need not be proved. In an indictment for murder it is not necessary to prove each particular circumstance. Here it sufficiently appears that the loss was primarily caused by the perils of the seas.

Lord Mansfield.— This is a very uncommon case, and deserves a reconsideration. There is great weight in the objection, that the evidence does not support the statement of the loss made in the declaration. There is no evidence of the ship being foul and leaky, and that certainly was not the cause of the delay. There is weight, also, in the circumstance of the throwing overboard of the negroes after the rain (if the fact be so), for which, upon the evidence, there appears to have been no necessity. There should, on the ground of reconsideration only, be a new trial, on the payment of costs.

Willes, Justice, of the same opinion.

Buller, Justice.— The cause of the delay, as proved, is not the same as that stated in the declaration. The argument drawn from the law respecting indictments for murder does not apply. There the substance of the indictment is proved, though the instrument with which the crime was effected be different from that laid. It would be dangerous [235] to suffer the plaintiff to recover on a peril not stated in the declaration, because it would not appear on the record not to have been within the policy, and the defendant would have no remedy. Suppose the law clear, that a loss happening by the negligence of the captain does not discharge the underwriters, yet upon this declaration the defendant could not raise that point.

Rule absolute on payment of costs.

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