

#16

IN
THE COURT
FOR THE
TRIAL OF IMPEACHMENTS
AND THE
CORRECTION OF ERRORS.

BETWEEN
JOHN G. COSTER, LEWIS LARUE, AND JOSEPH SANDS,

ASSIGNEES OF THE COLUMBIAN INSURANCE COMPANY,

Respondents,

AND

JOHN B. MURRAY AND JAMES B. MURRAY,

Appellants.

CASE AGREED ON BY THE PARTIES.

TO WHICH ARE ADDED,

THE POINTS ON THE PART OF THE RESPONDENTS.

NEW-YORK:
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1822.

IN THE COURT

FOR THE

TRIAL OF IMPEACHMENTS AND THE CORRECTION OF ERRORS.

BETWEEN

*John G. Coster, Lewis Larue, and Joseph Sands, assignees of
the Columbian Insurance Company, Respondents,*

AND

John B. Murray and James B. Murray, Appellants.

THE respondents, John G. Coster, Lewis Larue, and Joseph Sands, on the 23d of June, 1821, filed their bill of complaint in the Court of Chancery of this state against the appellants, John B. Murray, and James B. Murray; and therein stated, amongst other things, that on or about the second day of April in the year 1810, the Columbian Insurance Company (an insurance company duly incorporated by an act of the legislature of this state) became assurers for the firm of S. & L. Clarkson & Co. to the amount of \$10,000, upon 311 boxes of Havana sugar, laden or to be laden on board the ship *Egeria*, Law master, then belonging to the appellants, trading under the firm of John B. Murray & Son, on a voyage at and from New-York to St. Petersburg or Archangel. That the said ship, having the said sugars on board, was, during the prosecution of the said voyage, carried by her master into Copenhagen, where the voyage was discontinued and broken up by the master; and a technical total loss of the said sugars having in consequence thereof accrued, the said assured afterwards abandoned the said sugars to the said Columbian Insurance Company, and having duly received payment of such loss from the said Company, did, on the 23d day of May in the year 1811, by an indenture of assignment duly executed, cede and transfer to the said Columbian Insurance Company, their successors and assigns, the said sugars, and all sums of money, avails, salvages, averages, and compensation what-

soever, which had been or might thereafter be received on account of the same; by virtue whereof the said sugars, and all the proceeds and avails thereof, became vested in the said Columbian Insurance Company, their successors and assigns: That the proceeds and avails of the said sugars, or some part thereof, were received by George Dickinson, then the agent at Copenhagen of the said Columbian Insurance Company; and that in or about the summer of the year 1813, the said George Dickinson, acting as such agent aforesaid, and the said James B. Murray, acting for the said firm of John B. Murray & Son, made a joint purchase of 35 boxes, cases, or packages of linens, at Copenhagen aforesaid, or elsewhere in the north of Europe, and the said George Dickinson advanced and paid one third part of the purchase-money of the said linens from and out of the proceeds and avails of the said sugars; and it was agreed between the said George Dickinson and the said James B. Murray, acting as aforesaid, that the said linens should be shipped on the joint account of those concerned therein, and that the Columbian Insurance Company, or their representatives, should be entitled to one equal third part of the said linens, or of the proceeds thereof; and that if a sale thereof should be made by the said firm of John B. Murray & Son, no commission should be charged by them for or on such sale. That for the purpose of removing any possible grounds of misunderstanding relative to the said agreement between the said parties, the said James B. Murray, on the 7th day of July, A. D. 1813, addressed a letter to the said George Dickinson relative to the said linens, of the tenor or effect following, viz.

“ Copenhagen, July 7, 1813.

Mr. Geo. Dickinson—Present.

Dear Sir,

As it is proper, before my departure, we should precisely understand each other with respect

to the thirty-five boxes German linens shipped by us to Gottenburg via Landscrona, I shall state what I consider to be our relative situation. These goods being the proceeds of fifty hogsheads of tobacco left here by Captain R. Law in the hands of Messrs. Ryburg & Co. over one-third of which you have control, as agent for the owners of sugars shipped by Messrs. Clarkson on board the Egeria, are from the same cause interested in one third of these linens; and should they be sold in Gottenburg, are to receive one third of the neat proceeds, after deducting all charges that may have accrued since leaving this port; but should they not be sold at Gottenburg, and are shipped to America, you are also to receive one third of the neat proceeds when sold, or that proportion of the goods will be delivered to your order, on paying the various expenses and commissions which may have arisen; it being understood, that in case of a sale being made by *my* house, *no commission* is to be charged for such sale. As we have directed Messrs. Low and Smith of Gottenburg to send orders for insurance on these goods to my said house as soon as they have procured freight for them to America, I consider you as responsible to Messrs. Low & Smith for one third of charges aforesaid—or if they should have charged them all to my account, that you will point out some mode by which I may be reimbursed; and that you are also accountable to John B. Murray & Son for one third of the premium of insurance on said goods, whatever might be their fate; and, in short, that you stand in every respect one third interested with me or my house in the before-mentioned thirty-five packages of linens.

With sentiments of esteem, I am, sir,

Your friend and servant,

JAMES B. MURRAY."

That on the same day the said George Dickinson replied to the said letter in substance and effect as follows—that is to say:

" Copenhagen, 7th July, 1813.

Mr. James B. Murray—Present.

Dear sir,

In reply to your letter of this date, of which the above and foregoing is an exact copy, I have to say, that I coincide with you in opinion with respect to my interest in the thirty-five packages of linens therein mentioned, and that I shall consider myself accountable to your house, as well as to Messrs. Low & Smith, as there stated, and for one third of such expenses as may arise on the goods previous to their shipment for America. I hereby authorize you, or that last mentioned house, to draw on Messrs. Tho. Mullett, I. J. Evans & Co., for whom I hand you a letter of advice; and in case of their being sold in Gottenburg, wish my proportion of the proceeds to be remitted there.

I am sir, your obedient servant,

GEO. DICKINSON."

That the said Columbian Insurance Company, having become embarrassed in their circumstances, did, by an indenture dated the 22d day of May, A. D. 1813, assign and convey, amongst other effects, all the goods, effects, and funds belonging to the said Company in the hands or under the control and directions of the said George Dickinson, including the equal third part of the said linens and the proceeds thereof, to John Grant, John G. Coster, and John J. Astor, to hold the same as trustees of the said Company, in trust for certain purposes in the said trust deed specified. That in the spring of the year 1814 the said George Dickinson delivered to the said trustees of the said Columbian Insurance Company, an order on the said John B. Murray & Son, touching the said linens or the proceeds thereof, of the tenour or effect following, viz.

" Messrs. John B. Murray & Son,

" Gent.—Please deliver to the trustees of the Col. Ins. Comp. or order, one-third part of the thirty-five boxes of German linens purchased here in conjunction with James B. Murray; or if sold, pay over to these gentlemen one-third part of the proceeds, after reimbursing yourselves, as agreed on, for expenses.

Yours respectfully,

GEO. DICKINSON.

Copenhagen, 28th April, 1814."

That the said thirty-five cases of German linens were shipped at Gottenburg by the said Low & Smith to the United States, and arrived in safety, and were delivered to the said John B. Murray & Son, who sold the same and received the proceeds thereof: That shortly after receiving from the said Geo. Dickinson the said order, viz. on or about the first day of June, in the year 1814, the said trustees presented the same to the said John B. Murray & Son, and demanded of them the equal third part of the said linens, or if the same were sold, the equal third part of the proceeds thereof: That thereupon the said John B. Murray & Son admitted that they had received and sold the said linens, and a few weeks after the presentment of the said order, the said John B. Murray & Son rendered to the said trustees an account of the sales of the said linens, a copy whereof is contained in Schedule A, hereto annexed: That the charges contained in the said account of sales, of \$1001.25 for insurance, and of \$1153.7 for commissions, are most unwarrantable and unjust, inasmuch as no insurance was effected on the said linens on the voyage from Gottenburg to the United States, and as it was the express agreement between the said Geo. Dickinson and the said James B. Murray that no commission whatever should be charged on the sales of said linens by the said John B. Murray & Son: That immediately upon the pre-

sentiment of the said account of sales, the said trustees objected against the said charges for insurance and commissions, but the said John B. Murray & Son refused to pay over to or account with the said trustees for any portion of the proceeds of the said linens, unless the said firm should be allowed to retain for their own use the amount of the said charges for insurance and commissions, with which said terms the said trustees, acting in their representative capacity, did not feel themselves authorized to comply: That the said John B. Murray & Son, immediately after receiving the proceeds of the sales of the said linens, applied the moneys thence arising to their own use, and have at all times since mixed the same with their own proper moneys, and used and employed the same as their own in their business and other operations: That, the said Col. Ins. Comp. having become insolvent, the Chancellor of this State, on or about the 14th day of July, A. D. 1814, upon the application of the President and Directors of the said Company, pursuant to the act of the legislature of this State, entitled "An act respecting incorporated insurance companies, in cases of their insolvency;" directed an assignment to be made by the said Company under their corporate seal, of all its estate and property whatsoever, in law and equity to the complainants (the now respondents,) in trust upon the trusts and for the purposes in and by the said act in that behalf directed or expressed: That in conformity to the said order and direction, the said Col. Ins. Comp. on or about the 15th day of July, in the said year 1814, duly executed an assignment under their corporate seal, to the respondents, thereby granting and assigning to them all the estate and property whatsoever of the said company in law or equity, to hold the same in trust for the purposes in and by the said act in that behalf mentioned or expressed: That afterwards the said first mentioned trustees of the said Col. Ins. Comp. did, in and by an indenture dated the 30th day of July, A. D. 1816, grant, assign, release, and convey to the respondents all the said estate, property,

moneys and funds which had been assigned to them, the said trustees, by the said Col. Ins. Comp. as aforesaid, or of which they, as such trustees, had the disposition or control: That after the execution and delivery of the said assignments and conveyances, the respondents frequently applied in a friendly manner to the said John B. Murray & Son, presenting the said order of the said Geo. Dickinson, and urging them to pay the equal third part of the said linens, but such applications proving wholly fruitless, the respondents, in or about the month of May, A. D. 1821, made a final application to the said John B. Murray & Son, stating to them that they, the respondents, had found themselves obliged to place their said claim against the said firm in the hands of a solicitor for collection, and that unless the same was paid without any further delay, their said solicitor had directions to proceed against the said firm in due course of law: That upon the said last mentioned application being made, the said John B. Murray & Son proposed that an interview should be had between the counsel of the parties, on the subject of the proceeds of the said linens; and accordingly the counsel of the respondents called on the counsel of the appellants upon the subject, and after repeated negotiations, the counsel for the said John B. Murray & Son proposed that they should pay to the respondents the principal amount of the one-third part of the proceeds of the said linens, without interest, but the respondents declined to accept such principal without interest, and humbly contend that, acting as trustees for others, they were bound so to do, not only on the ground that the said John B. Murray & Son had unjustly withheld from the legal representatives of the said Col. Ins. Comp. the said funds which of right belonged to them, but also on the ground that the said John B. Murray & Son had used the said funds as their own ever since they came into their hands.

The bill of the respondents, after stating that the appellants refused to account or pay as required in the premises, and after calling on the ap-

CHARGES.

1813.									
Oct. 29.	Insurance from Gottenburg	\$10,000 a 10 per ct. a 9 mo.	\$1000 00						
		Policy	1 25						
	Bond for duty on goods, cost Bo. Ms.	29760 00							
	Dutiable charges	1459 13							
			31219 13						
	Add 10 per cent.		3121 19						
			34341 12						
	Ms. Bo. 34,341.12 are \$11447 a 29.875 per cent.		3305 32						
		2. 75	314 79						
			3620 11						
	Paid making out entry, bonds, &c.		7 20						
Dec. 31.	Sundry postage,		3 67						
1814. Jan. 12.	Expenses entering at Newport,		1 40						
	Freight from Gottenburg,	£33 4 6							
	Discount 14 per cent.	4 13 0							
		23 11 6							
			127 00						
	Richmond & Roger's commis. adv'g. \$128 a 2½ per ct.		3 20						
	Do. forwarding goods,		25 00						
			156 60						
Jan. 9.	Cartage from Providence to New-York, 35 packages, weighing 16013 lbs. a 4 cts. per lb.								640 52
12.	Wm. Blodget's acct. of freight of goods from Newport to Providence,		23 33						
	do. cooepage at do.		11 50						
	do. wharfage do.		2 10						
			36 93						
May 24.	Paid labour storing and delivering, postage and advertising,		6 22						
	.. charges on sales at auction,		198 96						
	.. storage 35 cases 1 month at 20 cts.		\$7 00						
	.. do. 7 do. do.		1 40						
	.. do. 22 do. 2 months		8 80						
			17 20						
	Balance of interest as below,		29 23						
	Our commissions on \$23,061.40 a 5 per ct.		1153 7						
			16190 44						
	Errors and omissions excepted,								
New-York, July 8, 1814.									

JOHN B. MURRAY & SON.

Interest on above to 23d July, 1814, time of first payment at 7 per cent. per annum.

1813.									
Dec. 31.	Cash paid at Custom-house and postage,	\$10.87, interest 6 mo. 23 days,	\$0 45						
1814. Jan. 9.	.. transportation of goods to N. York,	640.52, .. 6 .. 14 ..	24 16						
.. 12.	.. charges at New-port & Providence	254.75, .. 6 .. 11 ..	9 46						
May 24.	.. charges at auction, storage, &c.	220.13, .. 2 ..	2 57						
									\$36 64

CR.

1814.									
Mar. 3.	Sales to Ovrett & Lyon,	\$120.00, .. 4 ..	3 27						
May 24.	do. at auction,	335.20, .. 2 ..	4 14						
									7 41

Balance carried to acct. sales,
E. and O. E. \$29 28

To the said bill, the said John B. Murray and James B. Murray (the now appellants,) put in the following plea and answer, viz.

"These defendants, by protestation to so much of the said bill as seeks an account of the linens in the said bill mentioned, or any part thereof, and to all the discoveries and relief in and by the said bill sought or prayed for against these defendants, these defendants do plead in bar, and for plea say that by an act of the legislature of the State of New-York, entitled "an act for the limitation of criminal prosecutions and of actions at law," it is among other things enacted, that all actions upon the case, and of account, other than actions for slander, and actions which concern the trade of merchandise between merchant and merchant, their factors or servants, and all actions of debt for arrearages of rent, or founded upon any contract without specialty, shall be commenced and sued within six years next after the cause of such action accrued, and not after; and these defendants for further plea say, that if the said complainants, either in their own right, or as trustees or assigns of the said John Grant, John G. Coster, or John Jacob Astor, in the said bill mentioned, or as trustees or assignees of the said Columbian Insurance Company, in the said bill named or otherwise, ever had any cause of action or suit against these defendants for or concerning any of the matters in the said bill of complaint mentioned (which these defendants do by no means admit,) such cause of action or suit did arise above six years before the filing of the complainant's bill of complaint, and above six years before the suing out process against these defendants to appear and answer the same.

And these defendants for further plea say, that they did not, nor did either of them, at any time within six years before the exhibiting of the said bill, or the suing out process against these defendants to appear and answer the same, promise, or agree to come to any account for, or to pay, or in any way to satisfy to the said Columbian Insurance

Company, or to the said Grant, Coster, and Astor, or to the said complainants, any sum or sums of money, for or by reason of any of the matters, transactions, or things in the complainants' said bill of complaint charged or alleged.

All which matters and things these defendants do aver to be true, and are ready and willing to maintain and prove, as this honourable court shall award; and they do plead the same in bar to the whole of the said bill, and they do humbly demand the judgment of this honourable court, whether they the said defendants ought to be compelled to make any further or other answer thereto.

And the said defendants in no respect waiving or relinquishing their said plea, but in aid and support thereof, for answer to the residue of the complainants' bill not herein before pleaded to, or to so much thereof as they are advised it is in any wise material or necessary for them to answer; and each of these defendants for himself saith, that these defendants do expressly deny that they ever have within six years prior to the filing of the complainants' bill in this suit, made any offer, tender, promise, or agreement, to pay to the said complainants, or to the said Columbian Insurance Company, or to any person or persons vested with the rights of, or claiming under the said Columbian Insurance Company, any sum of money whatever, for, or on account of the said linens, or any other matters in the said bill mentioned, or in any wise to account concerning the same; excepting only as is herein below stated, in respect to the negociation between the counsel of these defendants, and the counsel of the said complainants.

And these defendants further answering say, that during the said period of six years, prior to to the filing of the complainants' bill, they were never called upon by the complainants, or any person or persons on their behalf, to pay or account for the proceeds of the said linens, or any part thereof; but on the contrary, these defendants had no reason to suppose that the said complainants, or any person invested

with the rights of the said Columbian Insurance Company in this behalf, would have accepted the proceeds of the said linsens, in the said bill mentioned, or any part thereof; but these defendants were given to suppose, and did suppose, that it was the intention of the persons acting on behalf of the said Columbian Insurance Company, to press against these defendants, or one of them, a claim for not proceeding in the said voyage of the said ship *Egeria* to Russia, on the ground that the same was unnecessarily broken up and relinquished in Denmark. And this defendant, James B. Murray, for himself, saith, that such claim was made upon him by the said John Grant in the said bill mentioned, in a conversation between the said John Grant and the said James B. Murray, which took place, as nearly as this defendant, James B. Murray, can recollect, in the month of August in the year 1814, in which conversation the said John Grant, speaking as this defendant, James B. Murray, understood, in behalf of himself and of his co-trustees in the said bill of complaint mentioned, expressly informed this defendant, James B. Murray, that he should go for damages for not proceeding on the said voyage.

And this defendant, John B. Murray, for himself answering, saith that the said ship *Egeria* did not belong to both these defendants, as supposed in the said bill of complaint, but solely to this defendant, John B. Murray, and that in the month of January now last past, (1821) this deponent was informed by Samuel Jones, esq. counsellor at law, that he had been for a long time before directed by the trustees of the said Columbian Insurance Company to prosecute this defendant, John B. Murray, for damages, for not having duly prosecuted the said voyage in the said ship *Egeria*; and this defendant, John B. Murray, becoming alarmed by the threat of a prosecution which might involve responsibilities to a great and unliquidated amount, immediately, and with great trouble and anxiety, set about preparing his defence against the said claim, and collected

materials and information therefor, and especially did for that purpose apply to and receive information and documents from the said Captain Law in the said bill mentioned, then and still residing in the state of Connecticut.

And this defendant, John B. Murray, further answering, saith, that very shortly before the filing of the bill in this suit, the said John G. Coster and Joseph Sands in the said bill mentioned, called upon this defendant, John B. Murray, and asked him, in general terms, what he intended to do in the business of the Egeria: but made no specific claim or statement of any demand; and this deponent replied, in substance, that he understood they had long since ordered a suit to be brought, and he had nothing to say upon the subject, but left them to pursue such course as they might think proper; and very shortly afterwards the same persons called again upon this defendant, John B. Murray, but still omitted to make any statement of the nature or amount of their claim, but proposed that the same should be submitted to arbitration.

This defendant, James B. Murray, for himself further answering saith, that he doth admit that shortly before the filing of the bill in this suit, Joseph Sands, one of the complainants, applied to him in respect to the Egeria, or the old Egeria claim, or something to that import and effect, but the said Joseph Sands did not make or intimate any specific claim for the proceeds of the said linens, or any portion thereof, or express a willingness to accept the same, or any portion thereof, and the said James B. Murray did thereupon refer the said Joseph Sands and the said complainants to the counsel of the said defendants; and these defendants have been informed by their counsel, and believe and admit, that shortly before the filing of the complainants' bill, a negotiation was opened between the counsel of the complainants and the counsel of these defendants; and it being a primary object of the defendants to obtain a definite written statement of the claims made

against them, the counsel of these defendants addressed a note to the counsel of the complainants in the following terms :

“ SIR,

“ We are instructed by Messrs. John B. Murray & Son to ask from the Columbian Insurance Company a statement in writing of their claim, made yesterday through you. This is in itself so reasonable and so necessary, to avoid misunderstanding, that we hope it will not be refused.

Your most obd't.

April 26, 1821.”

To which note, although the receipt thereof was verbally acknowledged by the said counsel for the defendants, no answer was ever returned, although at one time the counsel for these defendants absolutely refused any negotiation, unless a statement of the pretensions of the complainants was first made in writing; and repeatedly solicited and urged the complainants' counsel to make such statement. Nevertheless, these defendants, being anxious to avoid litigation, instructed their counsel to offer to the counsel for the complainants to pay to the said complainants one third of the proceeds of the said linens in the bill mentioned, without making therefrom any deductions on account of the commissions in the bill mentioned; and as these defendants are informed by their counsel, and believe and admit their counsel did make the said offer to the counsel of the said complainants, stating, however, at the same time, to the said counsel for the complainants, explicitly and repeatedly, that the said defendants were (as they conceived and insisted, and as they the said counsel for the defendants conceived) discharged from all liability to the said claim by the lapse of time, and by virtue of the statute of limitations; and that the said offer was made under a reservation of their right to avail themselves of the statute of limitations in their defence against the said claim, in case the said offer should be refused; and inasmuch

as the said offer was made under the circumstances, and with the reservations aforesaid, and the said complainants have by their own showing refused the said offer made, these defendants humbly insist that they ought, under the circumstances above mentioned, to be in no respect prejudiced thereby.

And these defendants expressly deny that they have, at any time within six years before the filing of the bill in this suit, received any sum or sums of money for or on account of any of the matters or subjects in the said bill of complaint mentioned, or that they have, within the period last mentioned, in any manner made any offer, promise, or admission, expressed or implied, to the said complainants, or any other person or persons vested with the rights of the said Columbian Insurance Company, in relation to the said linens, in the said bill mentioned, or the proceeds thereof, except as is above particularly set forth."

The cause was set down for hearing, and brought to argument at the October term, A. D. 1821, of the said court of Chancery, on the pleadings aforesaid; and his honour the Chancellor, on the 11th day of December thereafter, made a decretal order, thereby ordering and decreeing, "that the said plea, and the answer accompanying the same, be overruled, and that the defendants put in a full and perfect answer to the bill, within four weeks after service, of a copy of the said decretal order on their solicitor, and that the question of costs, arising upon the said plea, and answer, be reserved."

From the said decree, the defendants, John B. Murray, and James B. Murray, have entered an appeal to this honourable court.

H. D. SEDGWICK, of counsel for the appellants.

GEORGE GRIFFIN, of counsel for the respondents.