

The Aurora

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Appellant : The Aurora

Judgement :

The Aurora - 14 U.S. 96 (1816)

U.S. Supreme Court The Aurora, 14 U.S. 1 Wheat. 96 96 (1816)

The Aurora

14 U.S. (1 Wheat.) 96

APPEAL FROM THE DISTRICT COURT

FOR THE DISTRICT OF PENNSYLVANIA

SYLLABUS

To make a bottomry, executed by the master, a valid hypothecation, it is necessary to show that the master acted within the scope of his authority, or, in other words, that the advances were made for repairs or supplies necessary for effectuating the objects of the voyage, or the safety and security of the ship, and no presumption should arise in the case that such repairs or supplies could be

procured upon reasonable terms with the credit of the owner, independent of such hypothecation.

If the master have sufficient funds of the owner under his control or can procure them on the general credit of the owner to make a necessary repair, he has no authority to subject the ship to an hypothecation.

A bottomry bond given to pay off a former bottomry bond must stand or fall with the first hypothecation, and the subsequent lenders can only claim upon the same ground as the former lenders, of whom they are virtually the assignees.

Where money has been advanced, under a stipulation for a bottomry bond, and the vessel is permitted to go to sea without any attempt to enforce the stipulation, it is to be deemed a waiver of the hypothecation and the party cannot on a subsequent voyage insist upon a bottomry bond for his prior advances.

A *bona fide* creditor who advances his money to relieve a ship from an actual arrest on account of debts incurred on the ship's account may rightfully stipulate for a bottomry interest to secure him for such advances, and the master, if he has no other sufficient funds or credit, may execute a bottomry bond in his favor.

But it is very doubtful if the arresting creditor could entitle himself to such a bottomry bond by agreeing to withdraw his arrest.

If a person making advances for repairs, &c., has in his own hands funds of the owner which he may apply to pay for repairs, he cannot entitle himself to a bottomry bond for advances made for such repairs.

It is incumbent on the lender on bottomry to show the items of his claim, and if various demands are mixed up in his bond, some of which would and some would not support an hypothecation, it is his duty to separate them and exhibit them to the court distinctly before he can claim a decree for any part of his advances.

The brig *Aurora*, commanded by captain Owen F. Smith and owned by the claimants, sailed in July, 1809, from New York on a trading voyage to the Brazils, and from thence to the South Sea islands for the purpose of procuring a cargo for

the market of Canton or Manila, with liberty, after completing this adventure, to continue in this trade or engage in that between Canton and the northwest coast of America. The brig duly arrived at Rio Janeiro, where the principal part of her outward cargo was sold, and from thence proceeded to Port Jackson, in New Holland. At this port, the brig underwent considerable repairs, on account of which advances and supplies were furnished by Messrs. Lord & Williams, who were merchants there. The original objects of the voyage seem here to have

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been lost sight of, and the brig was chartered by the master to Messrs. Lord & Williams for a voyage of discovery, and was actually retained in their service for about a year under this engagement. At the end of this time, the brig had returned to Port Jackson, and Captain Smith was here put in gaol by some persons whose names are unknown for debts contracted, as it was asserted or supposed, on account of the vessel, and was relieved from imprisonment by Messrs. Lord & Williams. About this time, *viz.*, in July, 1811, the brig was again chartered to Messrs. Lord & Williams for a voyage from Port Jackson to Calcutta and back to Port Jackson, and a bottomry bond was executed for the same voyage by Captain Smith in favor of Messrs. Lord & Williams for the sum of 1,482 6s. 1d. and interest at nine percent, being the amount, as the bond expresses it, of

"charges incurred for necessaries and stores found and provided by Messrs. Lord & Williams, of, &c., at various times and places, for the use of the said brig."

The vessel duly proceeded to Calcutta and landed her cargo there, but being prevented, as it was alleged, by the British government in Calcutta from returning to Port Jackson, the voyage was broken up. In December, 1811, Captain Smith entered into a contract with the libellants, Messrs. Chamberlain & Co., at Calcutta by which he engaged to charter the brig to them, to carry a cargo on their account to Philadelphia, for the gross freight of 12,000 sicca rupees, to be paid to him in advance in Calcutta, and also to give the charterers the appointment of the master for the voyage.

He further agreed, in consideration of the libellants paying the bottomry bond of Messrs. Lord & Williams and advancing any sums necessary for the repairs and supplies of the ship, to execute a bottomry bond to them for the same voyage for the principal sum thus paid and expended and 20 percent interest. In pursuance of this agreement, on 17 December, a certain captain George Lee, with the assent of Smith, was appointed by the libellants to superintend the repairs, equipments, and loading of the brig, and afterwards sailed as master on the voyage. A bottomry bond, for 18,000 sicca rupees was formally executed by Captain Smith on 23 and a charter party on 26 December. In the latter part of January, 1812, Captain Smith resigned his nominal command of the ship to Captain Lee and delivered to him the ship's papers and letters for the owners. The ship duly sailed on the voyage and arrived at Philadelphia and there safely delivered her cargo. The advance freight was paid to Captain Smith, according to the contract, and he remained behind at Calcutta under the pretense that, with this advance freight, it was his intention to prosecute the plan of his original voyage and to endeavor to repair the losses sustained by his former conduct. It also appeared in evidence that Captain Smith was, during the whole voyage, much addicted to intoxication, both at sea and on shore, and Messrs. Lord & Williams and the libellants seem to have been fully apprised of his incapacity to manage the concerns of the voyage. The owners refused to pay the bottomry bond executed at Calcutta, and the

present libel was brought to enforce it. The district court, at the hearing, decreed the full amount of the principal and interest of the bond, deducting the 12,000 sicca rupees advanced at Calcutta. Upon an appeal, the circuit court reversed this decree, and upon the merits dismissed the libel.

STORY, J., delivered the opinion of the Court, and, after stating the facts, proceeded as follows:

Such are the material facts of the case, and the question to be decided is whether, under all the circumstances, the bottomry bond executed at Calcutta constitutes a valid lien upon the ship.

The law in respect to maritime hypothecations is in general well settled. The master of the ship is the confidential servant or agent of the owners, and they are bound to the performance of all lawful contracts made by him relative to the usual employment of the ship and the repairs and other necessaries furnished for her use. This rule is established as well upon the implied assent of the owners as with a view to the convenience of the commercial world. As, therefore, the master may contract for repairs and supplies, and thereby indirectly bind the owners to the value of the ship and freight, so it is held that he may for the like purposes expressly pledge and hypothecate the ship and freight, and thereby create a direct lien on the same for the security of the creditor. But the authority of the master is limited to objects connected with the voyage, and if he transcend the prescribed limits, his acts become in legal contemplation mere nullities. Hence, to make

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a bottomry bond executed by the master a valid hypothecation of the ship, it must be shown by the creditor that the master acted within the scope of his authority, or in other words it must be shown that the advances were made for repairs and supplies necessary for effectuating the objects of the voyage or the safety and security of the ship, and no presumption should arise that such repairs and supplies could be procured upon any reasonable terms with the credit of the owner independent of such hypothecation. If, therefore, the master have sufficient funds of the owner within his control or can procure them upon the general credit of the owner, he is not at liberty to subject the ship to the expensive and disadvantageous lien of an hypothecatory instrument.

Let us now, with these principles in view, proceed to the consideration of the validity of the bottomry bond executed at Port Jackson, which enters so materially into the subsequent one executed at Calcutta. This bond purports on its face to have been given for advances or supplies furnished for the ship's use, not

immediately before its date but at various times and places, and, from the other evidence in the case, it distinctly appears that the greater part was furnished before and during the voyage of discovery in which she was engaged under the contract with Messrs. Lord & Williams and for their immediate benefit. Not the slightest account is given of the earnings of the ship during this long voyage of a year nor of the terms or stipulations of the charter. This silence would be wholly unaccountable

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if it were not in proof that Captain Smith was guilty of the most shameful misconduct, and either fraudulently sacrificed or grossly neglected the interests of his owner.

The advances made by Messrs. Lord & Williams do not appear to have been originally made upon a stipulation for an hypothecation of the ship. On the contrary, there is the strongest reason to believe that they were originally made upon the general credit of the owner or master or both. If there had been a stipulation for an hypothecation, it must have been carried into effect by the parties on the next ensuing voyage, and as this was not done, there arises an almost irresistible presumption that Messrs. Lord & Williams looked for their reimbursements out of the freight of the voyage in which the ship was then engaged by them. If indeed there had been a stipulation originally for an hypothecation, it must be deemed in point, of law to have been waived by the omission to have had it attached to the first voyage then next to be prosecuted, and the party who thus waives his right cannot be permitted, at a subsequent time and under a change of circumstances, to reinstate himself in his former condition to the injury of the owner. It is said that the ship might have been arrested for these advances, and that in point of fact the captain was put in jail on account of debts contracted for the ship, and was relieved from imprisonment by Messrs. Lord & Williams. That Captain Smith was imprisoned on account of some debts appears in the evidence, but it is by no means clear that these

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debts were contracted for the use of the ship. The presumption is repelled by the consideration that the necessaries and supplies are expressly stated in the bond to have been furnished by Messrs. Lord & Williams, and the only other creditors who are alleged to have furnished stores, are admitted not to have instituted any suits. It is undoubtedly true that materialmen and others who furnish supplies to a foreign ship have a lien on the ship and may proceed in the admiralty to enforce that right. And it must be admitted that in such a case a *bona fide* creditor who advances his money to relieve the ship from an actual arrest on account of such debts, may stipulate for a bottomry interest, and the necessity of the occasion will justify the master in giving it, if he have no other sufficient funds or credit to redeem the ship from such arrest. But it would be too much to hold, as was contended for by the counsel for the appellants, that a mere threat to arrest the ship for a preexisting debt would be a sufficient necessity to justify the master in giving a bottomry interest, since it might be an idle threat which the creditor might never enforce, and until enforced, the peril would not act upon the ship itself. And even supposing a just debt might in such a case be a valid consideration to sustain a bottomry interest in favor of a third person, such an effect never could be attributed to a debt manifestly founded in fraud or injustice. Nor does it by any means follow, because a debt sought to be enforced by an arrest of the ship might uphold an hypothecation in favor of a third person, that a general creditor would be entitled

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to acquire a like interest. It would seem against the policy of the law to permit a party in this manner to obtain advantages from his contract for which he had not originally stipulated. It would hold out temptations to fraud and imposition and enable creditors to practice gross oppressions against which even the vigilance and good faith of an intelligent master might not always be a sufficient safeguard in a foreign country.

These are not the only difficulties which press upon the claim of Messrs. Lord & Williams. The terms of the charter party, entered into by them on the voyage to Calcutta as well as on the voyage of discovery, are nowhere explained. It was

certainly their duty in the first instance to apply the freight in their hands earned in these voyages to the discharge of the debt due to them for advances. What was the amount of this freight, and what was the manner in which it was to be paid, and how in fact it was paid or appropriated, are inquiries which have never been answered. These inquiries are at all times and in all cases important, but are emphatically so in a case where there is but too much reason to suspect that the interests of the owner were willfully abandoned by the fraud or the folly of the master.

It is incumbent upon the creditor who claims an hypothecation to prove the actual existence of the necessity of those things which give rise to his demand, and if, from his own showing, or otherwise, it appears that he has had funds of the owners in his possession which might have been applied to the demand,

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and he has neglected or refused so to do, he must fail in his claim. So if various demands are mixed up in his bond, some of which would sustain an hypothecation and some not, it is his duty so to exhibit them to the court that they may be separately weighed and considered. And it would be perilous indeed if a court were called upon to grope its way through the darkness and intricacies of a long account without a guide, and decide upon the interests of the ship owner by obscure and doubtful lights which here and there might cross the path.

Upon the whole it is the opinion of the Court that the bottomry bond of Messrs. Lord & Williams cannot be sustained as a valid hypothecation upon the proofs now before the Court. It appears to have been founded, to a very large amount, upon advances made by Messrs. Lord & Williams in previous voyages, and if some portion of the debt might have been immediately applicable to the necessities of the ship at the time of the voyage to Calcutta, that portion is not distinctly shown, and no reason as yet appears why the freight in their hands, if the transactions were *bona fide*, might not have been applied in discharge of these necessities.

As the bottomry bond of Messrs. Lord & Williams has not been established, the subsequent bottomry bond executed at Calcutta, so far as it includes and covers the sum due on the first bond, cannot be sustained. The plaintiffs in this respect can claim only as the virtual assignees of Messrs. Lord & Williams with the assent of the master, and the same defects which infected the original title pass along

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with the muniments of that title under the assignment.

And this observation leads to the consideration of the validity of the bottomry bond executed at Calcutta as to the sum remaining after deducting the amount of the first bond. Notwithstanding some obscurity in the testimony, it must be taken as true from the express acknowledgments of Captain Smith that the whole sum expended in repairs and supplies of the ship in Calcutta, including the sum of ten thousand seven hundred and thirteen sicca rupees paid on account of the first bottomry bond did not exceed the sum of eighteen thousand sicca rupees. It follows, therefore, that a sum a little more than six thousand rupees was expended in these supplies and repairs. By their charter party with the master, the plaintiffs agreed to pay an advance freight to Captain Smith of twelve thousand sicca rupees for the voyage to Philadelphia. There was therefore within their own knowledge an ample fund provided for all the repairs and supplies necessary for the voyage, and this fund absolutely within their own control if they were disposed to act for the interest of the owners, instead of lending their aid still further to involve them in difficulty and distress. There is therefore but too much reason to believe, that the plaintiffs were not unwilling to derive undue advantages from the intemperance and negligence of the master, whatever might be the sacrifices brought upon the owners. The plaintiffs expressly stipulated in their charter party for the right to appoint a new master for the voyage, obviously

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from a total want of confidence in Captain Smith. They would not even suffer the repairs and loading of the ship to be made except under a master specially in their

own confidence. They retained Captain Smith in the nominal command of the ship until all their own purposes were answered, and then discarded him with as little ceremony as any indifferent personage. Yet at the very moment that they were withdrawing their whole confidence from him, they advanced the whole freight of the voyage, to be applied at his own pleasure to any objects disconnected with the voyage. They could not be ignorant that the master was not about to return to the home of the owner and that the ship was, and the argument which imputes to them a collusive combination with the master is certainly not without considerable weight. At all events, here funds are shown to exist sufficient to meet the necessities of the ship, and consequently a resort to the extraordinary expedient of an hypothecation was not justified in point of law.

On the whole it is the opinion of the Court that the decree of the circuit court ought to be affirmed with costs.

Decree affirmed.