

The Virgin

The Virgin

SooperKanoon Citation : sooperkanoon.com/79476

Court : US Supreme Court

Decided On : 1834

Appeal No. : 33 U.S. 538

Appellant : The Virgin

Judgement :

The Virgin - 33 U.S. 538 (1834)

U.S. Supreme Court The Virgin, 33 U.S. 8 Pet. 538 538 (1834)

The Virgin

33 U.S. (8 Pet.) 538

APPEALS FROM THE CIRCUIT COURT OF THE

UNITED STATES FOR THE DISTRICT OF MARYLAND

SYLLABUS

Bottomry. On an appeal from the decree of the circuit court, of Maryland on a libel on a bottomry bond, originally filed in the district court, it appeared that commissioners appointed by the circuit court had reported that a certain sum, being a part of the amount of the bond, was absolutely necessary for the ship as expenses and repairs in the common course of her employment. No exception

was taken to this report by either party in the circuit court, and it was accordingly confirmed by that court. The report is not open for revision in this Court, there being nothing on its face impeaching its correctness.

It is no objection to a bottomry bond that it was taken for a larger amount than that which could be properly the subject of such a loan, for a bottomry bond may be good in part and bad in part, and it will be upheld by courts of admiralty as a lien to the extent to which it is valid, as such courts, in the exercise of their jurisdiction, are not governed by the strict rules of the common law, but act upon enlarged principles of equity.

It is notorious that in foreign countries, supplies and advances for repairs and necessary expenditures of the ship constitute, by the general maritime law, a valid lien on the ship, a lien which might be enforced *in rem* in our courts of admiralty even if the bottomry bond were, as it certainly is not, void *in toto*.

An objection was taken to the bond that the supplies and advances might have been obtained on the personal credit of the owners of the ship without an hypothecation. *Held* that the necessity of the supplies and advances being once made out, it is incumbent upon the owners, who assert that they could have been obtained upon their personal credit, to establish that fact by competent proofs, unless it is apparent from the circumstances of the case.

It was objected that the supplies and repairs were, in the first instance, made on the personal credit of the master of the ship, and therefore could not be afterwards made a lien on the ship. *Held* that the lender on the bottomry bond might well trust the credit of the master as auxiliary to his security, and the fact that the master ordered the supplies and repairs before the bottomry was given can have no legal effect to defeat the security if they were ordered by the master upon the faith and with the intention that a bottomry bond should be ultimately given to secure the payment of them. In cases of this sort, the bottomry bond is in practice ordinarily given after the whole supplies and repairs have been furnished, for the plain reason that the advances required can rarely be ascertained with exactness until that period.

It was objected that the advances were for a voyage not authorized by the

Page 33 U. S. 539

owners; that the original orders were for the master to get a freight for Baltimore or New York, and if he could not then to proceed to New Orleans, whereas the master broke up his voyage, and without any freight returned to Baltimore. By the court:

"It may be admitted that if a bottomry lender, in fraud of the owners and by connivance with the master for improper purposes, advances his money on a new voyage, not authorized by the instructions of the owner, his bottomry bond may be set aside as invalid. But there is no pretense to say that if the master does deviate from his instructions, without any participation or cooperation or fraudulent intent of the bottomry lender, the latter is to lose his security for his advances, *bona fide* made for the relief of the ships necessities."

Seamen have a lien prior to that of the holder of a bottomry bond for their wages, but the owners are also personally liable for such wages, and if the bottomry holder is compelled to discharge that lien, he has a resulting right to compensation over against the owners in the same manner as he would have if they had previously mortgaged the ship.

Graf, one of the owners, had the ship delivered up to him upon an appraisement at the value of \$1,800, and he gave a stipulation according to the course of admiralty proceedings to refund that value, together with damages, interest and costs, to the court. He is not at liberty now to insist that the ship is of less than that value in his hands, or that he has discharged other liens diminishing the value for which the owners were personally liable *in solido* in the first instance.

To the extent then, of the appraised value of the ship delivered upon the stipulation, the owners are clearly liable, for she was pledged for the redemption of the debt, and they cannot take the fund except *cum onere*. But beyond this there is no personal obligation upon the owners.

In this case, the value of the ship, the only fund out of which payment can be made, fell far short of a full payment of the amount due upon the bottomry bond. But this is the misfortune of the lender, and not the fault of the owners. They are not to be made personally responsible for the act of the master because the fund has turned out to be inadequate, since, by our law, he had no authority by a bottomry bond to pledge the ship and also the personal responsibility of the owners. The consequence is that the loss, ultra the amount of the fund pledged, must be born by the libellant.

The ship *Virgin* sailed in August, 1822, from Baltimore to Amsterdam, where she arrived on 12 October of that year under command of John Cunnyingham. By the plan of the voyage, she was to return from Amsterdam to Baltimore if she could procure a freight; otherwise she was positively directed to proceed to New Orleans. She was owned, when she sailed, by John C. Delplat, who, during her passage to Amsterdam became insolvent, and on 4 September sold one-third of her to Frederick C. Graf.

Page 33 U. S. 540

The vessel, on her way to Amsterdam, encountered severe weather, and arrived there in want of sails and a cable and of various repairs. At her departure from Baltimore, her owner directed that at Amsterdam, as the most economical place for the supply, she should be furnished with a mainsail and topsail and cable, of which it was foreseen she would then be in urgent need. The vessel had a cargo of which, except twenty hogsheads of tobacco, all belonged to Delplat, and all of the cargo was consigned to N. and I. and R. Vanstaphorst, at Amsterdam, to whom Delplat also consigned the vessel. The twenty hogsheads of tobacco belonged to Frederick C. Graf. Agreeably to these consignments, the captain, on arrival at Amsterdam, delivered to the Vanstaphorsts the cargo and committed to them all the concerns of the vessel, in consequence of which they collected and held in their hands all the freight that was actually payable upon any portion of the cargo, and all the proceeds of the tobacco belonging to Mr. Graf.

The captain, desiring to refit the vessel and afford her all the necessaries for her return voyage, applied to the Vanstaphorsts for the requisite means, and ultimately even offered them a bottomry of the ship for the funds. After much delay, they refused all advances, intelligence of the failure of Delplat, asserted by them to be largely their debtor, having meanwhile reached them. To provide for the event of this refusal, the captain set on foot a negotiation through brokers for raising the means by bottomry, and the application to the Vanstaphorsts, and this provisional negotiation, were pending for about three weeks -- the captain knowing no friends of the owner except the Vanstaphorsts to whom he could apply for the aid. During this period, the captain contracted on his own responsibility for various supplies, which he designates in his evidence as all those that were furnished before 1 November. The payment for these and for the other necessaries of the ship was made out of the moneys received from the appellee Vyfhius. On 12 November, after the Vanstaphorsts had finally declined making the advances, the captain contracted with Vyfhius for the loan upon bottomry of eight thousand guilders, at an interest of ten percent, all which, he shows, was appropriated for the indispensable uses of the ship.

Page 33 U. S. 541

About 3 November, the captain received from Mr. Graf a letter dated in September, 1822, announcing his purchase of one-third of the *Virgin*, and referring to a certificate of his purchase as enclosed in the letter, which in fact appears not to have been enclosed. About the same time, by another letter from Mr. Graf and perhaps also from other quarters, information was given to the captain of Mr. Delplat's failure, and in consequence the captain, on consultation, determined that it was his duty to proceed with the vessel home to Baltimore, and not to dispatch her to New Orleans. After undergoing repairs, and receiving all her supplies paid for by the appellee Vyfhius, the *Virgin* sailed from Amsterdam to Baltimore, and arrived there in March, 1823.

The owners refusing to pay the appellee his advances, the libel in this cause was filed, which prays citation against the owners by name as well as the captain, and

condemnation of the vessel for paying the loan, and also further relief such as the court may deem adequate and just. The owners, Delplat and Graf, appeared and answered; their answers called into question the fact and the necessity of expenses at Amsterdam, insisting too that the Vanstaphorsts had property enough of the owners, and which should have been applied for the wants of the ship, and charging that the bottomry was really taken by the Vanstaphorsts though colorably in Vyfhius' name, and maintaining, finally, that all requisite funds could have been raised on the credit of the owners, or of the captain.

A commission for evidence was sent to Holland, the chief object of which was to prove the Vanstaphorsts to be really the owners of the bottomry. The circuit court determined that the bottomry was invalid, but that the owners are personally liable for all the necessary supplies furnished by the means of Vyfhius for the vessel, and that to that extent he was entitled in this cause to recover against them. The cause was then referred to the clerk of the court to ascertain, calling to his aid two merchants, the amount of the necessary supplies referred to. The clerk and his assistants reported their ascertainment. Exceptions by Delplat and Graf were filed to it. The case was remanded to the clerk, who called two other merchants to cooperate with him, and they reported their statement of the

Page 33 U. S. 542

necessary expenses, which the court confirmed. Thereupon the court passed its final decree awarding payment to Vyfhius by Delplat and Graf of the sum of \$2,900, with interest from 26 November, 1830, the date of the decree, the principal of the ascertained expenses being \$2,900.

Both parties appealed to this Court.

Page 33 U. S. 548

MR. JUSTICE STORY delivered the opinion of the Court.

This is the case of a libel *in rem* upon a bottomry bond originally instituted in the District Court of the District of Maryland and thence brought by appeal to the circuit

court, and thence by appeal to this Court. The ship *Virgin* belonged to Baltimore, and being in Amsterdam, in the Kingdom of Holland, in November, 1822, bond was there given to the libellant by the master, for the sum of \$3,200 and maritime interest at the rate of ten percent for advances asserted to be made by the libellant to supply the necessities of the ship on a voyage from Amsterdam to Baltimore. The voyage was duly performed; and the bottomry loan not being paid by the owners, proceedings were duly commenced for the recovery thereof, and the suit has been protracted to the present period. The owners interposed a claim and defensive allegation, denying the validity of the bond, and at the hearing in the district court a decree was entered affirming its validity and awarding to the libellants the full amount of the bottomry bond, with interest at the rate of six percent from the filing of the libel. The circuit court, on the appeal, reversed this decree, pronounced the bottomry bond invalid, and then proceeded to entertain the suit *in personam* against the owners, holding them liable for the necessary supplies and repairs of the ship in the same manner as if the suit had been originally commenced *in personam* against the owners. And after some interlocutory proceedings, the circuit court awarded a final decree against the owners for the sum of \$2,900, being the amount ascertained by a report of commissioners as

Page 33 U. S. 549

"expenditures and advances absolutely necessary, and made in the course of the usual employment of the ship," with interest from the time of the decree until the payment of the amount thereof. From this decree both parties have appealed to this Court, and the cause now stands upon the argument for a final decision.

The first question is whether the bottomry bond was valid in its origin, and constituted a good lien on the ship. Several objections have been taken to its validity. In the first place it is said that the bottomry bond, though taken in the name of the libellant, Vyfhius, was in fact taken in trust and for the benefit of Vanstaphorst & Company, who were the consignees of the ship and cargo and had ample funds of the owners in their hands to meet the necessary expenditures if any were necessary, and therefore they cannot now subject the ship to a

bottomry lien. But we do not think that this objection is sustained as matter of fact by the evidence in the case. The only testimony to support it is a loose statement of Schimmelpennick, one of the partners of the house of Vanstaphorst & Company, who stated to a witness

"that the expenses of the *Virgin* had amounted to about eight thousand guilders, and that they would not be so foolish as to make such an expense for Delplat without securing themselves by a bottomry."

This language is quite equivocal and admits of different interpretations, and it does not appear upon what occasion or under what circumstances it was used. It may mean that they had declined to make the advances without a bottomry bond, without meaning to affirm that one had been actually taken for their benefit. But, what is most important in the case, this declaration cannot be competent evidence against Vyfhius, who is not shown to have had any knowledge of it or to have been in privity with Schimmelpennick, so that as to him it is the mere hearsay of a third person. And on the other hand, the master of the *Virgin* expressly disclaims any knowledge that any of the advances were made by Vanstaphorst & Company, and affirms that they were made by Vyfhius at his request, through the instrumentality of a broker. We may then dismiss all further consideration of this objection, since the bottomry bond is not traced home to Vanstaphorst & Company.

Page 33 U. S. 550

The next objection is that the advances were not necessary for the supplies and repairs of the ship. This objection is not now fairly open upon the record. The second and last report of the commissioners expressly finds that the sum of \$2,900 of the advances was absolutely necessary for the ship as expenses and repairs in the common course of her employment. No exception was taken to this report by either party, and it was accordingly confirmed by the circuit court, so that it is not now open for review in this Court, there not being anything on its face impeaching its correctness. It is true that the bottomry bond was taken for a larger amount, but that furnishes no ground of objection to the bond except for the

surplus, for a bottomry bond may be good in part and bad in part, and it will be upheld by courts of admiralty as a lien to the extent to which it is valid, as such courts, in the exercise of their jurisdiction, are not governed by the strict rules of the common law, but act upon enlarged principles of equity. There are many authorities to this effect, but it is only necessary to cite the cases of *The Augusta*, 1 Dodson 283; *The Tartar and the Nelson*, 1 Hag. Adm. 169, 176. And indeed, except so far as regards the maritime interest of ten percent, the question would be unimportant, for it is notorious that in foreign countries supplies and advances for repairs and necessary expenditures of the ship constitute, by the general maritime law, a valid lien on the ship, a lien which might be enforced *in rem* in our courts of admiralty even if the bottomry bond were, as it certainly is not, void *in toto*.

The next objection is that the supplies and advances might have been obtained upon the personal credit of the owners, without an hypothecation. Now, the necessity of the supplies and advances being once made out, it is incumbent upon the owners, who assert that they could have been obtained upon their personal credit, to establish that fact by competent proofs unless it is apparent from the circumstances of the case. Now not only is there no proof to this effect upon the record, but it is fairly repelled by the testimony of the master as well as by the other circumstances of the case. When the ship sailed on her voyage from Baltimore for Amsterdam, she was exclusively owned by Delplat, and she as well as her cargo, a great part

Page 33 U. S. 551

of which was also owned by Delplat, was consigned to Vanstaphorst & Company. Delplat failed during the voyage, and about that time assigned one-third of the ship to Graf and the other two-thirds to other persons. The cargo, on the ship's arrival, was delivered pursuant to the consignment to Vanstaphorst & Company, and certainly could not be rightfully withheld from them under the bills of lading. Delplat, after deducting all his consignment, remained in debt to Vanstaphorst & Company, in 19,000 guilders. And after they were apprised of Delplat's failure, and after a negotiation of some weeks between them and the master for advances,

they declined to make any to him, and he was thus compelled to obtain them elsewhere.

It is wholly immaterial in this case whether Vanstaphorst & Company had funds in their possession which ought to have been advanced by them for the relief of the ship. It is sufficient to justify the master that he could not obtain them, and the nonexistence of funds, and the nonability to get at them, must, as to the master, be deemed to be precisely equal predicaments of distress. It would not be very easy to convince any lender of money that he could safely trust to the personal security of an insolvent debtor, and although Graf was not involved in the failure of Delplat, yet his title was acquired on the eve of Delplat's failure, and did not appear on the ship's papers, so that a cautious lender might well hesitate as to the ability of the master to bind Graf, even if it had appeared, which it does not, that Graf's credit was so unquestionable at Amsterdam that his personal security, given by an acknowledged agent, would have been satisfactory. But the truth is that the master's testimony negatives any other adequate means of supplying the ship's necessities without resort to a bottomry bond, and there is not the least reason to suppose that he did not act with entire good faith and from a consciousness that funds could not otherwise be obtained. It is certainly incumbent on the owners, if they assert that such means existed, to give some solid proofs in support of their assertion.

Then again it is objected that the supplies and repairs were in the first instance made upon the master's credit. But how were they made? There is not a title of proof that the materialmen originally trusted to his personal credit exclusively,

Page 33 U. S. 552

waiving the lien which the foreign law would give on the ship for them, or the general responsibility of the owners. On the contrary, they might well trust to his credit, as auxiliary to these sources, and the fact that the master ordered the supplies and repairs before the bottomry bond was given can have no legal effect to defeat that security if they were so ordered by the master upon the faith and with the intention that a bottomry bond should ultimately be given to secure the

payment of them.

In truth, in cases of this sort the bottomry bond is in practice ordinarily given after the whole supplies and repairs have been furnished, for the plain reason that the advances required can rarely be ascertained with exactness until that period. In a case before Lord Stowell, [[Footnote 1](#)] an objection of a similar nature was taken, *viz.*, that the advances were made before the bottomry bond was taken; but that learned judge overruled it and said that it was sufficient that it was the understanding of the parties at the time that the money should be secured by means of bottomry, and that it was of no consequence whether the money was advanced at once and the bond immediately entered into or whether the master received it from time to time in different sums, and gave a bond for the whole amount. And he added, what is very significant under the circumstances of the present case, that the party who lent the money had a right by the maritime law to detain the ship and cargo until the debt was repaid, and it was only by the means of the bond that the owners had the benefit of the liberation of their property.

In the next place it is objected that the advances were for a voyage not authorized by the owners; that the original orders were for the master to get a freight for Baltimore or New York, and if he could not, then to proceed to New Orleans, whereas the master broke up his voyage and without any freight returned to Baltimore. Now it may be admitted that if a bottomry lender, in fraud of the owners and by connivance with the master for improper purposes, advances his money on a new voyage not authorized by the instructions of the owner, his bottomry bond may be set aside as invalid.

Page 33 U. S. 553

But there is no pretense to say that if the master does deviate from his instructions, without any participation or cooperation or fraudulent intent of the bottomry lender, the latter is to lose his security for his advances, *bona fide* made for the relief of the ship's necessities. In the present case, there is no proof that Vyfhius ever saw the master's instructions, much less that he fraudulently cooperated with him in a willful disobedience of the orders of the owner. A new

and unexpected state of things had arisen. The owner had failed and new owners had been substituted, with some of whom he had not had any communication. Under these circumstances he applied for advice to the friends of his former owners, and they advised him to return home, as not only prudent and proper, but as required by the change of ownership. His own judgment coincided with theirs, and there is no ground to assert that he did not act with entire good faith, and that under all the circumstances, the course adopted by him was not discreet and fit for such an emergency. To set aside a bottomry bond given under such circumstances would be to impair in no small degree the general confidence of the commercial community in their security, and would overturn the great maritime policy upon which they have been hitherto held sacred and privileged liens.

We have thus considered the principal objections urged against the bottomry bond, and are of opinion that they are unmaintainable. The consequence is that the bond must be upheld to the extent of the property pledged for the security of it. It has been said that the seamen have a prior lien on the ship for their wages, and that the amount of the wages ought first to be deducted. Undoubtedly the seamen have such prior lien, but the owners are also personally liable for such wages, and if the bottomry holder is compelled to discharge that lien, he has a resulting right to compensation over against the owners in the same manner as he would have if they had previously mortgaged the ship.

But in strictness, no such question arises on the present record. Graf, one of the owners, has had the ship delivered up to him upon an appraisement at the value of \$1,800, and he has given a stipulation according to the course of admiralty proceedings to refund that value,

Page 33 U. S. 554

together with damages, interest and costs, to the court. He is not at liberty now to insist that the ship is of less than that value in his hands, or that he has discharged other liens diminishing the value for which the owners were personally liable, *in solido*, in the first instance.

To the extent, then, of the appraised value of the ship, delivered upon the stipulation, the owners are clearly liable, for she was pledged for the redemption of the debt, and they cannot take the fund except *cum onere*. But beyond this there is no personal obligation upon the owners. It has been correctly remarked by Lord Stowell [[Footnote 2](#)] that the form of bottomry bonds is different in different countries, and so is their authority. In some countries they bind the owners; in others not; and where they do not, even though the terms of the bond should affect to bind the owners, that part would be insignificant; but it would not at all touch upon the efficiency of those parts, which have an acknowledged operation. In England and America, the established doctrine is that the owners are not personally bound except to the extent of the fund pledged which has come into their hands. [[Footnote 3](#)] To this extent, indeed, they may correctly be said to be personally bound, for they cannot subtract the fund and refuse to apply it to discharge the debt. But in that case, the proceeding against them is rather in the character of possessors of the thing pledged than strictly as owners. In the present case, the value of the ship, the only fund out of which payment can be made, falls far short of a full payment of the amount due upon the bottomry bond. But this is the misfortune of the lender, and not the fault of the owners. They are not to be made personally responsible for the act of the master because the fund has turned out to be inadequate, since, by our law, he had no authority by a bottomry bond to pledge the ship, and also the personal responsibility of the owners. The consequence is that the loss, ultra the amount of the fund pledged, must be borne by the libellant.

But as the owners have had the full benefit of the bond under the appraisalment and delivery during this protracted controversy,

Page 33 U. S. 555

it is but reasonable that they should be responsible for interest upon the appraised value from the time when the delivery upon the appraisalment took place.

The view which has been thus taken of the present case renders it wholly unnecessary to consider whether a decree *in personam* could be made by the

circuit court upon a libel and proceedings instituted *in rem*. That and the other questions respecting the exercise of the admiralty powers of the court may well be left for decision when they shall constitute the very points in judgment.

The decree of the circuit court must be

Reversed, and a decree will be entered conformable to the opinion of this Court to be carried into effect by that court.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland and was argued by counsel, on consideration whereof it is declared by this Court that the bottomry bond in the case stated is and ought to be held valid for the sum of \$2,900, being the amount ascertained by the second and last report of the commissioners to be due to the libellant for expenditures and advances absolutely necessary and made in the course of the usual employment of the said ship *Virgin*, and also for the additional sum of ten percent, the maritime interest agreed on, and payable by the terms of the said bottomry bond, amounting, in the whole, to the sum of \$3,190, and that the said libellant is entitled to the said last mentioned sum, with interest thereon at the rate of six percent from the commencement of the present suit to the time when the decree of this Court shall be carried into effect by the circuit court. And it is hereby ordered, adjudged, and decreed by this Court accordingly. And it is hereby further ordered, adjudged, and decreed that the decrees of the district and circuit courts, so far as they differ from this present decree be, and hereby are, reversed accordingly. And this Court, further proceeding to render such decree as the circuit court ought to have rendered in the premises, it is further ordered, adjudged, and decreed that the said claimant, Graf, do

Page 33 U. S. 556

forthwith pay into the said circuit court the sum of \$1,800, being the amount of the appraised value of the said ship *Virgin*, delivered to him on stipulation as in the proceedings mentioned, together with interest thereon, at the rate of six percent, from 24 March, 1824, when the same was delivered to him on stipulation as

aforesaid, unto the day when the same sum shall be so paid into the circuit court, together with the costs of the district and circuit courts, and unless he shall do so within ten days after the said circuit court shall require the same to be done, that execution do issue in due form of law upon the stipulation aforesaid, against all the parties thereto. And upon the payment of such sums, then that the claimants, as owners of the said ship *Virgin*, be and hereby are forever exonerated from all other and further payment in the premises. And it is further ordered, adjudged, and decreed that this cause be remanded to the said circuit court with directions to carry this decree forthwith into effect.

[[Footnote 1](#)]

La Ysabel, 1 Dodson 273, 276.

[[Footnote 2](#)]

The Nelson, 1 Hag.Adm. 176.

[[Footnote 3](#)]

The Tartar, 1 Hag.Adm. 1, 13; *The Nelson*, 1 Hag.Adm. 169, 176.