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The Kimball

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Court : US Supreme Court

Decided On : 1865

Appeal No. : 70 U.S. 37

Appellant : The Kimball

Judgement :

The Kimball - 70 U.S. 37 (1865)
U.S. Supreme Court The Kimball, 70 U.S. 3 Wall. 37 37 (1865)

The Kimball

70 U.S. (3 Wall.) 37

ERROR TO THE CIRCUIT

COURT OF MASSACHUSETTS

SYLLABUS

1. Stipulations in a charter party requiring the delivery of the cargo within reach of the ship's tackle and providing that the balance of the charter money remaining unpaid on the termination of the homeward voyage shall be "payable, one-half in five, and one-half in ten days after discharge" of the cargo, are not inconsistent with the right of the owner to retain the cargo for the preservation of his lien.

2. A clause in a charter party by which the owner binds the vessel, and the charterers bind the cargo, for the performance of their respective covenants is sufficient to repel doubt arising upon the construction of other stipulations not plainly controlling them as to whether the lien for freight was intended to be waived by the parties.

3. By the general commercial, law a promissory note does not extinguish the debt for which it is given unless such be the express agreement of the parties; it only operates to extend until its maturity the period for the payment of the debt. The creditor may return the note when dishonored and proceed upon the original debt. The acceptance of the note is considered as accompanied with the condition of its payment. And although in Massachusetts the rule is different, and the presumption of law there is that a promissory note extinguishes the debt for which it is given, yet there the presumption may be repelled by evidence that such was not the intention of the parties, and this evidence may arise from the general nature of the transaction as well as from direct testimony to the fact.

4. Upon this ground, it is not to be presumed that the owner of a ship, having a lien upon a cargo for the payment of the freight, intended to waive his lien by taking the notes of the charterers drawn so as to he payable at the time of the expected arrival of the ship in port. The notes being unpaid, he may return them and enforce his lien.

The owner of the *Kimball* chartered her, in July, 1856, to a Boston firm for a round voyage from New York to Melbourne, Calcutta, and Boston. The charter party, in most of its provisions, was in the usual form. A portion of the charter money was to be paid, and was paid, before or

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during the voyage; "balance," the instrument proceeded, "payable, one-half in five and one-half in ten days, *after discharge of homeward cargo.* "

The charter party contained also a clause that the cargo should "be received and *delivered within reach of the ship's tackles at the ports of lading and discharging,* "

and concluded with the not unusual provision that for the performance of its covenants the parties bound themselves -- the party of the first part, the vessel, her freight, tackle, and appurtenances; the party of the second, the freight and merchandise to be laden aboard -- each to the other in the penal sum of $40,000.

While the ship was yet at sea, the charterers, at the owner's request, gave him their notes for $10,000. They were drawn so as to be payable near the time when it was expected that the ship would arrive, and it appeared by the testimony of the broker who had been concerned in the matter that they were given for the accommodation of the owner and were to be held over or renewed in case they fell due before the ship reached home. The owner, in a receipt for the notes, stated that he had received them *"on account of the charter,"* and that it was "understood that this amount was to be insured by the charterers and charged to the owners of the ship." The owner used the notes, and obtained money on one of them at a bank where he had an account. The charterers effected insurance on the $10,000 in pursuance of the agreement. The vessel arrived about five weeks before the notes by their terms fell due.

Shortly before the vessel arrived home, and before the notes fell due, the charterers failed. The owner immediately tendered them back their notes, but they would not receive them.

By the terms of the charter party, the cargo was to be deliverable to the consignees, "they paying freight as per charter party," and after the arrival of the vessel, the owners, asserting a lien on the cargo for the unpaid money and refusing to credit as payment on account the notes for $10,000, filed a libel in the District Court for Massachusetts to enforce the lien. This libel was filed on the 18th March, 1858, the

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notes, which were produced and tendered in court, having fallen due on the 3d preceding. On appeal to this Court from the circuit court, where the matter went on appeal from the district court, two questions arose.

1. Whether the ordinary lien of the shipowner was displaced by anything in the charter party.

2. Whether the notes of the charterers were to be considered as payment.

The circuit court, reversing the district court, had held negatively on both points.

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MR. JUSTICE FIELD delivered the opinion of the Court:

Two questions are presented for determination in this case: first whether the lien of the owner of the ship upon the cargo for the freight was waived or displaced by the stipulations of the charter party, and second whether the notes given for a portion of the charter money constituted payment of the same.

It is admitted that the lien of the owner of a ship upon its cargo for freight is favored by the courts, and will not be displaced so long as the shipowner retains possession of the cargo except by express contract or by stipulations in the charter party inconsistent with its exercise. The position of the appellants is that there are such inconsistent stipulations in the charter party in this case, and two clauses are mentioned in support of this position -- the clause requiring the delivery of the cargo within reach of the ship's tackle and the clause providing that the balance of the charter money remaining unpaid on the termination of the homeward voyage shall be "payable one-half in five and one-half in ten days after discharge" of the cargo.

There is nothing in these provisions inconsistent with the right of the owner to retain the cargo for the preservation of his lien. The first clause only designates the place where the delivery must be had, which in this case is the wharf at which the ship may be lying. The second clause only

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prescribes the period in which payment must be made after the discharge of the cargo. The discharge mentioned does not import a delivery of the cargo; it only imports its unlading from the ship. Such is the obvious meaning of the term, and so it had been judicially held. [Footnote 1] The clause was intended for the benefit of the charterers. It gives them ample time to examine the goods and ascertain their condition and decide whether they will take them and pay the freight or decline to receive them. They can waive it and take the cargo short of the period designated, if it be ready for delivery.

The cases cited by the appellants do not support their position. In *Foster v. Colby,* [Footnote 2] the charter party provided that the remainder due for freight should be paid "in cash two months from the vessel's report inwards at London or Liverpool, and after right delivery of the cargo." The stipulation for the payment *after* the delivery of the cargo was inconsistent with the existence of a lien. In *Alsager v. St. Katherine Dock Co.,* [Footnote 3] the charter party contained two clauses, one providing for the delivery of the cargo on payment of the freight at a stipulated price and the other providing for the payment of the freight "two months after the vessel's inward report at the custom house." The court reconciled these clauses by annexing to the first the qualification as to the time of payment contained in the second, and read them together as requiring payment two months after delivery. The payment being thus considered to be irrespective of the delivery, it followed that no lien existed.

There is no doubt that a credit for the freight may be given for so great a period as to justify, in the absence of any provision for the delivery of the cargo, the inference that the shipowner intended to waive his right to a lien and to look solely to the personal responsibility of the charterers. It is sufficient, however, that there is no such credit given in the present case. Here the period allowed is only a reasonable one for examining the condition of the cargo.

But if there were any doubt as to the construction of the provision for the credit, it is dispelled by the concluding clause of the charter party. By that clause, the owner binds the vessel, and the charterers bind the cargo for the performance of all their respective covenants, of which the payment of the charter money is one. Though the law, in the absence of any stipulations on the subject, ordinarily implies this mutual security in every contract of affreightment, yet its distinct statement in the charter party shows that the attention of the parties was called to it, and is an important circumstance to be considered in the construction of other stipulations of the instrument respecting the payment of the freight.

In the case of the *Schooner Volunteer,* [Footnote 4] Mr. Justice Story had occasion to consider the effect of a similar clause in a charter party. In that case, the charterers had agreed to pay for the freight "within ten days after the return of the vessel to Boston" or in case of loss after she was last heard from, and the question was whether the allowance of the ten days for the payment of the fright amounted to a waiver of the lien. The learned judge held that it did not, and in this connection considered the effect of the clause named. After an extended examination of the authorities, he came to the conclusion that it contained an express contract for a lien, and if it did not, still that it contained enough to repel any notion that the delivery of the goods should precede the payment of the freight or that the lien of the maritime law for freight was intended to be waived by the parties.

The second question for determination is whether the notes given for a portion of the charter money constituted payment of the same.

The notes were given before the termination of the voyage, and consequently before the balance of the charter money became due. Treating them as an advance of a portion of the freight, they could be recovered back, or their amount, if paid, if the vessel did not arrive. Freight being

the compensation for the carriage of goods, if paid in advance, is in all cases, unless there is a special agreement to the contrary, to be refunded if from any cause not attributable to the shipper the goods be not carried. [Footnote 5] And there was no such special agreement in this case. The notes were drawn so as to mature near the time of the anticipated arrival of the ship, and according to the statement of the broker who made the arrangement, they were given for the accommodation of the shipowner, and were to be held over or renewed in case they fell due before the arrival. This statement is consistent with the nature of the transaction, and is sufficient to repel any presumption, under the law of Massachusetts, that the notes were taken in discharge or payment of the claim for the charter money. The presumption which prevails in that state that a promissory note extinguishes the debt or claim for which it is given may be repelled by any circumstances showing that such was not the intention of the parties.

By the general commercial law as well of England as of the United States, a promissory note does not discharge the debt for which it is given unless such be the express agreement of the parties; it only operates to extend until its maturity the period for the payment of the debt. The creditor may return the note when dishonored and proceed upon the original debt. The acceptance of the note is considered as accompanied with the condition of its payment. Thus it was said as long ago as the time of Lord Holt that "a bill shall never go in discharge of a precedent debt except it be part of the contract that it should be so." [Footnote 6] Such has been the rule in England ever since, and the same rule prevails, with few exceptions, in the United States. The doctrine proceeds upon the obvious ground that nothing can be justly considered as payment in fact but that which is in truth such unless something else is expressly agreed to be received in its place. That a mere promise to

pay cannot of itself be regarded as an effective payment is manifest.

The rule in Massachusetts is an exception to the general law, but even there, as we have said, the presumption that the note was given in satisfaction of the debt

may be repelled and controlled by evidence that such was not the intention of the parties, and this evidence may arise from the general nature of the transaction as well as from direct testimony to the fact. Thus, in *Butts v. Dean,* [Footnote 7] where a note was given for a debt secured by the bond of a third person, it was held that it was not to be presumed that the creditor intended to relinquish his security, and, therefore, the note was not to be deemed payment for the original debt. And following this and other like authorities of that state, Mr. Justice Sprague of the United States district court held that a lien for materials furnished a vessel built in Massachusetts, a lien given in such a case by a law of that state, was not displaced or impaired by the creditors' taking the notes of the debtor. [Footnote 8]

And on like grounds we think that any presumption of a discharge of the claim of a shipowner and of his lien upon the cargo in this case by his taking the notes of the charterers is repelled and overthrown.

Decree affirmed.

[Footnote 1]

Certain Logs of Mahogany, 2 Sumner 589.

[Footnote 2]

3 Hurlstone & Norman 705.

[Footnote 3]

14 Meeson & Welsby 794.

[Footnote 4]

1 Sumner 551.

[Footnote 5]

Watson v. Duykinck, 3 Johnson 335; *Griggs v. Austin,* 3 Pickering 20; *Phelps v. Williamson,* 5 Sandford 598.

[Footnote 6]

Clark v. Mundel, 1 Salkeld 124.

[Footnote 7]

2 Metcalf 76.

[Footnote 8]

Page v. Hubbard, Sprague 338.

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