

1893

April 25.

QUEBEC ADMIRALTY DISTRICT.

HENRY B. CHRISTIAN AND GEORGE  
OWEN SMITH, TRADING UNDER THE  
STYLE AND FIRM OF J. O. SMITH  
& CO..... } PLAINTIFFS;

AGAINST

## THE BRIGANTINE "ST. JOSEPH."

*Maritime law—Bottomry bond, essentials of—Communication to owner of master's intention to hypothecate—Brokers' commissions.*

The hypothecation of a ship is only justified when it is done to secure amounts due for necessary repairs to enable the ship to proceed with her voyage, or for necessaries or provisions required for the same purpose. Furthermore, in order to enable the creditor to benefit by the hypothecation, the following elements must be present in the transaction, (a) the repairs must be performed and the necessaries or provisions supplied on the express condition that the claim is to be secured by a bond; (b) there must be a total absence of personal credit on the part of the owner or master; (c) before pledging the ship, the master should, if it was at all possible to do so, have communicated with the owner, and (d) there must not be sufficient cash or credit available to the master to pay the amount of the indebtedness so incurred.

2. A master gave a bottomry bond on his ship for repairs executed some time previous to the voyage he was then prosecuting, and which were done entirely on his personal credit at the time and upon the distinct understanding that he would not be required to pay for them until his return from another voyage. It also appeared that the master had not communicated with the owners before entering into the bond, although means of communication were open to him; and it was, moreover, shown that the ship had enough credit at the place where the bond was made to pay the whole amount of the claim.

*Held,* That the bond was void.

3. A ship-broker's commissions cannot be the subject of a bottomry bond.

## ACTION on a bottomry bond.

The facts of the case are stated in the judgment.

March 21st, 1893.

The case was heard before the Honourable George Irvine, Local Judge in Admiralty for the District of Quebec.

*Pentland*, Q.C. for plaintiffs;

*A. H. Cook* for the ship.

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IRVINE, L. J., now (April 25, 1893) delivered judgment.

This action was brought in the Exchequer Court of Canada on the 31st July, 1891, against the brigantine "St. Joseph," Auguste Langelier, master, then lying in the Port of Montreal, to enforce payment of a bottomry bond given by the master to the plaintiffs at Port Elizabeth, Algoa Bay, on the coast of Africa, on the 18th April, 1891, for £298. 3s. 10d. Mr. John Arthur Maguire appears as sole owner of the vessel proceeded against and pleads, in effect, the nullity of the bond for various reasons set forth in the plea.

It is important to consider the facts of this case so far as they have reference to the circumstances under which this bond was given and which involve the history of the movements of the ship during the two years preceding the date of the bond. The original owner of this vessel, as far as the record shows, was one Gamache, of Cap St. Ignace, P.Q., who sold her to a man named Marcotte, the latter, however, never registered his purchase at the Custom-house, and Marcotte having got into pecuniary difficulties in 1887, Gamache resumed his ownership and the possession of the vessel.

In 1889 Gamache sold the vessel to Maguire, the present owner. She was at this time in Algoa Bay in South Africa, and Langelier was the master. The ship had been occupied for some time in making coasting

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voyages on the East coast of South Africa, and the plaintiffs had been acting as agents or brokers for the master at Port Elizabeth.

Maguire appears not to have been satisfied with the master's management of the affairs of the ship, and ordered him to leave the coast of Africa and gave him directions to sell the ship under the instructions of Maguire's agents and to return himself to Canada; or in any case, in the event of not being able to arrange for a satisfactory sale of the ship, to bring her to America at once.

Langelier was not able to comply with these instructions as he had chartered the vessel for a voyage to Mauritius under rather favourable circumstances, and his contract had to be carried out. He accordingly sailed on this voyage and arrived at Mauritius in the beginning of October, 1890. On this voyage the foremast was carried away, and it became necessary on his arrival to have a new mast put in. This was done by the firm of Black, Smith & Co., and their charge for the work amounted to 2,300 rupees, equal to £184 sterling. The arrangement between the shipwrights and the master was that they were to be paid on the return of the master with his ship on the next voyage,—he then intending to obtain a new charter to Mauritius on his return to Algoa Bay. It appears that the ship did not return to Mauritius, but made one or two coasting voyages and finally obtained, in April, 1891, a charter to carry wool to Montreal. In the meantime Maguire, being apparently anxious to get his ship more under his own control and not to allow the master to be deterred from returning for want of funds, opened a credit with the firm of Blythe & Co., at Mauritius for £300—this was done through Blythe's London house and the credit had been notified before or about the time that the foremast was being put into the ship.

The counsel for the plaintiffs at the hearing threw some doubt on the fact of Maguire having established this credit, but there is no evidence to contradict it. Maguire swears that while in London he made arrangements for this credit, and Langelier, although not very clear in his statement, seems to have had a conversation with Blythe on the subject, and states that if he had chosen to do so he would have had no difficulty in obtaining the amount necessary to pay the bill for the foremast. He expected, however, to have enough out of the freight for the next voyage to meet this amount without its being necessary to draw on the owner, which he seemed very reluctant to do. The ship not returning to Mauritius, Black, Smith & Co. became naturally anxious about the payment of their claim, and sent authority to the plaintiffs to collect it. Black, Smith & Co. had made no stipulation for a bottomry bond, but had simply given credit to the master who had promised to pay them on his return voyage and they had been satisfied with his promise.

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The position of the case respecting the shipwrights' claim is explained in the plaintiffs' letter to them on the 7th March, 1891, and their letter to Maguire of the 30th March.

The following are copies of the letters referred to:—

PORT ELIZABETH, 7th March, '91.

Messrs. BLACK, SMITH & Co.,  
 MAURITIUS.

DEAR SIRS,—We came duly in possession of yours 10th February, per "Dunrobin Castle." The captain of "St. Joseph" duly informed us on his arrival from Mauritius last time that he was indebted to you for a new mast and he confirms your account of 2,300 rupees. The "St. Joseph" would have returned to your island before this if we could have got a cargo the freight on which would have sufficed to pay your account, but he has not yet been able to do so and we have employed him on the coast here so as to pay expenses until he could get a cargo of guano which he may shortly succeed in, when he will go your way. Meantime we have at his credit about £70 the result of his last coasting trip which he has authorized us to hold against your account.

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The "St. Joseph" has now gone to East London and will return to this in a few days when we shall decide what to do further. Capt. Langelier has shown us letters from his owner naming that Blythe Bros. are his agents and hold his power to sell and failing a sale the vessel will proceed home, that is to Canada, and any indebtedness of the vessel will be met by Messrs. Blythe. Under all these circumstances we have not considered it advisable to adopt any extreme measures but to await the working out your account which we hope to see effected shortly. If we can get a cargo of guano for him to Mauritius this will at once clear your account.

Yours faithfully,  
 (Sgd.) J. O. SMITH & Co.

PORT ELIZABETH, 30th March, 1891.

Messrs. MAGUIRE & Co.,  
 Quebec.

DEAR SIRS,—We last addressed you on the 2nd February, since which Captain Langelier has shown us your letter to him, wishing him to proceed on his way homeward, and we had hoped to give him another cargo of guano to Mauritius, which would have enabled him to pay his indebtedness there for a new mast. A cargo in grease wool offering for Montreal, Capt. Langelier determined to accept the offer of 9s. 6d. in full per bale, as per copy of charter-party enclosed, as she would have to proceed to West Indies in ballast. You will note that the charterers are to advance £100 on account of freight, this, with a balance we had in hand from her last voyage to East London, will suffice to pay the Mauritius account; but the master will have to draw on you for disbursements to enable him to make this voyage, which we shall advance and which we do on the faith of your having placed credit with Messrs. ———, Mauritius, to enable him to proceed home. The "St. Joseph" will be fully loaded this week, and we will estimate it to carry 750 bales.

Had this vessel been properly found and in good order when she came into our hands, and not needed the heavy outlay to keep her in sea-going trim, she would have done well here, as she has earned money and would be a useful and profitable vessel on the coast here, with occasional runs to Mauritius, if in the hands of some one who had the authority to control expenditure and positively direct her movements.

Yours faithfully,  
 (Sgd.,) J. O. SMITH & CO.

The plaintiffs then remitted the amount of the cost of the foremast to Mauritius, gave the master £75 in cash and paid some other small disbursements

for the ship, which, with the amount of their commissions, make the sum mentioned in the bond.

The question to be decided in this case is whether, under the circumstances as above detailed, the master had any legal justification for giving the bond of hypothecation. It must be observed that I have only jurisdiction in this matter if a valid bottomry bond has been given. I have nothing to decide as to the question of whether or not there exists a just debt due to the plaintiffs by the owner of the vessel, nor is it my duty to give any opinion on that subject. The principles which govern this branch of maritime law are well known and have been defined by numerous decisions of the Admiralty courts in England and in this country. The hypothecation is only justified when created to secure amounts due for necessary repairs given to the ship to enable her to proceed on her voyage, or for necessaries or provisions required for the same purpose, and which must be furnished on the express condition that the amount is to be secured by the bond. There must be also a total absence of personal credit on the part of the owner and master, and before binding the ship in this way the master is bound, where it is at all possible to do so, to communicate with the owner. Applying these principles to this case, we have first the amount of 2,300 rupees as the cost of the foremast, for this expenditure no bond was asked by the shipwrights, but the work was distinctly done on the personal credit of the master, who was not to be required to pay for it until his return after another voyage. Moreover, it was not a necessary repair made to enable the vessel to proceed on her last contemplated voyage, indeed she had made at least one, if not two, voyages since such repairs were made.

I find that nothing can be more clear than that, so far as respects the amount due for the repairs in

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Mauritius, there was no legal case to justify bottomry ; but as a bottomry bond may be bad for a part, and good for the remainder, it is necessary to inquire into and decide on the balance of the amount intended to be secured by the bond. I hold that the commissions, although possibly quite fairly due to the plaintiffs, could not be the subject of bottomry.

Moreover, there are two additional grounds of nullity which I consider conclusive. The master and owner had enough credit to pay the whole amount of the claim. The plaintiffs, on the 30th March writing to Maguire, stated that they were willing to advance the required amount on the faith of his having placed a credit in Mauritius to enable the master to return home.

I am further of the opinion that there is not sufficient excuse for not having communicated with the owner before entering into the bond. The plaintiffs say it was impossible. I consider that this is not established, the master had a code and the cost of telegraphing is only \$2.40 per word.

I am, on the whole, of opinion that the bond is null, and I dismiss the action with costs.

*Judgment accordingly.*

Solicitors for plaintiffs : *Caron, Pentland & Stuart.*

Solicitors for the ship : *W. & A. H. Cook.*

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