

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Smith v. The Bank of New South Wales ("The Staffordshire") from the Admiralty Court of Ireland; delivered 13th February 1872.*

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Present:

SIR JAMES W. COLVILLE.  
LORD JUSTICE MELLISH.  
SIR MONTAGUE E. SMITH.  
SIR ROBERT P. COLLIER.

THIS is an Appeal from a Decree of the Court of Admiralty in Ireland, which decreed in favour of a bottomry bond. There is a very elaborate Judgment of the learned Judge of the Court below, and their Lordships do not think it necessary to go minutely into the facts of the case, as far as regards those parts of the case in which they thoroughly agree with the learned Judge in the Court below.

The general facts were that the ship "The Staffordshire," which was the ship bound by the bottomry bond, had been mortgaged to a gentleman of the name of Gumm, and the freight to be earned on the voyage to Melbourne and round from Melbourne to Callao and back, taking a cargo of guano from the Chinchas to England, had also been pledged by a letter to Mr. Gumm, and Mr. Gumm was to have the appointment of the different persons to whom the ship was to be consigned, the different ship agents, so that he might have a control over the freight. He consigned it to Dickson, Williams, and Co. of Melbourne. The part owner Mr. Smith (Barrett the master being also a part owner) wrote confirming that appointment, but as there was a considerable sum, more than 2,000*l.*, to be received

at Melbourne for the freight on the outward voyage, it was evidently anticipated at first by all parties that that sum would be sufficient to pay the disbursements in Melbourne. The ship wanted some repairs, and the repairs were commenced; but in the letters which were first written, it appeared clearly to have been anticipated that the freight would have been sufficient. Then the repairs proceeded, and in August the parties were acquainted that a considerably larger sum was being expended than was anticipated, as much as 2,000*l.* Even at the time when they wrote by the mail in August, they do not appear to have made up their minds that any bottomry was necessary; but when the repairs of the ship were finished at the beginning of September, and they amounted to upwards of 3,000*l.*, then the agents said that they really could not pay off that large sum, which the persons who had repaired the ship were entitled to receive; in respect of which, they threatened to put the ship into the Court of Admiralty; they could not pay off that large sum, unless they got a security on bottomry, and on that the bottomry bond was given.

The first question to be considered is, whether that bottomry bond was generally good with reference to the rules which are well established in the Courts respecting bottomry. First it was said that it was not sufficiently proved, that it was given for necessaries, that a large sum appeared to have been expended in repairing the ship. It was said that the ship had been entirely rebuilt, and that you can only expend in bottomry a sufficient sum for the repairs that were necessary for the particular voyage. When it is considered that the voyage is to go to Callao, and then to the Chincha Islands, and take a cargo of guano for England, which is notoriously one of the heaviest cargoes that can be obtained and carried by a ship, it is very difficult to suppose that more repairs could have been effected than what would be necessary for the purpose of the voyage.

But however that might be, it is clear that a very large portion, if not the whole of that sum must have been for necessary repairs. The question of amount is to be referred to the Registrar, and therefore it is clear the bond cannot be held bad, because it was not taken for necessary expenses.

It is next said that there was not sufficient evidence the money could not have been borrowed on the personal credit either of Gumm or the shipowner Smith, and that there was not sufficient evidence that the master attempted to borrow money on their personal credit. The answer to that appears to be, that there was no power in anybody to pledge the personal credit of Mr. Gumm. He was not the owner, only the mortgagee of the ship. He had, no doubt, put the ship into the hands of Dickson, Williams, and Co., the ship agents, but it appears very doubtful whether his credit would have been pledged even to them, and certainly there is no evidence that he gave Dickson, Williams, and Co. any authority to borrow money on his credit from anybody else. Therefore it is wholly immaterial that Mr. Gumm was a person in good credit, because money could not be borrowed on his credit.

As respects Smith, the shipowner, there is not the slightest reason to suppose that he was a person in any credit at Melbourne, and it really appears to their Lordships it would have been perfectly idle to advertise for anybody to lend money on his personal credit, because it was plain that nobody would lend money on his personal credit.

It was next said that the master ought to have communicated to Mr. Gumm and Mr. Smith in England, before he borrowed the money on bottomry. The answer to that appears to be, that there was really no opportunity of doing it. They did not know certainly before the mail went out in August that it would be necessary to borrow money on bottomry, and it appears very doubtful whether they really knew it then, and whether they fairly knew it before September. But even

if it be assumed that they knew it in August, there was no direct communication by telegraph. The message would have had to be sent to Galle by steamer, and by telegraph from Galle to England. Sending in that doubtful way, first writing a letter to the people to frame the telegram at Galle, and then to send it by telegraph, it would have been very difficult to give any thorough account of the state of things; and even if it could be done, it would have taken certainly more than two, and probably full three months before the answer could have been got back.

Under the circumstances it appears to their Lordships that it was not necessary; it would have been, in fact, very unadvisable to have kept the ship at Melbourne all that time, more particularly as Barrett was himself a part owner, and therefore, quite as able to judge as Smith was, what was desirable to be done; and more particularly also it is to be taken into account, that after all the parties were not pledged to the bottomry bond because a bill was drawn on Mr. Gumm, and, which is very material, in another part of the case, it was agreed at the time when the bottomry bond was given, that if that bill was accepted and paid when it became due, then the bottomry was not to be enforced.

But then it was urged very strongly by Mr. Cohen that the law looks with great suspicion upon a bottomry bond given in favour of the ship's agents, and that on that account, even although this might have been good if it had been given to some other person, it was not good considering it was given to the ship's agents; and some passages were cited from Lord Stowell's Judgment in the case of "The Hero," in which he says with respect to an agent, "Cases may  
 " possibly arise in which an agent may be jus-  
 " tified in so doing. It can be no part of his  
 " duty to advance money without a fair expect-  
 " tation of being re-imbursed, and if he finds it  
 " unsafe to extend credit to his employers beyond  
 " certain reasonable limits, he may then surely  
 " be at liberty to hold hard, and to say, 'I give

“ up the character of agent,’ and as any other  
 “ merchant might, to lend his money upon bond  
 “ to secure its payment with maritime interest.  
 “ If in such a case he gives fair notice that he  
 “ will not make any further advances as agent,  
 “ and affords the master an opportunity of trying  
 “ to get money elsewhere, and the master is  
 “ unable to do so, but is obliged to come back  
 “ to him for a supply, then he is fairly at liberty  
 “ like any other merchant to advance the money  
 “ on a security that is more satisfactory to him-  
 “ self.”

It appears to their Lordships that practically the agents in this case did really act and do everything that they were required to do as laid down by Lord Stowell, because they did give fair notice to the master that they would not make any further advance. They told the master, “This bill is so very large that we shall not be able ourselves to advance the money to pay it;” and they did give the master the opportunity of borrowing money elsewhere, which does not appear to mean as was argued, to borrow money upon bottomry elsewhere, but to borrow money elsewhere on the personal credit of the owners.

It is perfectly plain that the master could not borrow money on the personal credit of the owners. Then he comes back to the agents. The great reason why the law looks with suspicion on money advanced by the agent is, that the agent to some extent, at any rate in most cases, agrees that he will make some advances on the personal credit of the shipowner. The shipowner in ordinary cases has put the ship into his hands and he is dealing with him; but in the present case it would be very difficult to say that the agents, Messrs. Dickson, Williams, and Co., at Melbourne, agreed to advance one farthing on the credit of Smith, the shipowner, the ship really being put into their hands by Mr. Gumm, the mortgagee. They would have been quite willing apparently to advance money on the

credit of the mortgagee, Mr. Gumm, but then it was doubtful whether Mr. Gumm's credit was really pledged. As to Mr. Smith, they looked upon him as a person of no credit, and never intended or held out the least in the world that they would advance money to him.

It appears to their Lordships that under these circumstances it was a perfectly fair transaction for them to say to the master, "You must give us a bottomry bond; but you shall draw a bill on Mr. Gumm, who is a person in good credit, and who has put the ship into our hands, and who may be desirous to prevent the bottomry premium being incurred, and so his security on the ship being lessened, he may prefer to pay these expenses rather than to have his security lessened by the bottomry bond being enforced against the ship. Still draw a bill on him, and if he pays that bill well and good; then there will be no bottomry."

It appears to their Lordships that under the circumstances that was a perfectly fair mode of dealing on the part of the agents, and that it would be wrong to hold that the bottomry bond was bad on the ground that it was given to agents.

Neither does it appear that there was the least reason to suppose that anybody else would have advanced money on bottomry on the same conditions. Other parties very likely might have been found to advance money on bottomry for the voyage. They would have expected to have obtained their bottomry premium at all events if the ship arrived, and it is not likely that anybody else would have been content to draw a bill on Mr. Gumm and take the chance of that being paid, and say, if that is paid, then the bottomry bond is not to be enforced.

Therefore on this part of the case their Lordships agree with the Judgment of the learned Judge in the Court below, that the bottomry bond was originally perfectly valid.

The next, and a very important part of the

case is this :—It is said that the bills of exchange were never properly presented, and never properly dishonoured, and that the Court of Admiralty as a Court of Equity ought to prevent the bonds being enforced, and ought to decree that all that the parties are entitled to is to have the bills paid.

The circumstances on that part of the case were these :—The bill was drawn at 10 days sight on Mr. Gumm, and there appears to have been a reason why it was drawn on a few days sight, and why it was important that it should be accepted immediately, namely, that it was known that the voyage to Callao would probably not last very much longer than the time it would take for the bill to arrive in England, and that if the ship was to be seized and the bottomry bond was to be enforced at Callao, there would be very little time left after the bill arrived before it would be necessary to send out orders from England to seize the ship at Callao.

The bill arrived in England on the 1st of November, and, unfortunately, Mr. Gumm had died some weeks before, which has caused the whole difficulty in this part of the case. The bill had been sold to a bank in Melbourne, and the bottomry bond had been also deposited with the bank as a security for the payment of the bill, and the bill with the bond had been sent over to the bank's agents in London. The bill was sent to Mr. Gumm's office to be presented in the ordinary way, Mr. Currie, the manager of the bank, not being aware that Mr. Gumm was dead. When the person sent comes there he finds Mr. Ford, who had been the manager of the business during Mr. Gumm's lifetime. Mr. Gumm had been for some time apparently confined to his bed, and Mr. Ford had had the entire management of his business, and Mr. Ford is found there. The evidence of the different persons did not very accurately agree as to what took place. At any rate, Mr. Ford would not accept the bill, but he was the person

who first gave information that Mr. Gumm was dead, and that he had left some executors. They came a second time, and a third time, and Mr. Currie came himself, and then notice was given that one of the executors was abroad. He does not appear to have been told who the other executor was, neither did Mr. Currie ask. The bill certainly was not accepted, and Mr. Ford says that he had no authority to accept, and he says he did not lead them to believe that he dishonoured the bill on the part of the executors. Their Lordships cannot help thinking that there must have been an impression given to Mr. Currie that Mr. Ford did profess to act for the executors, and did tell him that the bill would not be accepted. He told them on one of the occasions that he repudiated the transaction altogether, and thought the bottomry was altogether invalid.

This having taken place, a notary is sent. The notary appears not to have been told that Mr. Gumm was dead, and therefore he merely presented the bill and caused it to be protested in the ordinary way. Then Mr. Hallett, one of the persons who had been named in the will of Mr. Gumm as executor, was living in London, and Mr. Ford communicated with him; therefore Mr. Hallett certainly had information that this bill had been presented. He referred them to the solicitors who had acted for Mr. Gumm, and were apparently acting for the executors. What precisely passed with the solicitor does not appear, but then communications were had by Mr. Ford with Mr. Smith, or persons acting for Mr. Smith, for the purpose of endeavouring to raise money for paying the bills, and Mr. Ford called on Mr. Currie on the 5th and left a letter which, whether he had authority from the executors or not, professed to be written by the authority of the executors, and asked that the bill should be presented again when it became due. But they did not hold out or make any promise that it would be paid. Then Mr.



Currie told them that the bill would be sent out on the 6th, which was the day when the French mail left, which would take the orders to Callao; and he told them that, unless the bill was paid that night, unless they produced the cash, he should send out the bond to Callao for the purpose of being enforced; and it appears to their Lordships that there was no distinct promise that the money should be paid prior to the time when the bond was sent out.

The main question to be decided really is, whether the bond was sent out too soon. After the bond had been sent out there were a variety of negotiations, and before the time when the 10 days and the days of grace would have elapsed, assuming the presentment to have been good, there was a promise that if the bond and the bills were given up the amount of the bills would be paid; but then, the bond having gone out that could not be done, and a claim was made for an indemnity that was refused; and further negotiations went on, and the result was that the parties never agreed.

The first question is, was the bill presented? Their Lordships think that it is hardly necessary in deciding this case to say whether the bill was presented, or that it would have been a good presentment of the bill for the purpose of giving notice of dishonour to prior parties to the bill. There appears to be very little authority indeed as to what is to be done to present a bill under these circumstances. It is laid down in Mr. Justice Byles' book on bills that if the drawee of a bill is dead the party ought to inquire for his personal representative. But in the present case no administration had been taken out, and no will had been proved. Then if a party who presents a bill is informed that there has been a will, and somebody named in the will as executor, but who has not taken out probate, who has not determined whether he will act or not, is he bound to present it to such a person who may or may not afterwards take out probate, or may or

may not afterwards turn out to be the executor? There is very great difficulty in that. There seems great difficulty in saying that a person would be bound to take the acceptance of anybody whose authority to give that acceptance, and whose authority as executor had not been recognized by probate being granted.

Their Lordships do not think it necessary to give a decisive opinion on that question, because they agree with the argument that they have heard that the real question here is, did the parties do under all the circumstances what was reasonable for the purpose of getting the bill accepted and paid? Their Lordships are of opinion that it is pretty clear that if the bill had been presented to Mr. Hallett, who was the only person named as executor in England, it would have had no effect; that he would have refused to accept it, and that presentment to him would not have really made any difference in the case. Look at what the position of Mr. Hallett was. Mr. Gumm was not liable for this amount. It would have been a very serious thing indeed for any executor to accept a bill drawn upon his testator for a debt for which his testator was not actually liable. Mr. Hallett was informed by Mr. Ford of the bill having been drawn and presented. He referred to his attorney, who afterwards appeared in some of the negotiations, and was present at them. If Mr. Hallett had really intended to accept it there was ample opportunity for them to have seen and informed Mr. Currie that the bill would have been accepted; but before the bond was sent out the executor never offered to accept, neither did anybody offer to accept for honour, nor did anybody offer to promise to pay; but all that was said was, "We desire that you should keep this bill for some more days, until in the ordinary course it becomes due, and then present it again." Was Mr. Currie bound to wait under these circumstances? Their Lordships think he was not, and for this reason: The time was very

material. It was known that even if they sent out by that mail it was very doubtful whether the bond would arrive out in time at Callao in order to stop the ship. If the ship left Callao the consequence would be that it would go to the Chinchas, take in a cargo of guano, and there would be all the risk of the voyage from the Chinchas to England; and, moreover, though possibly the parties did not know that such was the law, the bond having become due, and being forfeited seven days after the arrival of the ship at Callao; the law appears to be that the bottomry holders would have had no insurable interest to insure the bottomry bond on the subsequent voyage.

Under these circumstances it was very material that they should send out the bond by the first mail, and the other parties must have been, or at any rate ought to have been, aware of that.

Therefore, on the whole it appears to their Lordships that the bond was not sent out too early, that there was no violation of the agreement which Messrs. Dickson, Williams, and Company had made, at the time the bond and the bills of exchange were taken, that they would give the opportunity to Mr. Gumm of accepting and paying the bill before they would enforce the bond. No doubt it was a misfortune for which nobody was answerable, that Mr. Gumm happened to be dead. But still their Lordships think that the bill having arrived, and there being several days during which the bank could get neither acceptance nor payment before the next mail went out, they were justified in sending out orders by that mail with the bond, to have the bond enforced.

The next question to be decided is this: the bond was so drawn as to hypothecate any freight which might be earned between Callao and England, and though the bond was made payable at Callao, and it is objected that though the bond may be generally good, yet it is bad as

respects that freight. And their Lordships are of opinion that the bond does not validly hypothecate that freight, although it was admitted that the bond being bad in that respect does not make it entirely bad, but that it is still good as respects the ship. An ordinary bottomry bond beyond all question only pledges the ship, and sometimes the cargo and the freight to be earned on the voyage, which is to be accomplished before the bottomry bond becomes payable; and their Lordships have not been referred to any case in which freight to be earned on a subsequent voyage has been included in a bottomry bond. It was held in the "Jacob" that the subsequent freight under very peculiar circumstances might be liable, but there is no form of a bottomry bond produced which on the face of it professes to charge and hypothecate the subsequent freight; and their Lordships are of opinion that subsequent freight cannot be hypothecated, for this reason: That by the very nature of a bottomry bond the person who takes it is to become liable for the maritime risk, and therefore nothing can be hypothecated, except something which is in danger of perishing by maritime risk during the time that the bond is running. But here that freight was not begun to be earned, the cargo was not loaded on board until after the bond was forfeited, and when no maritime risk was being run by the person who had advanced his money on bottomry, because the bond being forfeited he already had got the personal security of the master. And, moreover, if there can be a valid pledge of the subsequent freight it does not appear why there should not be a valid pledge of the freight for ever and ever, until the bottomry holder chooses to seize the ship. It is difficult to see where the end of it would be.

The only case which has been cited was the case of the "Jacob;" it is unnecessary to say whether that was rightly decided, but it hardly appears to be an authority on the question, for

there the subsequent freight had not been hypothecated; but Lord Stowell came to the conclusion that by deviating from the proper voyage, and from going away too early, the ship-owner had wrongfully deprived the bottomry holder of the freight which really was pledged, namely, the freight to be earned in the current voyage, and that therefore it was right, the ship having got away before it could be seized, to hold that the subsequent freight could be seized. Their Lordships give no opinion whether that was right or wrong, but that case does not appear to be an authority for giving a pledge of the subsequent freight. Their Lordships have come to the conclusion that there was no valid pledge of the subsequent freight.

The question then arises, what ought to be done? Both ship and freight were seized when the ship arrived at Cork. Bail was given generally, and the ship was released, and earned the freight subsequently. Then it was said that because the bail had been given generally, and ship and freight had been released, there could be no subsequent inquiry into the value of the ship and freight; but practically the parties by giving bail must be considered to have agreed that if the bond was held to be valid in any part then the bail would pay the amount of the bottomry bond, which was the amount for which they had given bail. Their Lordships find that that is not the rule in the Admiralty, but that after bail has been given, on a proper case being made out, the Court of Admiralty will go into the question whether the *res* which was seized,—the whole of the property which was attached,—was of more or less value than the amount for which bail was given, and if it is found that it is of less value, then the parties will only be obliged to pay the amount of that. That appears to have been decided by Dr. Lushington in the case of “The Duchess of Brabant.” That was a case of collision.

The note is, “The bail is only liable to the extent of the value of the ship and freight, and

“ not for the full amount of the damage done,  
“ even although, as in the present case, bail may  
“ have been given for a sum beyond the value  
“ of the ship and freight;” and there it was  
decided that on a proper case being made out, a  
subsequent inquiry may be made into the value  
of the ship and freight, notwithstanding bail has  
been given for a larger sum. If that may be so  
when both ship and freight are held to be liable,  
*a fortiori*, their Lordships are of opinion that it  
would be the case if the Court comes to the de-  
cision that though the ship is liable the freight  
is not; and, therefore, they are of opinion that the  
decree of the Court below ought to be varied by  
declaring that the bottomry bond was not a valid  
hypothecation of the freight earned by the vessel  
on the voyage from Callao to England, and ope-  
rated only as a hypothecation of the ship, and by  
referring it to the Registrar to ascertain what  
was the value of the ship when released.  
Subject to that variation, the decree of the  
Court below will be affirmed, but the decree  
having been varied in a substantial part of the  
case, their Lordships will humbly report to Her  
Majesty that it should be affirmed with that  
variation, but without costs to either side.

Their Lordships understand that it will be for  
the convenience of both parties that the cause  
should be retained in this Court, and that the  
questions remaining to be determined should  
come before Her Majesty's Registrar in Maritime  
Causes. This course may therefore be pursued.