

NEW BRUNSWICK ADMIRALTY DISTRICT.

Between

JOSEPH F. MICHADO.....PLAINTIFF;

AND

THE SHIP "HATTIE & LOTTIE," }
MANUEL VIEIRA AND JOAS Z. } DEFENDANTS.
DA SYLVA..... }

1904
Nov. 25.

Shipping—Foreign vessel—Interference with rights acquired under foreign judgment—Comity of Courts—Account between co-owners.

The ship which was the subject of the proceedings herein was registered in an American port and owned by American citizens resident in the United States. The defendant S. advanced to the then captain of the ship at Brava, Cape de Verde Islands, the sum of \$1,400 for necessaries, and took from the captain and V., a part-owner, what purported to be a bottomry bond, and a further instrument, purporting to be a charter-party, as security for such advance. By the last mentioned instrument the control and possession of the ship was handed over to S. until the profits of the employment of the ship repaid the loan. S. thereupon took over the ship and brought her to the United States port, where she was arrested at the suit of R. for an amount due him for necessaries supplied to the ship on a previous voyage. By the judgment of a competent court in the United States the rights of S., under the instrument mentioned, were held to give him priority over the claim of R. and he was confirmed in his possession of the ship. The plaintiff herein was the owner of 17/64 shares of the ship and had notice of the American suit between S. and R., and subsequently took part in some negotiations for the settlement of the claims of both. By instituting proceedings on the Admiralty side of the Exchequer Court the plaintiff sought to obtain possession of the vessel while in a Canadian port, together with certain relief against the defendant V.

Held, that as by the proceedings taken in this court the plaintiff sought to derogate from rights obtained by one of the parties under the judgment of a competent court in the United States, the action should be dismissed. *Castrique v. Imrie* (L. R. 4 H. L. 414) referred to.

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Semble: In so far as the action sought to obtain an account between the parties who were co-owners, the court would have directed an account if it had been shown that S. had received from the earnings of the vessel sufficient to repay him the amount of his loan.

THIS was an action for possession of a ship and an account between co-owners.

The plaintiff, as owner of 17/64 shares of the ship *Hattie and Lottie*, of the port of New Bedford, in the State of Massachusetts, United States of America, and on behalf of other owners, namely: Frank Magellan, owner of 9/64 shares: Antonio J. Olivera, owner of 8/64 shares of said ship or vessel, claimed possession of the said ship against Manuel F. Vieira, owner of 17/64 shares of the same ship and against Joas Z. da Sylva, the master of said vessel; and the plaintiff asked to have an account taken and for costs. The ship was an American ship and the litigating parties were American citizens. In April, 1902, the vessel was at Brava, Cape de Verde Islands, and being in need of funds, the then master, John F. Pina and Manuel F. Vieira, a part owner and at the time employed on the said vessel, borrowed the sum of \$1,400 from the said Joas Z. da Sylva and gave as security for the repayment of the said money a writing claimed to be a bottomry bond which said writing is in the words and figures follows:—

“Know all men by these presents: That we, Manuel F. Vieira, part owner of the American schooner *Hattie and Lottie*, of New Bedford, Mass., United States of America, and John F. Pina, of Providence, master of the said *Hattie and Lottie*, of the burden of ninety-six tons or thereabouts, now lying in the port of Furna, in the Island of Brava, are held and firmly bound unto Joas Zurich da Sylva in the sum of one thousand and four hundred dollars, lawful money of the United States of America, to be paid to the said Joas Zurich

da Sylva; for which payment well and truly to be made we bind ourselves and also the said vessel, her tackle, apparel and furniture, firmly by these presents. Sealed with our seal at Brava, Cape Verde Islands, this twenty-fourth day of April, in the year of our Lord one thousand nine hundred. Whereas the above bounden Manuel F. Vieira and John F. Pina have been obliged to take up and borrow and have received of the said Joas Zurich da Sylva, for the use of the said vessel and for the purpose of fitting the same for the sea, the sum of one thousand and four hundred dollars, lawful money of the United States of America, which sum is to be and remain as a lien and bottomry on said vessel, her tackle, apparel and furniture."

"In consideration whereof, all risks of the sea, rivers enemies, fires, pirates, &c., are to be on account of the said *Hattie and Lottie*. And for the better security of the said sum the owner and master, do by these presents, hypothecate and sign over to the said Joas Zurich da Sylva, the said vessel, her tackle, apparel and furniture.

"And it is hereby declared that the said vessel *Hattie and Lottie* is thus hypothecated and assigned over for the security of the money so borrowed and taken up as aforesaid, and shall be delivered for no other use or purpose whatever, until this bond is first paid as hereby agreed. Now the condition of this obligation is such that if the above bounden Manuel F. Vieira and John F. Pina shall well and truly pay, or cause to be paid, unto the said Joas Zurich da Sylva the just and full sum of one thousand and four hundred dollars lawful money as aforesaid, being the sum borrowed; and also at or before the expiration of the time of payment which will be, when the said vessel earns the said amount at the rate of what it will be agreed on

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the charter of party between the owner and Joas Zurich da Sylva, as freighter."

"It is also understood and agreed that the said vessel shall be in charge of the freighter until the whole amount of the bottomry bond is paid. The master has to-day delivered the said vessel to the freighter. Joas Zurich da Sylva, therefore, holds no responsibility hereafter, on accounts to be settled."

"Signed, sealed in presence of witness and United States Consul Agent on the date and year aforesaid.

Sgd JOAS ZURICH DA SYLVA,

" JOHN F. PINA,

" MANUEL F. VIEIRA.

In addition to the above instrument the said parties entered into another agreement as further security for the repayment of the said loan of \$1,400 whereby it was stipulated that the said da Sylva, the lender, should have immediate possession of the said vessel and should continue to hold and manage the same until the indebtedness to him was paid out of the profits of the ship's earnings. The said writing is as follows:

"We, the undersigned, Manuel de Freitas Vieira, single, of lawful age, proprietor, resident of New Bedford in the United States of America, of one part and of the other part Joas Zurich da Sylva, married, of lawful age, proprietor, resident in the Island of Sal, and both parties at present in this Island, in the presence of witnesses undersigned, the party of the first part, one of the owners of the American schooner *Hattie and Lottie* now anchored in this port of Sal, Rey of the Island of Boa Vista of Cape Verde, freights (charters) to the second party Joas Zurich de Sylva the said schooner for the sum of thirty mil reis (\$30) for each month clear of wages, grub bills and port charges, all of which will be paid by the said freighter (charterer) Joas Zurich da Sylva."

"1st. Any and all repairs which the said schooner may need such as painting bottom, blocks, sails or any other damage or repairs, small or great, for the preservation of said vessel and guarantee shall be on account of the said vessel."

"2nd. Said vessel shall be held by the charterer, according to the bottomry bond made in the presence of the U.S. Consular Agent at Brava until the sum of \$1,400 is paid, or this sum is fully paid and satisfied by the freight under this charter."

"3rd. In case said charterer shall come to terms for the sale of said vessel with the owner, then the sum agreed upon shall be paid at sight at Cape Verde, or by bill of exchange at four months anywhere away from Cape Verde."

"As we have above agreed to sign this, in the presence of witnesses Jose Lino Evora and Antonio Jose de Souza Carvalho, both married, merchants and residents in this port of Sal Key, Boa Vista, May 6, 1902.

(Sgd) MANUEL F. VIEIRA,
 " JOAS ZURICH DA SYLVA,
 " JOSE LINO EVORA,
 " ANTONIO J. SOUZA CARVALHO.

The said da Sylva, under the terms of the said writings, entered into possession of the vessel and brought her to the United States. While there the vessel was arrested at Providence, R.I., at the instance of a Mr. Rodgers, for a claim for necessaries supplied the ship on her previous voyage. da Sylva employed Mr. Healy, an attorney of that place, to take proceedings to protect his interests, contending that he as a holder of a Bottomry Bond had priority over the claim of a material man for necessaries.

On the 27th day of August, A. D. 1902, the District Court of the district of Rhode Island gave judgment

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in favour of da Sylva. The following is the decree of the court :—

“ It is now ordered, adjudged and decreed that the said schooner *Hattie and Lottie*, her boats, tackle and furniture be delivered to the libellant, Joas Z. Sylva, the charterer under the charter party in said libel, and that the respondent Antonio M. Rodgers pay to the said libellant his costs as taxed by the clerk at the sum of \$48.07.”

The vessel under this decree was then handed over to da Sylva who brought her to Saint John, N B., under a charter to load lumber for the Azores when she was arrested in this suit.

November 18th, 19th and 24th, 1902.

The case was heard before the Local Judge for the New Brunswick Admiralty District.

Dr. A. A. Stockton, K.C., and *John Kerr, K.C.* for plaintiff. There is no evidence of any such necessity to take up money at Brava, as to justify bottomry ; absolute necessity must be shown by the lender (4 *Am. and Eng. Ency. of Law*) (1). The writing is not a bottomry bond. There is no maritime risk, and the payment is not dependent on the safe arrival of ship at any destination ; no voyage is specified during which the risk is to continue. The master cannot hypothecate the vessel except upon condition that the lender shall bear the risk of the voyage, as that the bond is at his risk ; the payment must depend upon the safe arrival of the vessel. (*The Virgin* (2) ; *The Gaetano-Maria* (3) ; *The Julia Blake* (4) ; *Stainbank v. Fenning* (5) ; *Stainbank v. Shepard* (6) ; *Henry's Admiralty Practice* (7). The master had no right, even with consent of a part owner,

(1) 2 ed. p. 741 and cases cited. (4) 107 U. S. 418.

(2) 8 Pet. at p. 554. (5) 11 C. B. 51.

(3) L. R. 7 P. D. 137. (6) 13 C. B. 418.

(7) P. 147.

to hand over possession and control of the ship to da Sylva, as was attempted under the alleged charter, without the consent of the other part owners. The decree of the foreign court is not binding on this court, as it does not disclose the grounds upon which it was granted. The sentence of a foreign court of Admiralty is not conclusive as to the grounds of condemnation unless it be explicitly stated in the decree what the ground is. (*Dalgleish v. Hodgson* (1). The record must show the grounds of the decree. (*Bigelow on Estoppel* (2); *Hobbs v. Henning* (3). No grounds are shown upon the decree in this case, and it does not appear upon what grounds the decree was founded. The defendant, da Sylva, surely cannot hold the vessel indefinitely, because a foreign court gave him possession against the claim of a material man for necessaries. The case of *Castrique v. Imrie* (4) is not opposed to plaintiff's contention. There, a sale of the vessel was ordered and under it the title to the property passed to the purchaser, who, as a third party, was protected by the process of the court. Furthermore the plaintiff is entitled to an account. The defendant da Sylva only claims to hold the vessel for advances. A correct account might show that the whole debt was paid. The vessel, therefore, on that ground should be detained until the account is taken, or, if allowed to go, security should be given for her safe return.

C. J. Coster for the defendants. The case of *Castrique v. Imrie* is relied upon by the defendants as conclusive in their favour. The parties are all American citizens and the vessel under arrest is also of American registry. The dispute between Rodgers and the defendant da Sylva was one in which the right to the

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(1) 7 Bing 495.

(3) 17 C. B. N. S. p. 823.

(2) 2 ed. 157.

(4) L. R. 4 H. L. 414.

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possession was involved. This court cannot disregard the decree of the District Court of Rhode Island. That court is one possessing Admiralty jurisdiction. It had full authority over the persons in that case and after a lengthened hearing has decided that da Sylva is entitled to the possession of the vessel. In the case already cited it was admitted that the French court through misapprehension had decided contrary to English law, and had rendered a decree contrary to what it would otherwise have been if the court had clearly understood the rights of the parties under the English law. The vessel was sold under that decree of the French court, and the title of purchaser was preferred to that of a mortgagee. The defendants, therefore, claim that this court by the comity of nations will not disregard the decision of the American court in this case, but will order the arrest to be discharged and the vessel delivered over to the defendant da Sylva. The court in Rhode Island must have considered the writing between the parties a bottomry bond, and this court will not differ from that conclusion.

Dr. Stockton, K.C., replied.

McLEOD, L. J. now (November 25th, 1902) delivered judgment.

The facts of this case are practically as follows :—

The defendant da Sylva advanced to the then captain of the vessel, at Brava, the sum of \$1,400 (fourteen hundred dollars), and took from the captain what is claimed to be a bottomry bond. This writing is also signed by one of the part-owners who was at the time on board the vessel. As further security for the repayment of the loan, Pina, the then captain, and the part-owner then on board, signed another document called a charter party, whereby the possession and control of the vessel were handed over to da Sylva

until the profits arising from her employment repaid the loan. The vessel, then in charge of the defendant da Sylva, arrived at Providence, Rhode Island, and while there, proceedings were taken against the vessel by a Mr. Rodgers for an amount due him for necessaries supplied for a previous voyage, and in that suit the vessel was arrested. The defendant da Sylva employed Mr. Healy, an attorney-at-law, residing at Providence, R.I., to protect his interests, and to contest the claim of Mr. Rodgers, on the ground that his claim, founded on bottomry, took priority over any claim for necessaries. Mr. Healy accordingly instituted proceedings, on behalf of da Sylva, in the District Court for the district of Rhode Island. As is well known, the District Courts of the United States exercise Admiralty jurisdiction. The result of the litigation was in favour of da Sylva, one of the defendants in this cause, and his claim, under the alleged bottomry bond and charter party, was given priority over the suit of Mr. Rodgers for necessaries, and by the decree of the court, the vessel was given into possession of da Sylva. From the evidence of Mr. Healy, it appears, that the plaintiff in this cause, and the other part-owners acting with him, had knowledge of the litigation between the competing claims of Rodgers and da Sylva in Rhode Island, and while they were not parties to the suit, yet they took part in some negotiations looking to the settlement of all claims against the vessel. The application in this suit is practically to undò what was done by the court in Providence, and I do not think I can do that. If the plaintiff in this cause said that since the decree of the American court, the defendant da Sylva had received from the earnings of the vessel sufficient to repay him the amount of his loan, I might then act, and order the account to be taken on that ground. But it is not pretended that since that decree, any amount has been paid, and in fact it is not denied that some

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amount is still due the defendant. The contention is that his claim is not correct; the general account, however, was given to the plaintiff at Providence, and the only witness examined here for him, saw the account and how it was made up on board the ship, and he does not deny that Mr. Healy also showed it to him. Under these circumstances I do not think I can interfere to undo what was done in the court at Providence, although that court may have taken a course which I would not have taken. In the case of *Castrique v. Imrie* (1), cited by counsel on both sides, the Lord Chancellor, in delivering judgment, admits that the French court wrongly construed the English law; but that, under the circumstances, our court would not interfere with the judgment of the foreign court. And in the same way, I do not think I should interfere with the judgment of the District Court of Rhode Island, more especially as all the parties are American citizens, resident in the United States, and the vessel is of American register. The case is one peculiarly for the American court. I do not think I would have a right to say to a foreign court, "notwithstanding all that has taken place, you have decided wrongly, and you should not have made the decree you did." If the plaintiff said: "It is true the defendant, da Sylva, was given possession of the vessel by that decree, and has since had possession, and the earnings thereof, and these earnings are sufficient to pay the amount of the indebtedness" it might be different. I might then order an account to be taken, but that state of facts does not exist, and under all the circumstances I must decline to interfere. The action will, therefore, be dismissed with costs.

Judgment accordingly.

Solicitor for plaintiff: *John Kerr.*

Solicitor for defendants: *C. J. Cos'er.*

(1) L. R. 4 H. L. 414.