Case No. 7,293.

THE JERUSALEM.

{2 Gall. 191.}[1]

Circuit Court, D. Massachusetts. Oct. Term, 1814.

BOTTOMRY BOND—FOREIGN EXECUTION OF—JURISDICTION OF ADMIRALTY COURTS.

1. The admiralty courts of the United States will entertain jurisdiction in rem, to enforce a bottomry bond executed in a foreign country, between subjects of a foreign country, when the ship is within the territory of the United States.

{Cited in Ex parte Lewis, Case No. 8,310; Steele v. Thacher, Id. 13,348; Phillips v. The Thomas Scattergood, Id. 11,106; The Bee, Id. 1,219; The Gold Hunter, Id. 5,513; Leland v. The Medora, Id. 8,237; Davis v. Leslie, Id. 3,639; One Hundred and Ninety-Four Shawls, Id. 10,521; The Alida, Id. 199; New Jersey Steam Nav. Co. v. Merchants' Bank of Boston, 6 How. (47 U. S.) 421; Patch v. Marshall, Case No. 10,793; Lorway v. Lousada, Id. 8,517; The Maggie Hammond, 9 Wall. (76 U. S.) 457; The Kate Tremaine, Case No. 7,622; The Hermine, Id. 6,409; Thomassen v. Whitwell, Id. 13,928. Quoted in The Belgenland, 114 U. S. 355, 5 Sup. Ct. 865.}

See The Aurora, 1 Wheat. {14 U. S.} 102; The Packet {Case No. 10,654}; The Mary {Id. 9,187}; Ross v. The Active {Id. 12,070}; Wilmer v. The Smilax {Id. 17,777}; Drinkwater v. The Spartan {Id. 4,085}; The Marion {Id. 9,087}; 3 Kent, Comm. (5th Ed.) 167–170.

2. In what cases suits will be maintained between foreigners in our courts, and in what cases they will be remitted to their domestic forum.

[Cited in Becherdass Ambaidass, Case No. 1,203.]

3. The jurisdiction of the admiralty depends, not on the character of the parties, but on the subject matter, whether maritime or not.

4. An attested copy of a bottomry bond, executed in a distant foreign country, being produced by the libellant a continuance was allowed, under the circumstances, to enable him to procure the original.

This was a libel against the polacre Jerusalem, a Greek ship, owned in part and commanded by the claimant [Catara].

[2]The libellant, Hugon Couturier, alleged, that on the 30th day of May, 1812, he lent nine thousand nine hundred and fifty three dollars to the claimant, for the victualling, loading, and repairing of said ship, then lying in Smyrna, for which sum Catara, by his writing obligatory of the same date, a copy of which was produced, hypothecated to him her hull, tackle, cargo and freight. The premium was to be twenty per cent. if a sale should be effected in Malta or Sicily, thirty per cent, if in Majorca, Minorca, or other port of Spain, and forty per cent. if in Lisbon; the principal and interest to be paid, on the safe return of said vessel to Smyrna, or after the sale of her cargo at any other place. The libel then averred, that the ship had not returned to Smyrna, but had proceeded to New York, where her cargo was sold, and afterwards arrived at Boston where she, then was. The parties were both subjects of the Sublime Ottoman Porte, and the instrument of hypothecation was executed within the dominions of their sovereign. The claimant appeared under protest, denying the jurisdiction of the court, and setting forth the alienage of the parties.

Mr. Hubbard, for libellant.

The jurisdiction of the admiralty extends to all cases of bottomry, and it is no objection to that jurisdiction, that the contract was made in a foreign country, and between foreigners. Hall, Adm. pt. 1, p. 25; Thomson v. The Nanny [Case No. 13,984]; [Mason v. The Blaireau] 2 Cranch [6 U. S.] 264; 2 Brown, Adm. 119; The Jacob, 4 C. Rob. Adm. 245; The Gratitudine, 3 C. Rob. Adm. 245; Emerig. Mar. Loans, 187; 2 Emerig. Ins. 383; 5 Vinn. 859, 886; Huberus, lib. 5, tit 1, note 50; 2 Domat. 674; Bynk. De Foro Leg. c. 4; Casar. Disc. 43, § 53; Id. Disc. 179, § 52, "Hypotheca sequitur rem Hypothecatum tanquam lepra leprosum."

Mr. Blake, Dist Atty., for claimants.

It is not denied that this court possesses, as a court of admiralty, all the jurisdiction, which belongs to the admiralty courts in England, and if in that country jurisdiction would be sustained in a case like the present, I shall not be disposed to contest it here. But it is believed, that on examination it will be found, that in cases between foreigners, the jurisdiction of those courts is never exercised, either as to the person or thing, except to the

single case of salvage; an exception, which is founded exclusively upon reasons of policy. {Mason v. The Blaireau} 2 Cranch {6 U. S.} 248, 249, 264; The Two Friends, 1 C. Rob. Adm. 271.

The admiralty jurisdiction is confined to cases, the character and circumstances of which are such, as to make them properly the subjects of that jurisdiction, and to admit of its being exercised without inconvenience. Vatt. bk. 2, c. 7, §§ 84, 85; Id. c. 8, §§ 103, 104. The courts of one country never take cognizance of controversies between the subjects of another, unless they concern lands lying within the country, to which the court belongs. In cases of bottomry, indeed, if it appear from the instrument itself, that the voyage is to be terminated, and the money paid, in a foreign country, where the contract is sought to be enforced, the parties may then be considered as submitting, by the contract itself, to the jurisdiction of the foreign court. But the instrument, upon which this libel is founded, does not contemplate a voyage to the United States. The voyage is described as to the West generally, and different rates of premium are provided with a view to the ship's discharging, in several different places, the most distant of which is Lisbon. It was intended to end the voyage in Smyrna. There is no analogy between this case, and those of salvage or rescue. Bottomry is a contract entirely municipal, and to be governed by the laws of the country, where it is made. The courts of that country only can determine the principles, upon which the rights of the parties are to depend; the process to be used, and the disasters, which shall excuse from payment. No case can be found in England, or our own country, where jurisdiction has been sustained between foreigners on a bottomry bond, unless by the assent of parties, or when the voyage was there to terminate. But even admitting that the comity prevailing among the nations, which compose the European commonwealth, would induce them to exercise such jurisdiction, in respect to one another, still this reason will not extend to the Ottoman empire. The Jerusalem is the first Greek ship that has visited our shores. To compel a sale of her would be received as a declaration of war. It would be highly impolitic to interfere in a case like the present, where the ship is of considerable value, and the owner a man of some note and consequence among his countrymen; more especially, as he has been long struggling to extricate his ship, and to carry her to the very door of this libellant. The same strict rules of law are not to be applied to the subjects of the Ottoman empire, as to those of other nations (The Madonna

del Burso, 4 C. Rob. Adm. 169), and it is confidently hoped, that the circumstances of this case are such as will induce the court, if there be the smallest doubt of its jurisdiction, to send the parties to the tribunals of their own country.

Mr. Prescott, in reply.

In cases of this nature, the court is governed by the rules of the civil law which are universal in their application. No principles are more generally known and received, than those which relate to the contract of bottomry. Commercial usage has made it cognizable every where. The remedy may, it is true, be personal, but in this case the thing pledged is the object of the suit. It resembles a real action, in which the tenant in possession is sued, but it is the land only, that is sought to be recovered. No good reason can be given, why the court should decline to interfere. Is there any thing in the nature of the contract? It is a maritime contract, which may be executed every where; upon which a court sitting in America, in England, or in France, is competent to decide. It is a stronger case than that of two foreigners making a contract to be executed here, which it is admitted might be enforced in our own courts. The ship is pledged for the payment of the money, whenever the voyage ends, or is deviated from. If a person, whose credit is pledged, may be followed, shall not the creditor be permitted to follow the thing pledged? The money is due, either because the voyage is terminated, or because there has been a deviation.

(STORY, Circuit Justice. In this preliminary inquiry, it must be presumed that the voyage has been completed, and the money become due.)

Mr. Blake contended, that this being a fact, which entered into the question of jurisdiction, it could not be taken for granted, but must be inquired into by the court.

(STORY, Circuit Justice. On a question of jurisdiction, the court will not inquire into the completion or non-completion of the, voyage; that question belongs to the merits, and will be settled on a hearing, if the court should decide, that it has a right to hear.)

STORY, Circuit Justice. It is not necessary, in this stage of the cause, to inquire into the exactness or regularity of the allegations of the parties. A preliminary question, as to the right of this court to adjudicate upon the merits of the ease, has been brought forward upon a protest to its jurisdiction, and after an ample discussion, remains now to be decided.

The question in short is this, whether the courts of the United States, in the exercise of their authority over causes of admiralty and maritime jurisdiction, have cognizance of maritime suits in rem between foreigners, whose permanent domicil is in a foreign country, when the specific property is within our territory. I state this as the general question, although in the acts of court the parties have alleged facts, which, if proved, might perhaps somewhat narrow the discussion. But it is fit, that the general principle, that governs this class of eases, should be extracted from the embarrassment of minute circumstances, examined in its more extended application. Whatever may be the case as to other mar-

itime contracts, respecting which I affirm or deny nothing, it cannot be doubted, that the contract of bottomry is one, over which the admiralty exercises an undisputed jurisdiction. It is indeed, the only tribunal capable of enforcing a specific performance in rem by seizing into its custody the very subject of hypothecation. To its guardian care, I may without rashness affirm, the whole commercial world look for security and redress, and without its summary interference, maritime loans would, in all probability, become obsolete. A jurisdiction so ancient and beneficial, which exercises its powers according to the law of nations, and those rules and maxims of civil right, which may be said to form the basis of the institutions of all Europe, ought not to be restrained within narrow bounds, unless authority or public policy distinctly requires it.

It is argued, that the courts of a country cannot consistently with the law of nations, take cognizance of any controversy between foreigners, who are not domiciled within its territory; and Vattel (book 2, c. 7, §§ 84, 85; book 2, c. 8, § 103) is cited in support of the position. It is true, that Vattel contends that personal controversies between foreigners, or between a foreigner and a citizen, are to be determined by the judge of the place, where the defendant has his settled abode, or where he is, when any sudden difficulty arises. But this rule is so far from being universally acknowledged, that many nations exercise jurisdiction over the property and persons of foreigners found transiently in their territory, not only in favor of citizens, but also of other foreigners. Vinn. Comm. Inst. de Actionibus, lib. 4, tit. 6, p. 777, §§ 8, 9; 2 Hub. lib. 5, tit. 1, § 46; De Carriere v. De Calonne, 4 Ves. 577. The rule seems indeed exclusively drawn from the civil law. But, however the case may be, as to remitting the defendant to his domestic forum in personal controversies, it is very clearly settled, that in proceedings in rem, or the real actions of the civil law, the proper forum is the locus rei sitae. Indeed, it seems to have been a question among civilians, whether the action in rem could be brought before any other tribunal. 8 Vinn. Comm. Inst. de Actionibus, lib. 4, tit. 6, p. 777; 2 Hub. lib. 5, tit. 1, p. 728, § 50; Heinec. Ad. Pandect, lib. 5, tit. 1, § 36; Bynk. De Foro Leg. c. 4; Casar. Disc. 43, § 53; Id. Disc.

179, § 52; 2 Emer. Des Contrats a la Grosse, c. 9, § 2; Id. p. 528, § 4.

With reference, therefore, to what may he deemed the public law of Europe, a proceeding in rem may well he maintained in our courts, where the property of a foreigner is within our jurisdiction. Nor am I able to perceive how the exercise of such judicial authority clashes with any principles of public policy. The refusal might indeed well be deemed a disregard of national comity, inasmuch as it would be withholding from a party the only effectual means of obtaining his right. And, accordingly, it has been held, that it is a good cause of reprisal for a sovereign not to compel his courts to execute the sentence of a foreign court, where the person or goods sentenced are within his jurisdiction. 2 Brown, Adm. 120. It is argued, that the exercise of such authority would be highly inconvenient, inasmuch as this contract, like many other maritime contracts, is differently regulated in different countries, and therefore the construction of the contract, as well as the remedy on it, might in many cases essentially differ. And it is urged, that on this ground courts of law uniformly refuse to interfere, in respect to the contracts of foreigners made with their own seamen for marine services. I am not aware, that the inconvenience is so great as has been represented. It is a general rule, that foreign contracts are to be construed according to the law of the place where they are made, or to be executed. And I do not perceive the hardship of compelling a party to perform his engagements according to the construction, which the courts of his own country would put upon them. In respect to maritime contracts, there is still less reason, to decline the jurisdiction, for in almost all civilized countries, these are in general substantially governed by the same rules. Almost all Europe have derived their maritime codes from the Mediterranean; and even in this country we take a pride in conforming our decisions to the rules of the venerable Consolato del Mare.

As to the case alluded to, of the contracts of seamen for wages, I am not aware that any authority countenances the position, to the extent in which it is laid down. Where the voyage has not terminated, or the seamen have bound themselves to abide by the decisions of the tribunals of their own country, foreign courts have declined any interference, and remitted the parties to their own tribunals for redress. But where the contract has been dissolved by the regular termination of the voyage, or by the wrongful act of the other party, the cases are not unfrequent, in which foreign courts have sustained the claim for mariners' wages. Limland v. Stephens, 3 Esp. 269; Hulle v. Heightman, 4 Esp. 75, 2 East, 145; Sigard v. Roberts, 3 Esp. 71; Thompson v. The Catharina {Case No. 13,949}; Willendson v. The Forsoket {Id. 17,682}; Moran v. Baudin {Id. 9,785}; Weiberg v. The St. Oloff {Id. 17,357}; Thomson v. The Nanny {Id. 13,984}. And although the doctrine in Gienar v. Meyer, 2 H. Bl. 603, and the intimation in The Two Friends, 1 C. Rob. Adm. 271, look the other way, it does not seem to me that they outweigh the authorities on the other side, even supposing (which is not admitted) that they are not to be reconciled.

It is admitted, that suits for salvage have been entertained between foreigners in the admiralty, and it is urged that these form exceptions to the general rule, as cases standing upon the jus gentium, or upheld by the consent of the parties. Independent, however, of the principle, that consent can never give a jurisdiction to a court, which it cannot otherwise sustain, the decisions on this subject evidently proceed upon the ground, that the court has a competent capacity, and leave the policy of its exercise to be judged of by the circumstances of the particular ease. The Two Friends, 1 C. Rob. Adm. 271; Mason v. The Blaireau, 2 Cranch [6 U. S.] 240. And although Sir W. Scott intimated, in The Two Friends, that if there was the slightest disinclination of the parties to submit to the jurisdiction, he should not incline to interfere; yet he evidently refers to cases, where all the foreign parties decline the jurisdiction (as might happen in cases like that before him), and not to cases, where the jurisdiction was sought by one of them. And the whole current of his reasoning strongly leans in favor of the policy of sustaining the general jurisdiction of the admiralty over foreigners. In the same case, it was asserted by counsel, and not denied, that the admiralty frequently entertained bottomry suits between foreigners. And, accordingly, we find that in The Gratitudine, 3 C. Rob. Adm. 240, and The Jacob, 4 C. Rob. Adm. 245, both of which cases were contested on other points with great ability, the court sustained the jurisdiction and decreed in favor of the bottomry holders. It may be said that the question of jurisdiction passed without objection; but it is difficult to conceive that it could have escaped the attention of the court and of the bar, if it had been deemed tenable. It has been argued, that these were cases where the voyage ended within the British dominions, and therefore are distinguishable. But I know of no principle, which sustains this distinction. It was not the case of a contract made with reference to the laws, and to be executed within the dominions, of Great Britain. The most that can be said is, that there the lien first attached absolutely upon the property. In the latter case, however, this lien grew out of a former voyage, and was applied to reach proceeds of freight, which accrued in a subsequent voyage. The ground then of the jurisdiction could not have been, that the voyage terminated in Great Britain, but that

the proceeds were within the reach of the court.

And this leads me to the consideration, that the jurisdiction of the admiralty, in matters of contract, depends not on the character of the parties, but on the character of the contract, whether maritime or not. When once its jurisdiction, therefore, rightfully attaches on the subject matter, it will exercise it conformably with the law of nations, or the lex loci contractus, as the case may require. It will enforce a foreign maritime judgment between foreigners, where either the property or the person is within its jurisdiction. 2 Brown, Adm. 120. Yet the objection to such proceedings, so far as touches the remedy, applies as forcibly here as in other maritime causes.

It has been urged, that whatever may be the propriety of interfering in cases arising between the subjects of the powers of Europe, the court ought studiously to abstain where the parties are subjects of the Sublime Ottoman Porte. It is certainly true, that in prize causes an indulgence is granted to the subjects of the Ottoman empire, which is not allowed to any foreigners of Christian Europe, in consideration of the peculiarities of their situation and character, and of their not being professors of exactly the same law of nations with ourselves. The Madonna del Burso, 4 C. Rob. Adm. 169. But in matters of contract between such persons, or between them and other foreigners, I am not aware that courts have thought themselves at liberty to act otherwise, than by the general rules applicable to all forensic business; especially where one subject of the empire has asked for redress against another, and upon a maritime contract, the stipulations of which seem to require a summary interference, and to recognize an acquaintance with the general maritime codes of Europe.

On the whole, I am of opinion, that the rule of the civil law, "in actionibus in rem speciale forum tribuit locus in quo res sitae sunt" (Vinn. Comm. Inst de Actionibus, lib. 4 tit. 6, p. 777; Heinec. Comm. in Pand. pt. 2, p. 147, § 36), applies to this case; that there is no solid ground against the exercise of the jurisdiction, and in the language of Sir W. Scott, on another occasion (The Two Friends, 1 C. Rob. Adm. 271, 280), I will add: "I go farther, and say, that I think there is great reason for it, because it is the only way of enforcing the best security, that of the lien on the property itself."

I have thus far considered the case upon general principles; and if I had felt any difficulty in the conclusion, which I have already stated, I should have felt none, when the contract itself carries on its face a stipulation, that the voyage was to terminate in a foreign country; and therefore that a suit in rem in such a foreign country would not only be sustained (as the claimant's counsel has admitted) but was evidently within the contemplation, of the parties. Where the parties have, therefore, waived the benefit of the exclusive jurisdiction of their own tribunals, the whole reasoning, upon which they should be remitted to such forum, falls to the ground. To remit this cause from the present to another foreign forum, I imagine would be "but to change postures on an uneasy bed."

There is also another fact alleged, and which, if true, brings this case directly within the authorities cited, and that is, that the>voyage really ended in the United States. The voyage stated in the bottomry bond is from Smyrna to the West; and a different rate of interest is payable, as the cargo shall be discharged in Malta, or Sicily, Majorca, Minorca or other port in Spain or in Lisbon. And the claimant expressly stipulates to make payment in Smyrna, on his safe return, or in any other places where the obligation should be presented to him, after the sale of the cargo then on board. And the allegation of the proponent states, that the cargo was wholly sold, part in the United States, and part at the Havanna. But I forbear to dwell on this and other peculiarities, because I am entirely satisfied to rest the cause on the soundness of the general doctrine. I overrule the protest of the claimant to the jurisdiction of the court, and assign him to answer peremptorily to the libel of the plaintiff.[3]

Prescott & Hubbard, for libellant.

G. Blake, for claimant.

At a subsequent day of the term Blake read the answer in chief of Catara, which, among other things, denied that the instrument of hypothecation relied upon was his deed. The replication averred the bond to be the deed of Catara. A copy of the contract in the handwriting of the Swedish consul at Smyrna, and attested by him as a true copy, was produced by the counsel of the libellant, and upon this they founded a motion for a continuance, to afford them time for procuring the original.

Mr. Blake, Dist Atty., opposed this motion. He represented to the court the extreme hardship of this case, and contended, that there had been such remissness and laches in not procuring the original, that no postponement ought to be granted to the libellants for this cause; that three originals were executed, and probably delivered to the obligee; that one of these might have been sent at the same time with the copy; that it would be impossible to obtain the original from Smyrna in any reasonable time, and that the libellant had therefore commenced this action prematurely, and ought not be permitted to hold the claimant in fetters for so long a" time, as must necsarily elapse.

STORY, Circuit Justice, said, he did not wish to hear the other side; that the principles of law were clear; that admitting three

originals to have been executed, it would have been difficult, considering the nature of this voyage, for the libellant to obtain such intelligence, as would enable him to determine, to what place the originals should be sent; that the hardship was common to both parties; and that the court could not be influenced by the distressed situation of Catara, however it might be deserving of pity; that, at common law, it was the practice to allow time for procuring originals, as in cases of bills of exchange; that there did not appear, in this case, to have been any laches on the part of the libellant, and there being evidence to satisfy the court of the existence of an original, the cause must therefore be continued. If, as was alleged, the vessel was in a perishing condition, an order of sale might be made, upon a proper application for this purpose.

{The vessel was subsequently sold under an order of court, and a petition for an allowance for repairs out of the proceeds was granted, in preference to the bottomry interest. Case No. 7,29.}

NOTE. The following extract from Sir Leoline Jenkins's argument for the bill to ascertain the jurisdiction of the admiralty (Works, vol. 1, p. 82), is not inapplicable to some of the subjects discussed in the foregoing case. "An English merchant here owes money upon a foreign contract to a Spaniard; he sues for it in the admiralty, but the English defendant flies to the common law, and has a prohibition. The Spaniard in his trial at law, produces the contract in the form usual beyond sea. The defendant pleads non est factum; how can the party be relieved against this plea? For the original contract, subscribed by the contractors and the witnesses, is a record; that the notary in Spain will not part with, without forswearing himself and losing his office. The copy exemplified will be no evidence to a jury, nor can the notary and the witnesses be had and heard viva voce, without a thousand contingencies; whereas the Spaniard exhibiting his instrument upon oath, for a true and real instrument, in the admiralty, the adversary must either confess or deny it; if he confess the instrument, (as notarial instrument seldom are denied) there is so much in proof before the court as to judge of the contents of it; if it be denied, the plaintiff may have a commission into Spain pro scrutinio, and the copies exhibited here may be inspected, and compared with the original remaining in the notary's hand. And the magistrates of the place will certify, that the notary is a public and authentic person there, to whose acts credit is given in judgment, and then that instrument is before the court in due form of proof."

[1] {Reported by John Gallison, Esq.}

[2] See case of Kleine v. Catara {Case No. 7,869.}

[3] See the case of The See Reuter, 1 Dod. 22.