

1975
Sept. 5

SOTERIS P.
PASCHALIS

v.

THE SHIP
"TANIA MARIA"

[HADJIANASTASSIOU, J.]

SOTERIS P. PASCHALIS,

Plaintiff,

v.

THE SHIP "TANIA MARIA" EX "CONSTANTIS
FOTINOS" NOW IN LIMASSOL PORT,

Defendant.

(Admiralty Action No. 4/73).

Admiralty—Necessaries—Money advanced to master to enable him proceed further with voyage, pay officers and crew and expenses incurred in attending repairs of ship—Whether necessaries.

Admiralty—Action in rem—Necessaries—Foreign ship—Maritime lien—Action in rem for necessaries lies only if at the time of its institution the rem was the property of plaintiff's debtor—Change in the ownership of ship long before institution of action—No maritime lien—No action lies. 5 10

Admiralty—Bottomry bond—Meaning and effect of—Document wherein master of ship acknowledged that plaintiff advanced to him a certain amount—Not a valid bottomry bond.

Admiralty—Jurisdiction—Courts of Justice Law, 1960 ss. 19(a) and 29(2)—English Administration of Justice Act, 1956 ss. 1, 3(2), (3) and (4). 15

By an admiralty action in rem the plaintiff claimed against the defendant ship "Tania Maria", ex "Constantis Fotinos" the following amounts: 20

(a) "£3,000.- on a bottomry bond and/or loan and/or bond and/or as disbursements, and/or money advanced to the master of the ship on or about the 18th June, 1971 as necessaries to enable the ship to proceed with her voyage." 25

(b) £1,100.- disbursements in respect of proper expenditure of necessary things for the ship for the purposes of navigation.

(c) £320.400 further disbursements in respect of proper expenditure of necessary things for the ship for the purposes of navigation.”

1976
Sept. 5

SOTERIS P.
PASCHALIS

v.

THE SHIP
«TANIA MARIA»

5 With regard to claim (a) above the plaintiff, alleged that on or about the 19th of June, 1971 the said ship whilst in the course of a voyage arrived at the port of Manchester and was unable to proceed further on her voyage owing to lack of funds and want of credit to pay the officers and crew wages, necessaries and
10 supplies for the continuance of the voyage.

The ship did then borrow from the plaintiff the sum of £3,000 on the security of a bottomry bond (quoted in full at p. 168 *post*) and/or of a bond and/or as a loan given to her for her own benefit in order to pay
15 the officers and crew wages, and/or proceed with its journey, and/or in order to save her from arrest. It was further alleged by the plaintiff, in the alternative, that as such a necessity existed, the ship through the master did create a loan on bottomry from the plain-
20 tiff for the sum of £3,000 and thereupon the master did execute a bottomry bond and delivered same to the plaintiff. In consequence of the said advance, the ship was enabled to sail, and on the following day she arrived at her destination.

25 With regard to claim (b) plaintiff alleged that he was in charge of the defendant vessel during all her U.K. calls in 1970 and 1971 and personally attended and supervised both crew and ship requirements and slept on board whilst the ship was at Manchester; and
30 in or about September, 1970, while the said ship was lying in the port of Manchester, the plaintiff properly made necessary disbursements on account of the ship amounting to £1,100.

35 Finally with regard to claim (c) above plaintiff alleged that in or about May, 1971, while the said ship was lying in the port of Lisbon he properly made necessary disbursements on account of the ship, amounting to £320.400.

The defendant's main contentions were the following :

40 (a) That the Court had no jurisdiction to entertain the action because “the claims raised therein do not

1975
Sept. 5

SOTERIS P.
PASCHALIS

v.

THE SHIP
"TANIA MARIA"

create maritime liens and/or any cause of action in rem, or any other cause of action cognisable by this Court, in particular as set out in the Administration of Justice Act, 1956, sections 1(1)(a) to (s) and 3 as applied in Cyprus by sections 19(a) and 29(2)(a) of the Law 14 of 1960"; and because "at the time of the commencement of this action the defendant ship was not owned by any person who may have been personally liable to the plaintiff, as envisaged by s. 3(4)(a) of the Administration of Justice Act, 1956 or otherwise".

(b) That the previous owners of the defendant ship sold the defendant ship on the 22nd September, 1971, to the present owners.

(c) That the outstanding amounts do not create any lien over the said ship or against its present owners and that they are not claims for which the ship or her present owners are answerable or liable, and even if any right in rem ever existed (which is denied) the same was extinguished upon the sale of the defendant ship on the 22nd September, 1971.

The defendant ship was until September, 1971 known as "Constantis Fotinos" when, according to Lloyd's Register of Shipping the name "Constantis Fotinos" changed and its new name was recorded in the records as "Tania Maria".

The defendant ship, being under mortgage was, in accordance with the Bill of Sale, sold in September, 1971, by the previous owners, "Compania Naviera Evedelia S.A." to "Rosade Lines S.A.R.L." in consideration of the sum of £20,000 paid to the said company by "Odette A. Nauphal" acting for herself and for the new owners *free from all incumberances and maritime liens.*

Held, (1) I have no doubt at all, that the expenses referred to in claims (a) and (b) above, were not disbursements made by the master of the ship in order to make himself liable for, in respect of necessary things for the ship for the purpose of navigation. But, in any event, even if I am wrong, the law does not give the plaintiff a maritime lien in respect of necessities for a foreign ship, because he cannot have an

action in rem, unless at the time of its institution the res is the property of his debtor in the case. (See *Heinrich Bjorn* [1885] L.R. 10 P.D. 44; [1886] 11 A.C. 270; *The Monica S.* [1973] 3 All E.R. 740; *The Orienta* [1895] P.D. 49 and s. 3(4)(a) of the Administration of Justice Act, 1956).

1975
Sept. 6
—
SOTERIS P.
PASCHALIS

v.

THE SHIP
«TANIA MARIA»

(2) As there was a change in the ownership of the defendant ship long before the institution of this action on the 15th January, 1973, therefore, the action must be dismissed regarding these two claims, once the plaintiff has not a maritime lien for the amounts of his advances which could be attached to and follow the ship from and after the time when those advances were made.

(3) Regarding the question whether the alleged bottomry bond is a valid bond, having considered the written document, signed by the master of the ship, this is not one of those cases in which the parties having plainly intended to create a bottomry contract, have made a mistake in some particular, in which case the Court may reject the erroneous particular. (See the *Heinrich Bjorn* [1885] L.R. 10 P.D. 44 at pp. 49 - 50).

(4) Having read the document more than once, I am convinced that the notion of bottomry was absent from the minds of the plaintiff and of the master of the ship, because nothing is mentioned in the said written document that it was a bottomry bond. Furthermore, the said contract creates no charge upon the ship; and that the lender of the said amount of £3,000 assumes the maritime risk, that is, that repayment of the loan should be made contingent upon the safe arrival of the property charged. In these circumstances, it appears that the position of the plaintiff is that of a volunteer who made the payment of £3,000 in discharge of seamen's wages, but clearly he does not acquire the maritime lien, which the seamen had originally, in support thereof.

(5) Once, therefore, the said document does not contain the particulars which should be contained in a valid instrument, and as no time is fixed for payment, I have come to the conclusion that it is not a valid bottomry bond and I hold the document void. (See *The James W. Elwell* [1921] P.D. 351 and *The Ency-*

1975
Sept. 5

SOTERIS P.
PASCHALIS

v.

THE SHIP
«TANIA MARIA»

clopaedia of Forms and Precedents, 4th ed. Vol. 21
p. 78).

(6) I feel bound to conclude that once the plaintiff
did not acquire any maritime lien for the amount of
his advance to the master, which attached to and 5
followed the ship from and after the time, when this
advance was made, he cannot have an action in rem
once at the time of its institu'ion the res was no longer
the property of his debtor.

Action dismissed. 10

Cases referred to :

- The St. Elefterio* [1957] 2 All E.R. 374;
The Banco [1971] 1 All E.R. 524;
Heinrich Bjorn [1885] L.R. 10 P.D. 44 at pp. 49 - 50,
60; [1886] 11 A.C. 270 at pp. 276, 277; 15
The Monica S. [1967] 3 All E.R. 740;
The Orienta [1895] P.D. 49 at p. 55;
The Karnak [1869] L.R. 2 P.C. 505;
The St. George [1926] 136 L. T. 252;
The Cecilie [1879] 4 P.D. 210; 20
The Haabet [1899] P. 295;
The James W. Elwell [1921] P.D. 351;
The Petone [1917] P.D. 198;
The Nelson, 166 E.R. 61;
The Beldis [1935] All E.R. Rep. 760 at p. 766. 25

Admiralty Action.

Admiralty action for (a) £3,000.- on a bottomry bond
and/or loan and/or as disbursements and/or money
advanced to the master of the ship "Tania Maria", (b)
£1,100.- disbursements and (c) £320.400 mils further 30
disbursements.

Ph. Poetis and Chr. Chrysanthou, for the plaintiff.

S. G. McBride, for the defendant.

Cur. adv. vult.

The facts sufficiently appear in the judgment delivered by :

1975
Sept. 5

SOTERIS P.
PASCHALIS

v.

THE SHIP
"TANIA MARIA"

HADJIANASTASSIOU, J. : In this action in rem the plaintiff Soteris P. Paschalis, of London, claimed against the defendant ship "Tania Maria" ex "Constantis Fotinos" (a) for the amount of £3,000 on a bottomry bond and/or loan and/or bond and/or as disbursements, and/or money advanced to the master of the ship on or about the 18th June, 1971, as necessities to enable the ship to proceed with its voyage; (b) £1,100.- disbursements in respect of proper expenditure of necessary things for the ship for the purposes of navigation; and (c) £320.400 further disbursements in respect of proper expenditure of necessary things for the ship for the purposes of navigation; and legal interest.

On the same date of filing the writ of summons, the plaintiff made also an application on the 15th January, 1973, seeking an Order of the Court for the arrest of the ship lying in Limassol port, and keeping the same under safe arrest until further Order of the Court. This application was based on the Cyprus Admiralty Jurisdiction Order 1893, para. 50 et seq. In support of the application, an affidavit was sworn on the same day by Tassos Paschalis, the brother and general agent of the plaintiff in Cyprus, stating that he was fully authorised to swear that affidavit. It appears from the said affidavit that the said ship is a Lebanese ship and at the material time, that is to say, of incurring all the expenses amounting to £4,420.400, the ship carried the name of "Constantis Fotinos" and she belonged to N.C. Spanos Shipping Co. Ltd. This latter statement that the ship belonged to N.C. Spanos, as it appeared from the petition, proved to be a wrong statement.

On the 15th January, 1973, the Court after reading the affidavit and the other material before it, including the alleged bottomry bond, issued a warrant of arrest against the said ship with the additional direction that the ship should be released by the Marshal on the filing of a security bond for the amount of £5,000 by or on behalf of the ship in question.

I should have added that what is described in the affidavit as bottomry bond *exhibit A* is a document

1975
Sept. 5

SOTERIS P.
PASCHALIS

v.

THE SHIP
«TANIA MARIA»

addressed by the master of the ship to Mr. Soteris Paschali, and because of its importance I propose quoting it :-

*"M.V. CONSTANTIS FOTINOS
PANAMA*

5

CYPRUS AGENTS

U.K. AGENTS

N.C. SPANOS SHIPPING
CO. LTD.,
7A RHODOS STREET,
FAMAGUSTA.

N.C. SPANOS SHIPPING
CO. LTD.,
51 CRUTCHED FRIARS,
LONDON, EC3 N 2DA. 10
PORT : MANCHESTER
DATE : 18th June, 1971.

Mr. Soteris Paschali,
97 Booth Road,
London.

15

Dear Mr. Paschali,

I, the Master of the above vessel, Captain G. Karadzis confirm that the total amount of money which you advanced is three thousand English pounds

CASH TO MASTER £3,000 20

It was given to the officers and crew and the ship was not arrested. You can see the crew is restless and wages were not paid regularly.

Now I can continue voyage but please send balance wages crew so I have no more troubles. 25

All cargo is on board and will sail tonight."

Then a stamp is affixed with the signature of the master of the ship.

The next document, *Exhibit B*, dated 20th September, 1971, is a list of personal expenses incurred by the plaintiff in attending to the repairs of the ship, referred to as re-imburements incurred as necessaries in paragraph (b) of the affidavit, and I quote :- 30

"N.C. Spanos Shipping Co. Ltd.

51 Crutches Friars,
London, E.C. 3.

35

m.v. 'CONSTANTIS FOTINOS'

	Proceeding to Manchester 27.8.70 —	
	Return fare —	£12.50
	Taxis and meal on train	2.50
5	attend above vessel's damage and Special Survey repairs till 30.9.70	
	My fees and expenses including issue of Survey report—total 35 days	
	Fees @ £19 per day	
	Hotel @ £4 per day	
10	Meals @ £4 per day	
	Out-of-pocket expenses @ £4 per day all inclusive	£1085.00
		<hr/>
		£1100.00
15		<hr/> <hr/>

1975
Sept 5
—
SOTERIS P
PASCHALIS
v.
THE SHIP
«TANIA MARIA»

With Compliments

50% charge to Fire Damage Repairs
50% charge to special survey repairs

(Sgd) T. Paschalis.”

20 The third document, *Exhibit C*, dated 20th September, 1971, is again a list of the expenses referred to as necessities in para. (c) of the said affidavit and is in these terms :-

“20th September, 1971.

25 N.C. Spanos (Shipping) Co. Ltd.,
51 Crutched Friars,
London, E.C. 3

*m.v. 'Constantis Fotinos'
Steering Gear Failure*

30	Proceeding to Lisbon 2.5.71 —	
	Return Air Fare	£77.40
	Attend above vessel's damage repairs till 10.5.71	
	My fees and expenses including report to owners	
35	Total—9 days	
	Fees @ £19 per day	£171.00
	Meals @ £4 per day	36.00
	Out-of-pocket expenses	36.00
40		<hr/>
		£320.40
		<hr/> <hr/>

1975
Sept. 5
—

With Compliments

Note

SOTERIS P.
PASCHALIS

Nothing has been paid by owner against this a/c

v.

(Sgd) S.P. Paschalis."

THE SHIP
«TANIA MARIA»

On the 20th January, 1973, counsel on behalf of the 5
said ship "Tania Maria" gave notice to the plaintiff to
show cause against the order for the arrest of the said
ship made by the Court on the 15th January, 1973, and
the main ground on which the owners of defendant ship
relied for the discharge of the order for the arrest of 10
the ship was that the documents attached to the appli-
cation (referred to earlier in this judgment) did not show
that the plaintiff had any right of maritime lien over
the defendant ship which could be attached against the
subsequent owners, the ROSAGE LINES of Beirut 15
Lebanon.

However, on the 25th January, 1973, there was an
application under Order 60, on behalf of the plaintiff
praying for an order of the Court releasing the ship
"Tania Maria" and the order of release was issued on 20
the same day, because in the meantime a letter of gua-
rantee was filed in Court for the sum of £5,000 in
satisfaction of any judgment that may be given in favour
of the plaintiff.

On the 10th March, 1973, because of the delay in 25
filing the petition by the plaintiff, an application was
made on behalf of the defendant ship for the dismissal
of the action for want of prosecution. This application
was withdrawn because in the meantime the petition was
filed on the 27th March, 1973. 30

In the petition it was alleged that the plaintiff was
the general manager of N.C. Spanos Shipping Co. Ltd.,
from almost the day it was incorporated in London in
the year 1969, until the 4th October, 1971, when the
said Company was wound up by the Order of the High 35
Court of Justice in England. It appears that the ship
"Tania Maria" under its then name "Constantis Fotinos"
was registered in the name of Compania Naviera Evdolia
S.A. Panama. The said N.C. Spanos Shipping Company

1975
Sept. 5

SOTERIS P.
PASCHALIS

v.

THE SHIP
"TANIA MARIA"

Ltd., were at all material times before this action the U.K. agents of the owners. On or about the 19th June, 1971, the "Tania Maria", whilst in the course of a voyage between Cyprus—Beirut—Manchester, arrived at the port of Manchester (England) and because she was unable to proceed further on her voyage, owing to lack of funds and want of credit to pay the officers and crew wages, and for necessaries and supplies for the continuance of the voyage, the said ship did then borrow from the plaintiff the sum of £3,000.- on the security of a bottomry bond and/or of a bond and/or as a loan, given to her for her own benefit in order to pay the officers and crew wages and/or to proceed on her journey, and/or in order to save her from arrest.

It was further claimed by the plaintiff, in the alternative, that as such a necessity existed, the ship through the master did create a loan on bottomry from the plaintiff for the sum of £3,000.-, and thereupon the master did execute a bottomry bond and delivered same to the plaintiff. In consequence of the said advance, the ship was enabled to sail, and on the following day she arrived at her destination. According to para. 7 of the petition the plaintiff was in charge of this vessel during all her U.K. calls in 1970 - 71 (four of them) and personally attended and supervised both crew and ship requirements and slept on board whilst at Manchester, including the special survey in August - September 1970; and in or about September 1970, while the said ship was lying in the port of Manchester, the plaintiff properly made necessary disbursements on account of the said ship amounting to £1,100.

On the 27th March, 1973, the owners of the defendant ship filed the answer, and according to para. 3 it was alleged that even should there be any substance in the claims raised in this action (which is denied) those claims should be raised by N.C. Spanos Shipping Co. Ltd. and not the plaintiff who was at all times material to this action the servant and/or agent of the said N.C. Spanos Shipping Co. Ltd., and acting as such, and not in his personal capacity.

In para. 8 the defendant ship alleged that the outstanding amounts do not create any lien over the said

1975
Sept. 5

SOTERIS P.
PASCHALIS

v.

THE SHIP
«TANIA MARIA»

ship or against the present owners of the said ship and that they are not claims for which the ship or her present owners are answerable or liable, and even if any right in rem ever existed (which is denied) the same was extinguished upon the sale of the defendant ship on 22.9.71. 5

It was further alleged in para. 11 that the plaintiff wrongfully or unjustifiably caused the arrest of the defendant ship and has caused thereby to the said defendant ship and to her present owners loss which she now claims; and in a counterclaim the defendant ship claimed the amount of £5,449.959 damages. 10

On the 10th April, 1973, the plaintiff joined issue to the defendant's defence, denied the counterclaim and prayed for its dismissal with costs. 15

The defendant ship raised also a preliminary objection that the Court had no jurisdiction to entertain this action

“(a) because the claims raised in this action do not create maritime liens and/or any cause of action in rem; or 20

(b) any other cause of action cognisable by this Court in particular as set out in the Administration of Justice Act 1956, sections 1(1)(a) to (s) and 3 as applied in Cyprus by sections 19(a) and 29(2)(a) of Law 14/60 and 25

(c) because at the time of the commencement of this action the defendant ship was not owned by any person who may have been personally liable to the plaintiff, as envisaged by section 3(4)(a) of the Administration of Justice Act 1956.” 30

Having heard the contentions of both counsel, I think I must try first to show what is the jurisdiction of this Court to deal with the claims of the plaintiff. According to section 19(a) of the Courts of Justice Law, 1960, (Law 14/60) this Court, in addition to the powers and jurisdiction conferred upon it by the Constitution, has exclusive original jurisdiction — 35

“(a) as a Court of Admiralty vested with and exercising the same powers and jurisdiction as those 40

vested in or exercised by the High Court of Justice in England in its admiralty jurisdiction on the day immediately preceding Independence Day;"

1975
Sept 5

SOTERIS P
PASCHALIS

v

THE SHIP
«TANIA MARIA»

5 The law to be applied under s. 29(2) of Law 14/60 is to the effect that the High Court in exercise of the Jurisdiction :-

10 "(a) conferred by paragraph (a) of section 19 shall apply, subject to paragraphs (c) and (d) of subsection (1), the law which was applied by the High Court of Justice in England in the exercise of its admiralty jurisdiction on the day preceding Independence Day, as may be modified by any law of the Republic;"

15 At the present time in England, the Admiralty jurisdiction of the High Court, and the manner in which it may be invoked, are governed by the Administration of Justice Act 1956. That Act, (as amended) provides :-

20 "1(1) The Admiralty jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims—....

(c) any claim in respect of a mortgage of or charge on a ship or any share therein;
25 (m) any claim in respect of goods or materials supplied to a ship for her operation or maintenance; ...
(o) any claim by a master or member of the crew of a ship for wages of a ship for any money or property which, under any of the provisions of the Merchant Shipping Acts, 1894 to 1954, is recoverable as wages or in the court and in the manner in which wages may be recovered; ... (p) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship; ... (r) any claim arising out of bottomry.

35 3 ... (2) The Admiralty jurisdiction of the High Court may in the cases mentioned in paras. (a) to (c) and (s) of sub-s (1) of s. 1 of this Act be invoked by an action in rem against the ship or property in question. (3) In any case in which there is a maritime lien or other charge on any ship ... for the amount claimed, the Admiralty jurisdiction of the
40

1975
Sept. 5

SOTERIS P.
PASCHALIS

v

THE SHIP
«TANIA MARIA»

High Court may be invoked by an action in rem against that ship ... (4) In the case of any such claim as is mentioned in paras. (d) to (r) of sub-s. (1) of s. 1 of this Act, being a claim arising in connection with a ship, where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or control of, the ship, the Admiralty jurisdiction of the High Court may (whether the claim gives rise to a maritime lien on the ship or not) be invoked by an action in rem against — (a) that ship, if at the time when the action is brought it is beneficially owned as respects all the shares therein by that person...”

Before proceeding further, I think I ought to reiterate that the ship “Constantis Fotinos” was under mortgage and in accordance with the Bill of Sale she was sold on the 17th September, 1971, by the previous owners, “Compania Naviera Evdelia S.A.” to “Rosade Lines S.A.R.L.” in consideration of the sum of £20,000 paid to the said company by “Odette A. Nauphal” acting for herself and for the new owners free from all incumbrances and maritime liens.

In September, 1971, according to Lloyd’s Register of Shipping the name of the ship “Constantis Fotinos” changed and its new name was recorded in the records as “Tania Maria”. Furthermore it appears that the Company N.C. Spanos Shipping Company Ltd. went into liquidation on the 4th October, 1971.

Counsel on behalf of the plaintiff in resisting the preliminary point of the defendant ship, argued that once the defendant ship put in an appearance not under protest, the plaintiff was entitled to continue his action, and the Court had, therefore, jurisdiction to hear this case.

Reverting now to s. 3(4) of the Act of 1956, relied upon by counsel for the defendant ship, I think I ought to state that this section was judicially construed in *The St. Elefterio* [1957] 2 All E.R. 374. Willmer, J., dealing with the contention of the defendants regarding the true construction of the Administration of Justice Act 1956, and in particular s.1(1) and s.3(4) thereof,

that the Court had no jurisdiction in rem to entertain the action, said at pp. 376 - 377 :-

1875
Sept. 5

SOTERIS P.
PASCHALIS
v.
THE SHIP
«TANIA MARIA»

5 "In my judgment that proposition rests on a mis-
conception of the purpose and meaning of s.3(4).
As it appears to me, that sub-section, so far from
being a restrictive provision, is a sub-section intro-
duced for the purpose of enlarging the Admiralty
jurisdiction of the court. As I view it, its purpose
is to confer for the first time in England the right
10 to arrest either the ship in respect of which the
cause of action is alleged to have arisen or any
other ship in the same ownership. That is an entirely
new right so far as the law of England is concerned,
although it previously existed in other countries in-
15 cluding Scotland. The reason for conferring that
right now is for the purpose of bringing this country
into line with other countries as a result of an inter-
national convention. In my judgment the purpose
of the words relied on by counsel for the defen-
dants, that is to say the words, 'the person who would
be liable on the claim in an action in personam',
is to identify the person or persons whose ship or
ships may be arrested in relation to this new right
(if I may so express it) of arresting a sister ship.
25 The words used, it will be observed, are 'the person
who would be liable' not 'the person who is liable',
and it seems to me, bearing in mind the purpose of
the Act, that the natural construction of those quite
simple words is, 'the person who would be liable
30 on the assumption that the action succeeds'. This
action might or might not succeed if it were brought
in personam. That would depend on the view which
the court ultimately took of the various contentions
raised by counsel for the defendants. But clearly, if
35 the action did succeed, the person or persons who
would be liable would be the owner or owners of
the steamship St. Eleferio. In such circumstances,
in the absence of any suggestion that the action is
frivolous or vexatious, I am satisfied that the plain-
40 tiffs are entitled to bring it and to have it tried, and
that, whether or not their claim turns out to be a
good one, they are entitled to assert that claim by
proceeding in rem."

1976
Sept. 5

SOTERIS P.
PASCHALIS

v.

THE SHIP
«TANIA MARIA»

Later on he said :-

“I make that observation because it adds point to what I want to say in conclusion, namely, that any construction of s.3(4) of the Act other than the construction which I have sought to put on it, would, it seems to me, lead to the most intolerable difficulties in practice”.

See also *The Banco*, [1971] 1 All E.R. 524, where the dictum of Willmer, J. in *The St. Elefterio* (*supra*) was applied.

Having regard to the contention of counsel on behalf of the defendant ship that the plaintiff's cause of action gave him no maritime lien and no right in rem, I think I ought to state that the maritime liens recognised by English Law are those in respect of bottomry and respondentia bonds, salvage of property, seamen wages and damage, but a maritime lien has been held not to exist in respect of towage or necessaries.

Regarding the claim of the plaintiff as to necessaries, the authority is the case of *Henrich Bjorn*, [1885] L.R. 10 P.D. 44. This was an action in rem for necessaries against the foreign vessel, and the headnote reads as follows :-

“A foreign vessel was in an English port, and the owner being temporarily in England and in want of funds for the purchase of necessaries, made an agreement with the plaintiffs by which, in consideration of their advancing him by cash or acceptance 600 l. for necessaries supplied to and for the use of the vessel, he thereby undertook to return them the amount so advanced with interest and all charges on the return of the vessel from her voyage. And the plaintiffs were thereby authorised ‘to cover the amount advanced the owner by insurance on ship, & c., out and home at owner's cost’.”

Fry, L.J. delivering the judgment of the Court of Appeal, in allowing the appeal and in dismissing the action of the plaintiff, had this to say at p. 60 :-

“The result of this long catena of authorities is hardly satisfactory; it shews that for several years

1975
Sept. 5

SOTERIS P.
PASCHALIS

v.

THE SHIP
«TANIA MARIA»

5 Dr. Lushington repelled the notion that the statutes
of 1840 created any maritime lien in favour of the
material man; it shews that in one or more cases
he admitted the opposite view, but that at a yet later
10 date he reverted to the earlier conclusion; and that
in the one case, that of *The Ella A. Clark*,¹ in which
he formally decided in favour of the lien, he did so
on a principle of construction, namely, that when
the legislature gave a proceeding in rem then it
15 created a maritime lien, and that this principle was
rejected by the learned judge himself in the next
case of *The Pacific*,² and by the Privy Council in
the case of *The Two Ellens* Law Rep. 4 P.C. 161.

20 It appears to us that upon the whole the current
of authorities is against the existence of the lien;
but the most important result, in our opinion, is the
negative one that there has been no settled or uniform
current of authority or of practice in the Admiralty
Court in favour of the lien, and that the question
is therefore properly open for decision on principle.

25 In our opinion the two statutes of 1840 and 1861
ought (notwithstanding the observations of Mellish,
L.J., in *The Two Ellens*) to be construed as in pari
materia, and we think that the decision of the
Privy Council in that case lends confirmation to the
conclusion at which we arrive, namely, that whilst
the statute of 1840 has enabled the material man
to enforce his claim in the Admiralty Court, and
30 as one means has given him a right to arrest the
ship, it has given him no maritime lien and conse-
quently no right against the ship till action brought.”

In the *Heinrich Bjorn* [1886] 11 A.C., 270, the deci-
sion of the Court of Appeal was affirmed and the head-
note reads :-

35 “The stat. 3 & 4 Vict. c. 65 s. 6 does not give
a maritime lien in respect of necessities supplied
to a foreign ship in an English port.

The plaintiffs advanced to the part-owner of a

(1) Br. & L. 32.

(2) Br. & L. 243.

1975
Sept. 5

SOTERIS P.
PASCHALIS

v.

THE SHIP
"TANIA MARIA"

foreign ship then at Liverpool money for necessaries for the ship. The part-owner having sold his interest in the ship to the defendants the plaintiffs brought an action in rem for the amount of the advances :-

Held, affirming the decision of the Court of Appeal (10 P.D. 44), that the action could not be maintained." 5

Lord Watson speaking in the House of Lords on appeal from the same case at the instance of the appellants for recovery of monies said to have been advanced by them in March, 1882 for equipping and supplying with necessary stores the Norwegian ship Heinrich Bjorn which was then lying in the port of Liverpool, said at pp. 276, 277 :- 10

"The action is in rem, that being, as I understand the term, a proceeding directed against a ship or other chattel in which the plaintiff seeks either to have the res adjudged to him in property or possession, or to have it sold, under the authority of the Court, and the proceeds, or part thereof, adjudged to him in satisfaction of his pecuniary claims. The remedy is obviously an appropriate one in the case of a plaintiff who has a right of property or other real interest in the ship, or a claim of debt secured by a lien which the law recognises. We have been informed that under the recent practice of the Admiralty Court the remedy is also given to creditors of the ship-owner for maritime debts which are not secured by lien; and in that case the attachment of the ship, by process of the Court, has the effect of giving the creditor a legal nexus over the proprietary interest of his debtor, as from the date of the attachment. 15 20 25 30

The position of a creditor who has a proper maritime lien differs from that of a creditor in an unsecured claim in this respect—that the former, unless he has forfeited the right by his own laches, can proceed against the ship notwithstanding any change in her ownership, whereas the latter cannot have an action in rem unless at the time of its institution the res is the property of his debtor. In the present case there was a change in the ownership of the Heinrich 35 40

1975
Sept. 5

SOTERIS P.
PASCHALIS

v.

THE SHIP
"TANIA MARIA"

5 Bjorn between March 1882 and the time when this
suit was instituted. Accordingly, it is not a matter
of dispute that the action must be dismissed, if the
appellants have not a maritime lien for the amount
of their advances, which attached to and followed
the ship, from and after the time when these ad-
vances were made."

Later on his Lordship said at p. 278 :-

10 "I do not think it necessary to refer to authori-
ties for the purpose of establishing that by the law
of England persons who equip or provide necessaries
to a ship in an English port have no preference over
other creditors, and have no lien upon the ship
15 itself for recovery of their demands. The law upon
that point is clear."

See also *The Monica S.*, [1967] 3 All E.R. p. 740, where
Brandon J. applied the dicta of Lord Watson at pp.
276, 277.

20 In *The Orienta*, [1895] P.D. 49, Lord Esher, M.R.,
dealing with the terms "disbursements" and "necessa-
ries" said at p. 55 :-

25 "The real meaning of the word 'disbursements' in
admiralty practice is disbursements by the master,
which he makes himself liable for in respect of ne-
cessary things for the ship, for the purposes of na-
vigation, which he, as master of the ship, is there
to carry out—necessary in the sense that they must
be had immediately—and when the owner is not
30 there, able to give the order, and he is not so near
to the master that the master can ask for his autho-
rity, and the master is therefore obliged, necessarily,
to render himself liable in order to carry out his
duty as master.

35 Here no disbursements were made by the master;
no goods were ordered by the master at all; no lia-
bility was incurred by the master in respect of these
goods. He is not liable for the price of the coals,
though it may be that the bill is drawn for the
exact price."

40 Having had the occasion to go through the two claims

1975
Sept. 5

SOTERIS P.
PASCHALIS

v.

THE SHIP
«TANIA MARIA»

of the plaintiff referred to in *exhibits* (a) and (b), I have no doubt at all, that those expenses were not disbursements made by the master of the ship in order to make himself liable for, in respect of necessary things for the ship for the purpose of navigation. But, in any event, 5
even if I am wrong, then in the light of the authorities I have quoted earlier, the law does not give to the plaintiff a maritime lien in respect of necessities for a foreign ship because he cannot have an action in rem, unless at the time of its institution the res is the property of 10
his debtor in this case. As I said earlier, there was a change in the ownership of the "Constantis Fotinos" long before the institution of this action on the 15th January, 1973, and, therefore, the action must be dismissed regarding those two claims, once the plaintiff has not a 15
maritime lien for the amounts of his advances which could be attached to and follow the ship from and after the time when those advances were made.

I think I must make it quite clear that the position of a creditor who has a proper maritime lien differs from 20
that of a creditor in an insecure claim in this respect, that the former, unless he has forfeited the right by his own laches, can proceed against the ship notwithstanding any change in her ownership.

The next question, therefore, is whether the alleged 25
bottomry bond, referred to under claim (a), (*exhibit* (a)). is a valid bond. It has been said that bottomry bonds are contracts in the nature of mortgage of a ship on which the owner or the master acting for the owner borrows money in circumstances of unforeseen necessity 30
or in case of distress to enable him to repair the ship or to pay for the repairs and despatch of the vessel for the completion of her voyage, and pledges the keel or bottom of the ship *pars pro toto* for repayment. If the ship is lost in the course of the voyage by any of the 35
perils enumerated in the contract, the lender on the bottomry bond loses his money; but if the ship arrives safe, then he recovers the loan, with interest, which is called maritime interest and may be in proportion to the risks of the voyage. In order, therefore, to enable the 40
Court to pronounce for the validity of a bottomry bond or bill, or a *respondentia* bond put in suit before it, and to condemn the ship or freight or cargo alone, as

the case may be, in the amount found due on the bond or bill, the Court must be satisfied by sufficient evidence that necessity existed for the loan on bottomry. (*The Karnak* [1869] L.R. 2 P.C. 505). This is, ordinarily, established by proof that the master or owner of the ship was in want of supplies, and was without credit, at the port where the bond was executed and was unable to obtain the necessaries for the continuance of the voyage without resort to the bottomry bond (see *The St. George* [1926] 136 Law Times 252). However, where there is no maritime risk, that is, where the repayment of the money advanced is not made dependent, upon the safe arrival of the ship, (*The Nelson* 166 English Reports 61) a bond cannot be enforced in an Admiralty action as a bottomry bond, though a bond covering in part property not exposed to maritime risk, and bad as to that part, may be valid as to the residue in respect of which maritime risk exists.

It has been further said in *The Cecilie* [1879] 4 P.D. 210 and *The Haabet* [1899] P. 295, that a bottomry bond may be pronounced valid and within the jurisdiction of the Court though it does not stipulate for the payment of maritime interest. In the *Heinrich Bjorn* (*supra*), Fry, L.J., in the Court of Appeal in considering whether or not the contract in that action was a bottomry bond said at pp. 49 - 50 :-

“...But we think that it is not admissible to qualify or shew the real intention of the parties to a written agreement. Taking the contract, then, as expressed in the written document signed by Abrahamsen, it must be inquired whether it charges the ship, and whether the lender assumes the maritime risk. It appears to us that the contract creates no charge upon the ship; on the contrary, the security taken is of an alternative kind; in the event of the return of the ship from her present voyage, the lender is to look to the borrower personally, and to enforce the liability created by the words, ‘I hereby undertake’. In the event of the ship being lost on her voyage, the lender is to look to the equitable charge on the policies which is created by the authority given to the lenders to insure the ship at the cost of the borrower. For the same reasons it appears to us that

1975
Sept. 5

SOTERIS P.
PASCHALIS

v.

THE SHIP
«TANIA MARIA»

the lender does not take the maritime risk; on the contrary he takes a contract which gives him an alternative security excluding all risk at all. This is not as it appears to us, one of those cases in which the parties, having plainly intended to create a bottomry contract, have erred in some particular, in which cases the Court may reject the erroneous particular; on the contrary, the notion of bottomry was absent from the minds of all the parties; the evidence is not addressed to it, it is not mentioned in the written document, in the oral evidence, in the pleadings, or in the judgment of Sir James Hannen, nor in the arguments before us, till some observations on it fell from the junior counsel for the plaintiffs. We therefore feel bound to conclude that the contract in question was not a contract of bottomry.”

In *The James W. Elwell* [1921] P.D. 351, it was held “that as neither the voyage on which the maritime risk was to be run, nor the time when the loan was to become repayable, was stated, the bond was not a valid contract of bottomry and gave the lenders no maritime lien”.

Hill, J., dealing with the question whether the American Express Co. had a good claim in bottomry against the proceeds of the ship in Court said at p. 364 et seq :-

“The question is whether they succeeded in creating a valid contract of bottomry.

The document is as follows :-

‘BORDEAUX (Gironde), FRANCE.

September thirtieth, Nineteen hundred and nineteen. Bond of Bottomry between A.C. CLARK, Master of American Schooner *James W. Elwell* of Portland, Maine, and AMERICAN EXPRESS COMPANY, Three Cours de Gourgue, Bordeaux :-

I, A.C. CLARK, Master of Schooner *James W. Elwell*, do hereby agree to bond and lien said Schooner together with her furniture, sails, gear and future earnings to the amount of francs 20,000 (twenty thousand) for value received, said American Express Company to have absolute lien upon vessel until said loan is repaid together with interest

accrued and all other charges relating thereto.

1975
Sept. 5

I further state that said vessel was built at Bath, Maine, U.S.A. (here followed description and dimensions).

SOTERIS P.
PASCHALIS

v.

THE SHIP
"TANIA MARIA"

5 This vessel at this date first above written, is
valued at about one hundred and fifty thousand
dollars, and there are no previous attachments
against her, to the best of my knowledge and belief,
and I further agree not to draw any further bond
10 on said ship without first having consent from the
AMERICAN EXPRESS COMPANY.

(Sgd) A.C. CLARK.

WITNESSED by JAMES D. CHILDS. ' "

Then the learned judge *posed* this question :-

15 "Is this an effective bottomry bond? Whether
it is or is not must be gathered from the document
itself: *The Emancipation*, 1 W. Rob. 124, 128, 130;
and cf. *The Indomitable*, Swa. 446, 452; 'there must
20 be a maritime risk in the instrument; it matters not
in what form of words'. See also *Simonds v. Hodgson*,
3 B. & Ad. 50, 57. 'No person can be entitled to it
(maritime interest) who does not take upon himself
the peril of the voyage; but it is not necessary that
25 his doing so shall be declared expressly, and in terms,
though this is often done; it is sufficient that the
fact can be collected from the language of the in-
strument considered in all its parts'. It is said that
such bonds should receive a liberal interpretation.
30 Be it so, but the document, given a liberal inter-
pretation, must be one which shows the essentials of
a bottomry contract. One of those essentials is often
spoken of as a maritime risk. This means that the
payment of the money advanced is conditional upon
the safe arrival of the ship: cf. *The Emancipation*,
35 1 W. Rob. 124, 128, 130. That is the meaning of
the necessity of sea risk: cf. *Stainbank v. Shepard.*,
22 L.J. (Ex.) 341, 346; 13 C.B. 418, 442: 'It is
essential to the validity of hypothecation that the
40 sea risk, should be incurred by the lender, and that
the pledge on the ship should take effect only in
the event of its safe arrival'. It is said that the use

1975
Sept. 5

SOTERIS P.
PASCHALIS

v.

THE SHIP
«TANIA MARIA»

of the word 'bottomry' shows that the lender was lending on terms of some maritime risk. It may be so: See *The Royal Arch*, Swa. 269, 281, where Dr. Lushington says 'the very term 'bottomry' implies sea risk, and cf. his observations in *The Emancipation*, 1 W. Rob. 124, 128, 130: 'Hypothecation may mean bottomry or mortgage only, and if you have a voyage described and the contract is expressed to be one of bottomry, there is little difficulty in inferring that the condition of repayment is safe arrival on that voyage'. But what can be inferred from the word 'bottomry' detached from any voyage or anything to denote when the risk is to begin and when to end? To have a good contract of bottomry you must have a loan with repayment conditional upon safe arrival—i.e., you must have a voyage the sea risk of which is to be run by the lender. Lord Stowell in *The Atlas*, 2 Hagg. Adm. 48, 53 said: 'The definition of bottomry bonds which I find in all the writers that have adverted to the subject, are contracts in the nature of mortgages of a ship on which the owner borrows money to enable him to fit out the ship, or to purchase a cargo for a voyage proposed, and pledges the keel or bottom of the ship, pars pro toto, as a security for repayment. It is moreover stipulated, that if the ship is lost in the course of the voyage, by any of the perils enumerated in the contract, the lender also shall lose his money'. No single case has been cited in which there was not a voyage specified in the bond except one exception which proves the rule—namely, *The Jane*, 1 Dods. 461, 463: 'He must describe the voyage as near as he can'. If no voyage at all is specified there is nothing to prevent the loan being immediately repayable or to make repayment conditional upon the ship surviving any particular risk. Or, on the other hand, there is nothing to prevent the lender indefinitely postpoing a demand for repayment and leaving the ship for years subject to a secret maritime lien. It is said for the plaintiffs that this bond became payable on arrival at Barry. The bond does not say so. Nor can anything of the sort be implied from its terms. The bond is a contract whereby, in consideration of an advance, the

1975
Sept. 5

SOTERIS P.
PASCHALIS

v.

THE SHIP
"TANIA MARIA"

5 plaintiffs are given an absolute lien on the ship and
her future earnings. As no time is fixed for pay-
ment, the loan is repayable on demand. I see no-
thing in this document to prevent the plaintiffs
demanding repayment before the ship left Bordeaux.
On the other hand, I see nothing to prevent them
letting the loan run on indefinitely and maintaining
the secret maritime lien on the ship all the time.
10 Called a bond of bottomry, it is really only an
attempt to create a lien to secure a loan, and it is
not even a mortgage. I hold it void."

See also *The Petone* [1917] P.D. 198.

15 In *The Beldis* [1935] All E.R. Rep. 760, Sir Boyd
Merriman, P. dealing with a passage in the judgment of
the Court of Appeal in the *Heinrich Bjorn* (*supra*), at
pp. 53 - 54, said at p. 766 :-

20 "The claim was for necessities, and the cardinal
fact was that at the time when she was arrested
the *Heinrich Bjorn* had been sold to parties who
were complete strangers to the cause of action. Her
former owner had entered into an agreement in
writing in respect of the supply of the necessities. It
was attempted, unsuccessfully, to assert that this
25 agreement was a bottomry bond; alternatively, it was
argued that there was a maritime lien on the ship
in respect of necessities. If there were a maritime
lien the ship would, of course, be subject to the lien
even in the hands of the new owners; but it was
30 held that there was no maritime lien for necessities,
though it was recognised that a claim for necessa-
ries would give a right to seize the ship for which
the necessities had been supplied in an action in
rem against owners on whose behalf the debt had
35 been incurred. This right, however, did not relate
back so as to be available against strangers to the
claim for necessities to whom the property in the
ship had passed before action brought. In other
words, when once the question whether the particu-
lar agreement amounted to a bottomry bond, which,
40 for present purposes, is irrelevant, was out of the
way, the only question remaining for decision was
whether the supply of necessities gave rise to a

1975
Sept 5

SOTERIS P
PASCHALIS

v

THE SHIP
"TANIA MARIA"

maritime lien. If not, the arrest of the Heinrich Bjorn could not be justified, since at the material date, namely, the commencement of the action, although she was the res in relation to which the cause of action arose, she was not a res belonging to the defendant owner 5

The passage relied upon cannot, therefore, be regarded as a binding statement of existing law on this point, though, naturally, a statement of the law by a court, composed as that Court of Appeal was, must carry 10 weight."

Having reviewed the authorities as to the particulars which should be contained in a valid instrument of bottomry, I turn once again to the case in hand, and taking the *exhibit* (a), as expressed in the written document, signed by the master of the said ship, it appears to me that this is not one of those cases in which the parties, having plainly intended to create a bottomry contract, have made a mistake in some particular, in which case this Court may reject the erroneous particular. 15 20

On the contrary, having read the document more than once, I am convinced that the notion of bottomry was absent from the minds of the plaintiff and of the master of the ship, because nothing is mentioned in the said written document that it was a bottomry bond. Furthermore, it appears to me that the said contract creates no charge upon the ship; and that the lender of the amount of £3,000 assumes the maritime risk, that is, that repayment of the loan should be made contingent upon the safe arrival of the property charged. No doubt, it appears that this is a document in which the master simply acknowledges the loan that the plaintiff has advanced to him the amount of £3,000. At the same time, it is clear to me from the letter which the plaintiff put in, that had it not been for the fact that N.C. Spanos Shipping Co. Ltd. went into liquidation on October 5, 1971, the plaintiff would look also for the payment of the loan to the company itself. (See letter dated October 5, 1971). 25 30 35 40

Once, therefore, the said document does not contain the particulars which should be contained in a valid

1975
Sept. 5

SOTERIS P.
PASCHALIS

v.

THE SHIP
"TANIA MARIA"

instrument, and as no time is fixed for payment, (see the *James W. Elwell (supra)*, and also the Encyclopaedia of Forms and Precedents, 4th edn. Vol. 21 at p. 78). I have come to the conclusion that this is not a valid
5 bottomry bond and, therefore, I hold the document void.

In these circumstances, it appears that the position of the plaintiff is that of a volunteer who made the payment of £3,000 in discharge of seamen's wages, but
10 clearly he does not acquire the maritime lien which the seamen had originally in support thereof. However, I feel that I should express my gratitude for the assistance given to me by counsel, and particularly by counsel for the defendant ship.

I, therefore, feel bound to conclude that once the
15 plaintiff did not acquire any maritime lien for the amount of his advance to the master, which attached to and followed the ship from and after the time when this advance was made, he cannot have an action in rem
20 once at the time of its institution the res was no longer the property of his debtor, having been sold to the owners of Rosade Lines of Beirut before this action. Accordingly, the action must be dismissed, the bail bond of £5,000 to be discharged, and the plaintiff to pay all the costs
25 of the action.

Action dismissed with costs.