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Statement of the case.

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## BELLE OF THE SEA.

1. Where adjusters of average, under directions from a mortgagee of a vessel in possession, and with the consent of her owners, undertake to adjust the business of the vessel on her coming in from a voyage in which she has suffered disasters and been obliged to take up money on bottomry, proceed in their office, collect the freights, general average, and insurance, pay the bottomry bond, having it assigned to themselves, and make the necessary disbursements of the vessel, it will not be inferred, except upon clear proof, that they meant to extinguish as against themselves the bottomry lien.
2. Nor will a representation in the nature of a mere opinion by them as to what will be the result of the whole adjustment, prevent them from enforcing their bottomry lien, if the freight, insurances, &c., do not discharge it, against a purchaser of the vessel who has relied on the representation.

APPEAL from the Circuit Court for the Eastern District of Pennsylvania; the case being thus:

The American ship "Belle of the Sea," owned by one Kimball, being in the port of New York, a certain Hammond, of that city, lent to her said owner, Kimball, \$25,000 on a mortgage of the vessel; and the vessel sailed to Calcutta. On her return voyage from Calcutta to New York, she sprung a leak, was obliged to put into Mauritius for repairs, and to take up \$46,000 on bottomry, the bottomry bond (now held by the Messrs. Ward in New York), covering ship, cargo, and freight. There were policies of insurance on both the ship and freight.

Shortly before the arrival of the ship at New York, the mortgage on her being long overdue, and the owner of the vessel, Kimball, being supposed to be unable to pay either bottomry bond or mortgage, Hammond, the holder of the mortgage, addressed himself to Higgins & Co., average adjusters, telling them that on the arrival of the vessel he meant to take possession of her, and that he wanted them to protect his interest in the mortgage generally. According to the account given of the matter by Higgins & Co., they agreed with him "to transact the business, *take up the bond,*

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and divide one-half the commissions that could be earned in the case." They subsequently saw the Wards, holders of the bond, and offered to take it up in behalf of Hammond, the mortgagee. The Wards agreed that if before twelve o'clock of a day named and then near at hand, Kimball, the owner of the vessel, did not take it up, they, the adjusters, might do so. At about eleven o'clock of the day thus fixed Kimball came with his two sons to the office of the adjusters. Higgins's account of the interview was to this effect:

"Mr. Kimball stated generally that he thought of putting the business of the vessel in our hands. I then told him that we had made all arrangements with Mr. Hammond to take up the bond, and that at twelve o'clock we expected to get it; that I did not think he could raise the requisite amount of money, or find anybody ready at a moment's notice to go into the affair, and that I therefore considered we were pretty certain of getting it.

"I further stated to him that as Hammond was then acting as mortgagee in possession, I didn't see that there need be any conflict, for if he could find any one to supply him with money to pay off Hammond, he would be bound to account for all moneys received by him flowing from the business of the vessel, and told him that I had made an arrangement with Hammond to divide one-half of the commissions with him. Mr. Kimball stated that he hoped to raise money and pay off Hammond, and that in that event he would expect Hammond to account to him for these commissions. I told him that my fee would be made in accordance with the trouble in the case. He then expressed his satisfaction, and volunteered to go and tell Mr. Ward that it was agreeable to him that we should take up the bond. I think I told him that we would endeavor to do justice to all parties interested; and he went away. At twelve o'clock we took up the bond; took an assignment of it from the Wards; and then we went on to manage the business of the vessel; everything being managed by Mr. Hammond, personally, in his capacity as mortgagee in possession. We put a man in possession. Mr. Kimball subsequently transferred the policies of insurance on the ship to us.

"I should state also that the same day, *before* we took up the bond, we were called on by the charterer, Samuel Stevens, who

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stated that he expected to have taken up the bond if he could have got it, in order to protect himself for advances made to the ship on account of freight-moneys, which he said amounted to \$27,500, or thereabouts, and that he had given notice to all the consignees not to pay the freight to anybody else but himself. I told him that that process would lock the whole freight-money up in court, and involve the whole thing in litigation, and that I didn't see why his rights couldn't be preserved by letting us collect the freight, and hold it subject to all the legal rights of all concerned. He said he thought it could be so done, provided we didn't allow ourselves to prejudice anybody's interest at the expense of another. I told him that it was very desirable that we should all move together, and that if he would lend his aid in having the whole matter amicably settled without litigation, we would pledge ourselves to act with the strictest impartiality to all parties. He expressed himself as entirely satisfied with such a pledge, and so promised, and thereupon went and informed the consignees that they might pay the freight to us."

The two sons of Kimball, who, as already mentioned, were present at the interview between Kimball and the adjusters, gave an account of it somewhat different from that given by the adjuster. Their statement was as follows:

"Mr. Higgins proposed to pay the bond for Mr. Kimball if Mr. Kimball would give him adjustments of claims against companies. He said that he would not charge any commission for payment of bottomry bond, as he would not be out of that money more than a day or two, as he intended to require payment immediately, and before delivery of cargo, of all charges on cargo, naming the freight and general average thereon; that there were not many owners of cargo, and that they were very earnest to get their goods; several had called, and they would pay any moment the entire freight and estimate of general average on cargo. Mr. Higgins estimated the freight at about \$34,000, and the general average on cargo at \$20,000, which would more than pay bottomry bond and disbursements on crew inwards, &c. This was all verbally agreed to by both parties. They said that *they would apply collections to bond immediately.*"

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Argument for the purchaser of the ship.

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Nothing was said at this interview about Mr. Kimball's policies of insurance, but at a subsequent meeting they were handed to Mr. Higgins to be collected, the amount to be applied to payment of the bond, if necessary.

During these operations, one Nickerson was desirous of buying the ship, and finally did buy it. He gave this account of his purchase:

"Before I purchased I had an interview with Higgins & Co., the agents of the former owner, Mr. Kimball, who had placed the affairs of the ship, arising out of her last voyage, in their hands for settlement. In this interview they *assured* me that if certain claims of the freighters were paid there would be a balance of some \$3000 in their hands belonging to the ship. On this assurance I bought the ship, and paid the freighters' claims."

Higgins in giving an account of this same matter stated that he had put all the accounts before Nickerson, who examined them, and had his own adjusters examine them; and he denied, in effect, that he had made such representations as those alleged.

As things turned out Higgins & Co. could not get all the insurance-money claimed, and asserted by them to be due from the insurers; and there was a deficit which was to fall on some one. On whom it was to fall was the question. The adjusters, Higgins & Co., asserted that it was to fall on the ship under the bottomry bond; they having been subrogated to the rights of the Wards. Nickerson, the purchaser, asserted on the contrary that it was to fall on Higgins & Co., the adjusters, who had undertaken to pay the bond, and to look to freight, insurance, &c., for reimbursement.

The two parties being thus unable to agree, and the vessel being in the port of Philadelphia, Higgins & Co. libelled her there for the deficit. The District Court decreed in their favor, and the Circuit Court on appeal affirmed the decree. Nickerson now brought the case here.

*Mr. Henry Flanders, for the appellant:*

1. The testimony shows that the adjusters expected confidently that the freight, insurance, &c., would reimburse

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Argument for the adjusters.

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them, and, therefore, that they agreed to *pay* and did *pay* the bottomry bond. The testimony of the two sons of Kimball shows this. Higgins's own testimony shows it no less; for he says that his firm was employed "*to take up the bond.*" The bottomry lien being thus once extinguished is not revived—especially is not revived against an innocent purchaser for value—because the adjusters expected to get money which they failed to get. The present case is one of every-day occurrence. The adjusters anticipated uncertain profits, and did not get them. For this, *their* own error of judgment, they must themselves suffer.

2. In addition to this, we have as a defence the assurance of Higgins to Nickerson, before the purchase of this last, that if certain claims of freighters were paid there would be a balance in favor of the ship; and the fact that *on that assurance alone*, Nickerson purchased.

The testimony on both parts of the case is, on the appellant's side, positive, specific, and to the point. The other side opposes to it but general denials.

*Mr. S. C. Perkins, contra :*

1. The purchaser of the vessel alleges, that the lien of bottomry was extinguished by an agreement by the adjusters with the owner of the ship that they would take up the bond and look only to the freight, general average, and insurance for their reimbursement. This he is bound plainly to prove. Has he proved it?

It is evident that the adjusters had proposed to the Wards to pay the bond and take an assignment of it, before they had any interview with Kimball, the owner of the ship. Their occupation being that of adjusters of averages, they were doubtless desirous to be employed in that capacity in reference to this ship. Whatever estimate they may have made of the comparative resources and liabilities of the ship, whatever assurances they may have given as to their ability to marshal and adjust them for the best interests of the owner, these are to be considered as reasons suggested for their employment, rather than as importing a stipulation

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Argument for the adjusters.

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that they would accept such resources as their sole security for reimbursement. Proposing to pay the amount of the bond and to take an assignment of it, it is improbable that they intended to forego the certain security thus afforded them, and depend upon the problematical sufficiency of the ship's credits to return their large advances. Admitting that they were the agents of the ship-owner, the payment of his debt with their own money would not work a satisfaction of the debt or an extinguishment of the security for it. By the assignment of the bond they took the place of the bottomry creditors, and there is no incompatibility in the rights to which they thus succeeded and their duties and obligations as agents of the debtors. Certainly there is no implication, in equity, at least, that by becoming agents of the debtor they thereby surrendered or lost any of their securities as creditors. Admitting further, that they paid the bond in pursuance of an arrangement with the owner to that effect, still the debt with its incidents subsisted and would only be discharged by payment in money or some other conventional mode. The defence really concedes this much. For it does not allege that the bond itself was satisfied, but only that it is not a lien upon the ship, because the adjusters paid it on the faith and credit of the freights, general average, and insurance exclusively. But such conclusion can only result from an express or implied agreement to that effect. That the adjusters expressly agreed to take up the bond and forego its lien does not appear in all the proofs, nor is it to be inferred from the fact of their agency, or from an agreement to take it up with their money and to adjust the liabilities and marshal the resources of the ship for the best interests of her owner.

2. If the adjusters represented to Nickerson, the purchaser of the vessel, that if certain claims of the freighters were paid, there would be a balance in their hands in favor of the ship, or her owner, and he thereupon paid these claims and purchased the ship, they could not maintain this suit. But this is a fact which it devolves upon the respondent to prove. The proof of it rests upon his unsupported

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testimony. It is denied by the libellant, Higgins, who is alleged to have made the representation. Thus affirmed by one party, and denied by the other, it cannot be considered as established, and the estoppel, which rests upon it, necessarily fails.

Mr. Justice STRONG delivered the opinion of the court.

Very clearly the ship was not discharged from the bottomry lien, unless the bond was actually paid, or unless the libellants agreed to pay it and look to the freights, the general average, and the insurances exclusively for their reimbursement. Of actual payment there is no evidence whatever. On the arrival of the ship at New York, Mr. E. A. Hammond, who had a mortgage upon her, which, with interest, amounted to more than \$30,000, took her into his possession, in virtue of authority conferred by the mortgage, and employed the libellants to take up the bottomry bond, to collect the freight, the general average and insurance, and generally to transact the business of the vessel. Subsequently this arrangement was assented to by the owner and the charterer. Accordingly the libellants took up the bond by taking an assignment of it from the Messrs. Ward who held it, and proceeded to adjust the business of the ship, collecting the freights, general average, and insurance, and making the necessary disbursements, but as they were unable to realize from the insurances what was expected, the sums collected proved insufficient to pay the expenses of discharging the ship, the commissions, and the necessary disbursements, together with the bottomry bond. They now claim the right to apply what they have been able to collect, first, to reimburse themselves, the commissions, necessary expenses, and disbursements made by them on account of the ship; and, secondly, to the discharge of the bottomry lien, looking to the ship for that portion of the bond which, by such marshalling of the fund, remains unpaid. And such, we think, are their rights, if they have not been surrendered. By the assignment of the bottomry bond to them, they became bottomry creditors, and even if there had been no such

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assignment, and had they in fact paid the bond at the instance of the owner and mortgagee, they would have been entitled in equity to the rights of the bottomry creditor. Being thus creditors by bottomry and also by payments on behalf of the ship for expenses, they have a clear right to apply whatever funds of the ship come to their hands, first, to the satisfaction of their unsecured claims, and secondly, to the bond, and to look to the ship for any unpaid balance of the bottomry. If, however, when they undertook their agency they agreed to pay the bond, and thus discharge its lien, looking to the freight, the general average, and the insurance alone for reimbursement, or to the personal liability of the owner, as the appellants insist they did, they cannot now set up a lien on the ship. But we do not think the evidence establishes any such agreement, and its existence is quite improbable. They were adjusters of averages, and they desired to be employed as such to attend to the business of the ship. To secure such employment, they made the most favorable representation of what they were able and willing to do. But they proposed to the Messrs. Ward, who held the bond, to take it up, taking an assignment of it, before they had any interview with Mr. Kimball, the owner. They could then have had no accurate knowledge of the amount of the freight, the general average, and the insurance. They could not have known that the ship's resources would suffice to pay the bottomry, and the other expenses necessary to make the freight and the general average available. And they had then no control over the insurances. It is, therefore, quite unlikely that they undertook to pay the bond and discharge the lien. Their arrangement was with the mortgagee, and there is no evidence that they agreed with him to do anything more than take the bond from the holder and act as general agents of the ship in adjusting its affairs. The proofs do not establish that in that arrangement they undertook to satisfy the bottomry and extinguish its lien without regard to the amount of freight, general average, and insurances which could be collected, and without regard to the necessary disbursements and commissions.

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Such is not the testimony of Mr. Higgins, nor has the mortgagee so testified, and the owner was not present at the arrangement.

The appellants, however, rely upon the statement of two sons of the owner, who do not speak at all of the arrangement with the mortgagee. They speak only of a subsequent interview of Mr. Higgins with the owner, from whom the possession had been taken, and who had then no control over the settlement of the ship's affairs. Their statement is that Higgins proposed to pay the bottomry bond for the owner if he would give his firm adjustments of claims against insurance companies, and expressed his convictions of what his firm could do, making some promises respecting the rate of commissions, and promising to apply collections to the bond immediately. The sons state further that this was verbally agreed to, but the policies were not delivered in pursuance of any such agreement, nor was there any agreement to deliver them, and what is very remarkable, the sons state that nothing was said at that interview about the policies. They were subsequently handed to Mr. Higgins to be collected, and the amount to be applied to the payment of the bottomry bond, if necessary. These witnesses are contradicted in some particulars by Mr. Higgins, but assuming that their statement is correct, it falls far short of proof that Higgins agreed to discharge the ship from the bottomry lien, or agreed to pay the bond and look only to the freight, insurances, and general average. And, even if the firm could be considered as agents of the owner, the payment of his debt, or the debt of the ship, could not work a satisfaction of the debt, or extinguish its lien. It would only change the creditor. We are of opinion, then, that no arrangement with the owner has been proved by which the libellants have been disabled from enforcing the bottomry lien.

Another defence has been set up. The appellants contend that the libellants are estopped from resorting to the ship for any balance of the bond unpaid, by their represen-

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Syllabus.

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tations. They insist that they purchased the ship relying upon a representation of Mr. Higgins, that if they purchased and would settle certain claims of the charterers, there would be at least three thousand dollars beyond what was needed to pay the bottomry bond, and other claims of his firm. There is, however, no sufficient proof of such representations. They are denied by Mr. Higgins, and the only person who affirms they were made is Mr. Nickerson, the purchaser himself. And even the testimony of Nickerson appears to assert only that Higgins expressed an opinion respecting what would be the result, rather than a positive assertion of the fact. This is quite an insufficient basis for an estoppel, and manifestly the opinion was not relied upon. Nickerson had examined for himself some of the accounts at least.

This disposes of the case. Admitting the libellants have no lien in admiralty for their fees and commissions, or even for their disbursements on account of the ship, they had, as we have said, a right to apply the funds they had in hand, first to the satisfaction of the debt due them for such fees, commissions, and disbursements, applying only the remainder to the bond. For the balance unpaid they have the security of the bottomry lien.

DECREE AFFIRMED, with interest at the rate allowed in Pennsylvania, and with costs.

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THE MONTELLO.

1. The navigability of a stream, for the purpose of bringing it within the terms "navigable waters of the United States," does not depend upon the mode by which commerce is conducted upon it, as whether by steamers, or sailing vessels, or Durham boats, nor upon the difficulties attending navigation; such as those made by falls, rapids, and sand-bars, even though these be so great as that while they last they prevent the use of the best means, such as steamboats, for carrying on commerce.