

TORONTO ADMIRALTY DISTRICT.

1921
March 11.

THE IMPERIAL TRUSTS COM- } PLAINTIFF;
PANY OF CANADA..... }

AND

THE SHIP *LEQUESNOY* AND THE }
NOVA SCOTIA TRANSPORTA- } DEFENDANT.
TION COMPANY, LIMITED..... }

Shipping and seamen—Jurisdiction—Mortgage on ship—Rights of mortgagee—Order for sale—Sale of ship when not in custody of court—Possession—Duty of mortgagee.

Held, that the court having by statute jurisdiction over the claim of a registered mortgagee whether or not the ship is within the power of the court by arrest, should, give such remedy as will enable the mortgagee to effectually realise his claim.

Therefore, where the plaintiffs, mortgagees, under a bond mortgage applied for an order for sale of the defendant ship, although at the time of application out of the jurisdiction, an order for sale was granted.

As possession ought to be given, plaintiffs should, before the date of sale, pay all claims against the defendant ship having priority over their claim.

Reporter's Note:—See Finnigan v. SS. Northwest (20 Ex. C.R., 180.

MOTION on behalf of a mortgagee of the defendant ship for an order for the sale of the said ship now lying in a port in England.

March 7th, 1921.

Motion now heard before the Honourable Mr. Justice Hodgins at Toronto.

A. C. McMaster for plaintiffs.

No one appeared for the defendants.

The facts are stated in the reasons for judgment.

HODGINS, L. J. A. now (11th March, 1921) delivered judgment.

I reserved judgment to determine whether an order for sale of the above named ship should be made. The ship is said to be in the port of West Hartlepool in England and the plaintiffs have paid or are in process of paying all claims upon her which have priority over their mortgage deed. They desire to sell her in Canada or the United States and to have leave to bid at the sale.

The writ claims possession and sale and has been duly served on the defendant company who are the mortgagors.

This demand of possession is an act equivalent to taking possession in the case of a mortgagee. *Gardner v. Cazenove* (1); *Willis v. Palmer* (2); *Rusden v. Pope* (3).

The plaintiffs' mortgage is made by the owner of the whole 64 shares in the ship and covers the ship etc. It is duly recorded in the proper registry here in Toronto. Under the Imperial Statute, 24 Vic., c. 10, jurisdiction is given to the High Court of Admiralty over any claim in respect of a mortgage duly registered according to the provisions of the Merchants Shipping Act (1894) whether the ship or the proceeds thereof be under arrest of the said court or not. The Exchequer Court in Canada exercises these powers by virtue of R.S.C. 1906, c. 141, a reproduction of the Imperial Admiralty Act, 1891, and amending Acts. *Cope v. Ship Raven* (4).

(1) 1 H. & N. 423, 435.

(2) 7 C.B.N.S. 340, 358.

(3) [1868] L.R. 3; Ex. 269.

(4) [1905] 9 Ex. C. R. 404.

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If the court has jurisdiction over the claim of a mortgagee when the ship is not under arrest, it seems to follow that the remedies to be given must be those enabling the mortgagee to effectually realise his claim. One of these remedies is set forth in Sec. 35 of the Merchant Shipping Act, 1894, as follows: "Every registered mortgagee shall have power absolutely to dispose of the ship or share in respect of which he is registered and to give effectual receipts for the purchase money." Where there are more than one mortgage, a subsequent mortgagee must apply to the Court to order a sale, unless he has the consent of every prior mortgagee. And where the Court, under Section 29 of that Act, has power to order a sale, "under the preceding sections, or otherwise," "it shall vest in some person the right to transfer the ship" and that transfer is to be as effectual as if it were made by the registered owner.

I can see no reason why, in pursuance of the statutory power giving jurisdiction in mortgage cases, notwithstanding that the ship is not within the power of the court by arrest, the plaintiffs should not have the right and power to sell the ship and why the Court should not so order. The order will name a person pursuant to Section 29, already quoted, to make the transfer, which can then be recorded in the registry here, after the sale has been had and that will be effectual to vest the title in the purchaser.

The sale of the ship will naturally carry with it the right of possession and the plaintiffs will have to see that, before the sale actually takes place, they are in a position to deliver actual possession to the purchaser. The advertisement for the sale should state that the vendors will arrange for the delivery of the ship at a

named port or at some convenient place to be announced at or before the sale. It would be well before proceeding to sell, that the plaintiffs should satisfy themselves that no complications can arise by reason of the engagements or charters made by the mortgagors before the notice that they required possession was given or the writ served. As to this see the following cases:— *Collins v. Lamport* (1); *Johnson v. Royal Mail* (2); *The Fanchon* (3); *The Cella* (4); *The Celtic King* (5); *The Heather Bell* (6); *Law Guarantee & Trust Society v Russian Bank for Foreign Trade* (7).

The order for sale may go, and the sale will be under the supervision of the marshal of the court or some one authorized by him if the vessel is to be sold outside this jurisdiction. The plaintiffs may have leave to bid.

Judgment Accordingly.

REPORTER'S NOTE.—The formal decree in this case is printed below as a useful precedent.

"This action coming on for trial on Saturday the fifth day of March, 1921, at a special sittings of this Honourable Court, held at Toronto, in the presence of counsel for the plaintiff, no one appearing for the Nova Scotia Transportation Company, Limited, although duly served, pursuant to the order herein bearing date the second day of March, 1921, upon reading the proceedings in this action, the affidavit of John Arthur Withrow, manager of the plaintiff company, proving the amount of the claim herein, the

(1) [1865] 34 L.J., Ch. 196.

(2) [1867] L.R. 3 C.P. 38.

(3) [1880] 5 P.D. 173.

(4) [1888] 13 P.D. 82.

(5) [1894], P.D. 175.

(6) [1901] P.D. 272.

(7) [1905] 1 K.B. 815.

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affidavit of Mae Ross, filed, and upon hearing what was alleged by counsel for the plaintiff and judgment having been reserved to this day.

1. This court doth order and adjudge that the sum of \$267,957.51 is due to the plaintiff in respect of its claim, together with the costs of this action, to be taxed.

2. This court doth further order and adjudge that the ship *Le Quesnoy*, be and is hereby condemned in the said sum of \$267,957.51, with costs, as aforesaid, and doth order that a commission of appraisement and sale of the said ship, do issue to the Marshal of this court, or to such other person as may be authorized by such Marshal, and that the said sale shall be subject to a reserve bid to be fixed by this court and to such conditions of sale as shall be settled by this court.

3. And this court doth further order and adjudge that, for the purpose of carrying the sale directed by this judgment into execution that the right to transfer the sixty-four shares of the said ship *Le Quesnoy* in the shipping register for the port of Toronto, be and is hereby vested in the Marshal of this court, and such Marshal shall upon a sale of the said ship approved of by this court, be entitled to transfer the said sixty-four shares of the said ship *Le Quesnoy*, in the same manner and to the same extent as if he were the registered owner thereof, and the registrar of shipping for the port of Toronto, shall obey the requisition of the said marshal so named, approved by this court in respect of any such transfer, to the same extent as if the said marshal were the registered owner.

4. And this court doth further order and adjudge that the plaintiff, and any bond holder whose bond is secured under the hereinafter mentioned mortgage

shall be at liberty to bid at the sale of the said ship *Le Quesnoy*, or any adjournment thereof, as directed by the judgment herein, and that the conditions of sale may contain a provision whereby any purchaser of the said ship for the purpose of making settlement or payment for the property purchased, shall be entitled to turn in any bonds secured under the mortgage to the plaintiff bearing date 1st November, 1918, and any matured and unpaid coupons thereby secured, in order that there may be credited thereon the sums payable out of the net proceeds of such sale to the holder of such bonds and coupons, as his ratable share of such net proceeds, after allowing for the proportion of the total purchase price required to pay the costs and expenses of the sale or otherwise, and the purchaser shall be credited on account of the purchase price of the property purchased with the sums payable out of such net proceeds on the bonds and coupons so turned in.

5. And this court doth further order and adjudge that the plaintiff be at liberty to pay any claims against the said ship *Le Quesnoy*, which may have priority over the said bond mortgage herein, and that upon such payment the plaintiff be and is hereby authorized to add such payments to their mortgage debt, with liberty to apply to add the same to the amount of the judgment herein. In case of any such payment the plaintiffs shall notwithstanding the addition of the amount or amounts to the mortgage debt, or to this judgment if ordered, be entitled to be subrogated to the right of the person or corporation, so paid off.

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6. And this court doth further order and adjudge that upon the sale of the said ship *Le Quesnoy*, the purchaser thereof shall pay his purchase money to the said marshal, who shall forthwith pay the same into court, to remain there until further order of this court.
