(ON APPEAL FROM BRITISH COLUMBIA ADMIRALTY DISTRICT.)

Between

BOW McLACHLAN & COMPANY, LIMITED (PLAINTIFFS) ..... APPELLANTS;

AND

THE UNION STEAMSHIP COMPANY OF BRITISH COLUMBIA, LIMITED (DEFENDANTS) ..... RESPONDENTS.

1906
Sept. 19.

Shipping — Appeal — Interlocutory order — Different motion on appeal — Re-hearing.

Where a motion made on appeal was a different one from that made to the court below, and the matter was one in which relief could still be given in the court below, the court on appeal refused to entertain the motion although in such cases the appeal is by way of re-hearing.

APPEAL from an order of the Deputy Local Judge of the British Columbia Admiralty District refusing an interlocutory motion to strike out portion of the defence to an action *in rem*.

The grounds of the appeal are stated in the reasons for judgment.

September 11th, 1906.

The appeal came on for argument at Ottawa.

R. Cassidy, K.C., for the appellants, cited *Annual Practice* (1); English Order 25, r. 4; Order 19, r. 4; *Metropolitan Bank* v. *Pooley* (2); *Reichel* v. *Magrath* (4).

W. D. Hogg, K.C., for the respondents, contended that steps had been taken since the filing of the defence which made this application to strike out too late. A

(1) [1906] p. 306. (2) 10 App. Cas. 210.
(3) 14 App. Cas. 665.

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commission to take evidence had been issued among other things. (Cited English Order 70).

Mr. *Cassidy*, in reply, cited *Thorpe* v. *Holdsworth* (1); *Tildesley* v. *Harper* (2).

THE JUDGE OF THE EXCHEQUER COURT now (September 19th, 1906) delivered judgment.

This is an appeal by the plaintiffs against an order made on the 22nd day of August last in a proceeding in the British Columbia Admiralty District whereby a motion to strike out certain parts of the statement in defence was dismissed with costs.

The action is brought to enforce a mortgage on the said ship. The defendants allege, among other things, that this mortgage was given as an "interim security," and that a subsequent agreement which is set out in full was entered into. The plaintiffs say that this subsequent agreement shows that the mortgage is subsisting and in force, and that it is inconsistent with the agreement and embarrasing to the plaintiffs for the defendants to allege that the mortgage was given "for interim security," and it is sought to have these words struck out. The learned judge who heard the motion refused to strike them out, and I think he was right. It does not follow that because the mortgage was given as an interim security that it is not now subsisting and in force; and an allegation that it was given as an interim security is not in itself an allegation that it is not now in force. Whether it is or not depends upon the subsequent agreement. But there is nothing inconsistent or embarrassing, so far as I can see in the allegation that the first of the two instruments mentioned was given "for interim security." By the terms of the mortgage mentioned the sum of twenty-three thousand two hundred and forty-eight pounds sterling thereby secured

(1) 3 Ch. D. 637. (2) 7 Ch. D. 403.

became payable on the ninth day of May, 1905. The agreement referred to provided for the repayment of that sum with interest by instalments, that is to say, an instalment of five thousand two hundred and forty-eight pounds was to be paid on or before the ninth day of February, 1906, and other instalments at later periods. The defendants thereby also agreed to give additional security by way of mortgage to keep the ship insured to the amount due from time to time and to hand over and endorse the policies to the plaintiff company. And then it was among other things provided that in the event of the bankruptcy or declared insolvency of the defendants, or of their going into liquidation, or of their failure to pay any of the instalments, or the half-yearly balance of interest when due, or of their failing to carry out any of the obligations undertaken by them under the agreement the plaintiff company should be entitled to enforce the said mortgages or any of them. The agreement is set out in the fourth paragraph of the statement of defence, which paragraph concludes with these words:—

"That the said owners have given to the plaintiffs "the charge or security referred to in the second para- "graph of the said agreement and have paid or tendered "to the plaintiffs all sums due to the plaintiffs under "the said agreement and mortgage for principal and "interest."

The plaintiffs also moved to strike out or amend this allegation as being framed to prejudice, embarrass, and delay the fair trial of the action. That part of the motion was also dismissed by the learned judge who heard it. It does not appear that any reasons were given for dismissing the motion, and I am not aware on what grounds his decision was rested. The objection now taken to the clause cited is that it does not, with what precedes it, disclose a sufficient answer to the statement of claim, that it alleges that the defendants carried

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out two of a number of obligations undertaken by them by virtue of the agreement set up; but that it does not allege that they have carried out all of such obligations, or that none of the contingencies have arisen under which the plaintiffs would become entitled to enforce the mortgages mentioned in the agreement; in short that all that is alleged in the fourth paragraph of the statement of defence might be true and yet the plaintiffs might have a right to enforce the mortgage sued on. I think that is so. In such a case the plaintiffs might raise the question of the sufficiency of the pleading as a point of law, or they might move to strike it out (1). In this case neither course was followed. The motion made was directed to particular words in the pleading, and not to the pleading as a whole. And upon the motion as made the order appealed from was I think a proper order for the learned judge to make. To strike out of the pleading the words cited would not have made matters better but worse. And it was not these words but the pleading as a whole that required amendment. The motion should I think have been made in another form, or at least the learned judge should have been asked to allow it to be amended and the matter presented to him in the way it has been presented here. Nothing of that kind appears to have been done.

There is another objection to the fourth paragraph of the statement of defence, namely, that it is not clear what mortgage is referred to in the concluding words of the paragraph which have been cited. The allegation is that the defendants have paid or tendered to the plaintiffs all sums due to the plaintiffs "under the said agreement "and mortgage, etc." But in the agreement set out in the pleading there is a reference to "the said mortgages" and the plaintiffs say that they are embarrassed as they

(1) Admiralty Rules, No. 66; Williams & Bruce Ad. Prac. 3rd ed. pp. 355, 357.

do not know to which mortgage the defendants allude in the words "under the said agreement and mortgage." Mr. Hogg, for the defendants, argued that it was clear that these have reference to the mortgage sued upon, and while perhaps it is not as clear as it ought to be I agree that that is the fair construction to be put upon the pleading.

On the whole I am of opinion to dismiss the appeal. It is argued that instead of doing that I should, as the appeal is a re-hearing, permit the plaintiffs to make here an application different from that made in the court below, and that I should give them upon terms such relief as I might have done if the motion had come before me in the first instance. But I do not think that would be convenient or tend to the orderly administration of justice. There is no relief to which the plaintiffs are entitled that may not be obtained in the court from which this appeal comes. The question of the sufficiency of the pleading in question may, at or before the hearing, be raised there as a question of law, and disposed of as conveniently as upon a motion to strike it out.

The appeal is dismissed and with costs.

Judgment accordingly.

Solicitor for appellants : *R. Cassidy.*

Solicitor for respondents : *Davis, Marshall & McNeill.*