

JOSEPH STRONG, *et al.* (DEFENDANTS) APPELLANTS;

1896

AND

Jan. 20.

ALFRED G. SMITH, *Trustee of the*
Estate of Moses Munroe, deceased } RESPONDENT.
 (PLAINTIFF)

THE SHIP "ATALANTA."

APPEAL FROM THE LOCAL JUDGE OF THE NOVA SCOTIA
 ADMIRALTY DISTRICT.

*Maritime law—Action by owner of unregistered mortgage against freight and
 cargo—Jurisdiction.*

A mortgagee under an unregistered mortgage of a ship has no right of
 action in the Exchequer Court of Canada against freight and cargo ;
 and unless proceedings so taken by him involve some matter in
 respect of which the court has jurisdiction, they will be set aside.

APPEAL from a judgment of the Honourable James
 McDonald, C.J., Local Judge for the Nova Scotia
 Admiralty District.

The grounds upon which the appeal was taken ap-
 pear in the reasons for judgment on appeal.

The reasons for judgment of the learned Local Judge
 are as follows:—

“ This is an application to set aside the arrest of the
 “ ship and cargo and the proceedings in the cause. An
 “ application made in October (1895) last to the same
 “ effect, was dismissed. It was, however, renewed on
 “ further affidavits disclosing facts not appearing in the
 “ former application. The mortgage under which the
 “ plaintiff claims was produced, and it is found that it
 “ is not in the form prescribed by the statute, and fur-
 “ ther, that it has never been registered. Indeed it could
 “ not have been registered under the Merchant shipping
 “ Acts, because it is rather a chattel mortgage of per-
 “ sonal property than that of a British ship. Whether

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“ any title whatever to the schooner *Atalanta* is conferred  
 “ by this instrument I do not think it necessary to de-  
 “ termine, but I am clearly of opinion that it is not  
 “ such as to give this court jurisdiction to determine  
 “ the rights of the parties under it. The arrest of the  
 “ ship will therefore be set aside, and the vessel will  
 “ be released. This decision does not apply to the  
 “ freight and cargo as to which the suit will proceed  
 “ to trial; and I direct that pleadings be filed by the  
 “ respective parties raising the issues they desire to  
 “ try. Further order as to costs in this and the pre-  
 “ ceding application reserved.”

“ The order will pass to set aside the arrest of the  
 “ ship. This order not to apply to the arrest of the  
 “ cargo and freight. The question of costs in this and  
 “ the former application will stand for further con-  
 “ sideration.”

The appeal was heard before the Judge of the Ex-  
 chequer Court on the 9th January, 1896.

*C. H. Cahan* for the appellants :

The Exchequer Court has no wider jurisdiction in ad-  
 miralty matters than the courts in England have under  
*The Admiralty Courts Act*, 1861, and the Merchant ship-  
 ping Acts. Prior to the passing of the first mentioned  
 Act, the Admiralty Court had jurisdiction in cases of  
 mortgage only if the ship was under arrest in a pro-  
 ceeding over which the Admiralty Court had jurisdic-  
 tion, and in which the parties beneficially interested in  
 the ship, or the proceeds thereof, were before the court.  
 But the Act of 1861 for the first time gave the Admir-  
 alty Court an original jurisdiction in regard to proceed-  
 ings upon a mortgage whether the ship, or the proceeds  
 thereof, are within the jurisdiction of the court or not.  
 But this new enactment limited the jurisdiction to a  
 certain kind of mortgage, namely, that which is pre-  
 scribed by *The Merchant Shipping Act*, 1854, and is also

registered under the provisions of that Act. [He cites *Howell's Admiralty Practice* (1); also, *Roscoe's Admiralty Practice* (2); *Abbott on Shipping* (3); *Williams & Bruce's Admiralty Practice* (4).]

Apart from the question of jurisdiction, the warrant to arrest in this case is bad in form because the affidavit to lead warrant did not disclose any ground upon which the court might found its jurisdiction; but on the contrary it expressly states that the ship was not registered, but was sailing under a 'provisional pass' in lieu of registry. [He cites *Williams & Bruce's Admiralty Practice* (5); *The Merchant Shipping Act, 1894, sec. 31 (form B)*.]

The mortgage in question here is in no sense a mortgage of a ship, within the meaning of the Merchant shipping Acts. It is an ordinary "blanket mortgage" to cover all chattels upon the mortgagor's premises, and may not even convey the property in the schooner at common law. But that argument is not material to my purpose, and it is sufficient for me to maintain that it is not a mortgage over which an Admiralty Court has any jurisdiction whatsoever.

We only appeal from so much of the judgment of the learned Local Judge as refuses to set aside the proceedings against the cargo and freight; and we say that reasons equally as strong as those upon which he came to the conclusion to dismiss the proceedings against the ship should have led him to dismiss them also as against the cargo and freight. The court has no jurisdiction over a chattel mortgage of a cargo or freight, and if there had been original jurisdiction by writ of summons against cargo and freight we should not quarrel with the order of the Local Judge; but there was not. [He cites *Abbott on Shipping* (6); *Alexander v. Simms* (7).]

(1) P. 288.

(2) P. 82.

(3) 12th Ed. p. 51.

(4) 2nd Ed. pp. 38, 40.

(5) 2nd Ed. p. 715.

(6) 12th Ed. p. 43.

(7) 5 De G. M. &amp; G. 57.

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As to the freight, the mortgagee must take possession before the voyage is completed in order to be entitled to receive the freight. This was not done. Furthermore, the mortgage does not pretend to cover this freight or cargo. [He cites *Bynon v. Godden* (1).] We are entitled to costs and damages for the seizure and detention. [He cites *The Evangelisimos* (2); *The Strathnaver* (3); *The Walter D. Waller* (4); *The Egerateia* (5); *Abbott on Shipping* (6); *De Mattos v. Gibson* (7).]

*E. McLeod* Q.C., for the respondent.

If there is no jurisdiction to entertain the action, there is no jurisdiction to award damages.

The mortgage was a sufficient conveyance of the ship and a sufficient power of attorney to authorize the solicitors at Halifax to take possession of the vessel as agents of the mortgagee. That they took possession in the name of the deceased mortgagee, Moses Munroe, does not alter the position of the parties in law, because it would be construed as taking possession on behalf of the parties legally entitled to the possession. The owner of the vessel was the owner of the freight.

It seems to me there are two elements involved in these proceedings upon which the court may well found its jurisdiction: 1st, the mortgage was sufficient to convey an interest in the freight earned by the vessel; and 2ndly, the mortgagee did take possession of the ship under the appropriate process of this court, as he lawfully might, and the *res* is now before the court.

THE JUDGE OF THE EXCHEQUER COURT now (January 20th, 1896) delivered judgment.

This action was commenced by a writ of summons

(1) 3 Exch. D. 263.

(2) Swab. 378.

(3) 1 App. Cas. 58.

(4) [1893] Prob. 202.

(5) 38 L. J. Ad. 40.

(6) 12 Ed. p. 52.

(7) 30 L. J. Ch. 145.

issued out of the District Registry at Halifax, on the 22nd of October, 1895. By the indorsement upon the writ the plaintiff claimed against the vessel, her cargo and freight, the sum of \$10,400 as due to him for principal and interest on a mortgage dated the 18th day of December, 1894. On the same day (the 22nd of October) the vessel, her cargo and freight were arrested. An appearance was entered under protest by the owner and others interested, and an application was made to the Local Judge of the Nova Scotia Admiralty District to set aside with costs the writ of summons, the service of the writ, and the warrant to arrest the vessel, her cargo and freight, and to order the release of the vessel, her cargo and freight, and for damages for the arrest and detention thereof. The affidavit to lead the warrant had been made by one of the solicitors for the plaintiff upon information communicated to them by telegrams from the plaintiff's solicitors, at St. Johns, Newfoundland, and the application to set aside the proceedings was met in the first instance by the plaintiff's solicitors at Halifax, asking for delay to enable them to communicate with the solicitors at St. Johns. Thereupon the application was dismissed, but subsequently it was renewed. The mortgage being then produced, it was found that it was not in the form, and that it had not been registered, as prescribed by the statute, and that in consequence the court had no jurisdiction under the 11th section of *The Admiralty Court Act*, 1861. The arrest of the vessel was therefore set aside, and the vessel released. The learned judge refused, however, to set aside the arrest of the freight and cargo, and directed that the suit should proceed to trial, and he reserved the questions as to damages and costs.

From this part of the order an appeal is taken by the defendants, and the court is asked to set aside the writ of summons, the service thereof, and the arrest of the

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cargo and freight, and to give damages and costs against the plaintiff.

The question to be now determined is, it will be observed, one of jurisdiction only. As to the cargo it was not suggested in this court that the mortgage on which the plaintiff relies covers it. It is contended, however, that the plaintiff had taken possession of the vessel and that he was entitled to the freight then due, and where freight may be proceeded against the cargo may be arrested as security for freight, and detained until the amount of the freight is brought into the registry. For the appellants it is conceded that if the court has jurisdiction in an action instituted by a mortgagee, under an unregistered mortgage against the freight and cargo, there being nothing else upon which to found the jurisdiction of the court, the order appealed from is a good order ; but it is contended that the court has no jurisdiction in such a case, and that contention must, it seems to me, prevail.

The jurisdiction of this court in proceedings in Admiralty depends upon the Admiralty jurisdiction of the High Court in England (1). Prior to the passing of the Act of the Parliament of the United Kingdom, 3rd and 4th Vict., c. 65, a mortgagee of a vessel could not initiate proceedings in the High Court of Admiralty, and it was doubtful as to whether or not he could intervene to protect his interest when a suit had already been instituted by parties competent to do so (2). To meet that difficulty the 3rd section of that Act, which extended to unregistered and equitable mortgages as well as to registered mortgages, provides that whenever any ship or vessel shall be under arrest by process issuing from the High Court of Ad-

(1) The Colonial Courts of Admiralty Act, 1890, s. 2 ; The Admiralty Act, 1891, s. 3 ; 3 Hagg. Rob. 82, 222.

miralty, or the proceeds of any ship or vessel, having been so arrested, shall have been brought into and be in the registry, the court shall have full jurisdiction to take cognizance of all claims and causes of action of any person in respect of any mortgage of such ship or vessel, and to decide any suit instituted by any such person in respect of any such claims or causes of action. But that provision is limited to cases where the vessel is under arrest by process issuing from the court, or where the proceeds of the vessel having been so arrested, have been brought into the registry of the court, and does not extend to such a case as the present. It is also to be observed that in the case of *The Fortitude* (3); in which freight had been proceeded against by the arrest of the cargo, Dr. Lushington held that the power given to a mortgagee to institute proceedings where the ship was already under arrest, extended to the ship alone and not to the freight.

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With reference to the questions of damages and costs, which were reserved, there is of course something to be said from the standpoint of convenience of disposing of them now; but on the whole I am inclined to leave them to be dealt with by the learned Local Judge of the Nova Scotia Admiralty District.

The appeal will be allowed with costs, and the writ of summons in this case and the service thereof, the warrant to arrest the vessel, her cargo and freight, and the arrest of the same, will be set aside, and the questions as to damages and as to costs, in the proceedings in the local registry which were reserved, will be left for the decision of the learned judge.

*Judgment accordingly.*

Solicitors for appellants: *Harris, Henry & Cahon.*

Solicitors for respondent: *Russell & Ross.*