

1920

Nov. 11.

QUEBEC ADMIRALTY DISTRICT.

CHARLES A. FINNIGAN..... PLAINTIFF;

VS.

SS. NORTHWEST..... DEFENDANT.

Shipping—Jurisdiction—Action on mortgage—Registration according to Merchant Shipping Act—Amendment—Costs.

Action in rem, to recover balance due on a Deed of Mortgage, executed at Buffalo and registered there according to the law and regulations of the state of New York. The ship was arrested and subsequently released on bail. After other proceedings had in the cause, defendant moved for an Order to set aside the writ of summons, etc., for want of jurisdiction. On the hearing F. moved to amend, which amendment was in substance an allegation that defendant undertook to have the ship placed under Canadian Register and to mortgage the ship, which he failed to do. The ship was not under arrest or seizure at the time of the institution of this action.

Held; On the facts, that in as much as the Admiralty Court possessed no original jurisdiction over mortgages of ships, and that by the Admiralty Court Act, 1840 (3-4 Vict. ch. 65, Imp.) the Court was only given jurisdiction in respect to mortgages, when the ship or proceeds thereof were under arrest by process from that court; and that later by Admiralty Court Act, 1861 (24 Vict., ch. 10, Imp.) the High Court of Admiralty was given jurisdiction over claims in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act, 1854, whether the ship or proceeds thereof were under arrest of the Court or not, the Court is without jurisdiction to entertain the present claim.

2. In as much as by his proposed amendment, the plaintiff endeavours to add a claim for damages for breach of contract to grant a mortgage, which claim could not be entertained by the court, the plaintiff will not be allowed such an amendment.
3. That where defendant could have made his motion at an earlier stage and thus saved the parties useless proceedings and expense, he will only be allowed the costs of action up to the time he could have so moved.

ACTION in rem against S.S. *Northwest* claiming by endorsement on the writ of summons the sum of \$76,997.62, balance due on a deed of mortgage executed at Buffalo and registered there according to the laws and regulations of the state of New York.

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The matter came before the Honourable Mr. Justice MacLennan, Deputy Local Judge in Admiralty, by way of motion to dismiss for want of jurisdiction, at Quebec, on the 25th day of September, 1920.

Thomas Vien K.C., for plaintiff.

Louis S. St. Laurent and A. C. M. Thomson, for defendant.

The facts are stated in the reasons for judgment.

MACLENNAN D. L. J. A. now (November 11, 1920) delivered judgment.

THIS is an action in rem against the S.S. *Northwest* and by the endorsement on the writ of summons the plaintiff claims the sum of \$76,997.62 for the balance due on a certain deed of mortgage executed at Buffalo, on the 19th day of November, 1918, payable in American funds at Buffalo on the 1st of July, 1919, with interest at six per cent (6%) and for costs. The ship was arrested and released on bail, pleadings were filed and some other proceedings were had in the cause. The defendant now moves for an order to set aside the writ of summons, the service thereof and the warrant and the seizure thereon, the defendant's bail released and the action dismissed with costs on the ground of want of jurisdiction of this Court to hear and decide the present cause. On hearing

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of this motion the plaintiff moved for leave to amend the endorsement on the writ of summons by adding the following words:—

“the whole as completed and amended by a memorandum of terms of settlement of mortgage claim of Charles A. Finnegan against the steamer *Northwest* and John F. D’Arcy, dated November the 10th, 1919, by which the defendant Charles A. Barnard undertook to have the said steamer *Northwest* placed on the Canadian register, and a first mortgage on such vessel registered on the Canadian Register against the said steamer *Northwest*, to secure in favour of the plaintiff in this case the payment of the above mentioned mortgage.”

and by adding certain paragraphs to statement of claim alleging at greater length the matters referred to in the proposed amendment of the endorsement of the writ.

The Admiralty Court possessed no original jurisdiction over mortgages of ships, but by the Admiralty Court Act, 1840 (3-4 Vict., chap. 65, Imp.) section 3,—the Court was given jurisdiction over claims or causes of action in respect of any mortgage of a ship whenever such ship or the proceeds thereof were under arrest by process issued from the Court of Admiralty, and by the Admiralty Court Act of 1861 (24 Vict., chap. 10, Imp.) section 11, the High Court of Admiralty shall have jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act, 1854, whether the ship or the proceeds thereof be under arrest of the said Court or not. The Merchant Shipping Act, 1854, is now replaced by the Act of 1894. The jurisdiction of the Exchequer Court as a Court of Admiralty in cases on mortgages is derived from the Imperial

Statutes of 1840 and 1861 above referred to. The mortgage upon which the present action is brought was executed at Buffalo, in the State of New York, U.S.A., on 9th November, 1918, and was registered in the office of the Collector of Customs for the Port of Buffalo, N.Y., on 19th November, 1918, according to the law and regulations of the state of New York. The pleadings and mortgage on their face show that the mortgage upon which this action is based is not a mortgage registered according to provisions of the Merchant Shipping Act, but is a mortgage registered according to the law and regulations of the state of New York. The ship was not under arrest or seizure at the time of the institution of this action, and, unless the plaintiff is entitled to amend by alleging a new cause of action over which the Court has jurisdiction, the defendant's application for dismissal of the proceedings will have to be granted. The plaintiff's proposed amendment is in substance an allegation that Charles A. Barnard undertook to have the ship placed under Canadian register and to mortgage the ship in favour of the plaintiff and that he has failed so to do. Any claim which might be based on the failure of the owner to carry out an agreement to grant a new mortgage must necessarily be in the nature of damages for the non-execution of the agreement, or, in other words, for the breach of a contract by which the owner of the ship undertook to grant a mortgage after the ship had been registered in Canada. This ship was brought from Buffalo to Quebec where certain repairs were made and the ship was registered on the Canadian register under a new name, but a new mortgage has not been executed in favour of plaintiff. The question therefore arises as to the jurisdiction of the Court to deal with a claim for the

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breach of a contract to grant a mortgage. If the Court has no jurisdiction in such a claim, the plaintiff's motion to amend should not be granted. The Admiralty Court has never exercised a general jurisdiction over claims for damages and its jurisdiction was originally confined within well defined limits which have been extended by the Admiralty Court Acts of 1840 and 1861. Neither of these Statutes give jurisdiction on a claim for damages arising from breach of contract.

In the case of *Bow, McLachlan & Co. v. Camosun (owners)* (1), it was held in the Privy Council that the Admiralty Court had no jurisdiction in a claim for the breach of a contract to build a ship whether there was an arrest or not, although the Court, under section 4 of the Imperial Statute of 1861, had jurisdiction over any claim for the building of a ship if, at the time of the institution of the action, the ship or the proceeds thereof were under arrest of the Court. In my opinion, the same principles apply on a claim for damages for breach of a contract to grant a mortgage and, holding that opinion, I must come to the conclusion that the plaintiff is not entitled to amend the endorsement on the writ and the statement of claim.

At the hearing plaintiff submitted that defendant's motion to dismiss for want of jurisdiction came too late and should not be entertained. The defendant's objection is that under the statute there is absolute absence of jurisdiction which is quite a different thing from a mere technical objection which could be waived by appearance and other proceedings—in the action. In the case of *Stack v. the barge Leopold* (2),

(1) 79 L.J.P.C. 17, 1909, A.C. 597.

(2) 18 Can. Ex.C.R. 325.

I held that an objection to the jurisdiction could be raised at the trial and, upon the authorities cited in that case, I am of opinion that this objection to defendant's motion is unfounded.

As I have come to the conclusion that the record shows that the action is based on a mortgage not registered under the Merchant Shipping Act, the Court is without jurisdiction. Defendant's motion to dismiss could have been made at an earlier stage which would have saved some useless proceedings and expense to the parties.

There will therefore be judgment dismissing the action, setting aside the arrest and releasing the bail, with costs of defendant's motion to dismiss and with the general costs in the action up to and including the release of the ship on bail; and the plaintiff's motion to amend the endorsement on the writ of summons and the statement of claim will be dismissed with costs.

Solicitor for plaintiff: *Thomas Vien K.C.*

Solicitor for defendant: *Lewis St. Laurent K.C.*

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