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PALESTINE  
BANK  
v.

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[STRONGE, C.J., CREAN AND SERTSIOS, JJ.]

THE ANGLO-PALESTINE BANK LTD.

v.

THE S.S. "ARROW", AND GIACOMO BRANCO.

*Admiralty jurisdiction—Claim against vessel by mortgagee—Arrest of vessel—The Cyprus Admiralty Jurisdiction Order, 1893 ; Rules 50 and 52—The Colonial Court of Admiralty Act, 1890.*

The respondent, a mortgagee of an unregistered mortgage on the S.S. "Arrow" for moneys advanced to the registered owner, issued a writ against the vessel for the sums due, and later on the same day obtained a warrant of arrest of the vessel.

*Held* by Stronge, C.J., and Sertsios, J., Crean, J., dissenting that—

(1) the Supreme Court as a Colonial Court of Admiralty has the same jurisdiction as that possessed by the High Court in England at the date of the Colonial Courts of Admiralty Act, 1890 ;

(2) the vessel not being under arrest when the suit was instituted the Court had no jurisdiction to entertain the action ;

(3) per Crean, J. : the arrest of the vessel is not a condition precedent to the institution of a suit by a mortgagee, and therefore the Court had jurisdiction to hear the action.

Appeal from an order of Thomas, J., dismissing an application by defendant Branco to have action struck out for want of jurisdiction.

Appellant brought two actions in the District Court, Famagusta, against the owner and master of the S.S. "Arrow" for sums due on bottomry bonds for towing, repairs and necessaries, and obtained judgment. In execution of the judgments the vessel was sold by public auction on 16th March, 1933, and bought by the appellant. On 13th May the Anglo-Palestine Bank Ltd. of Jaffa issued a Writ against the S.S. "Arrow" for £750 due to plaintiff Bank upon a mortgage of the vessel by the registered owner. On the same day plaintiff obtained a warrant of arrest of the vessel. On 26th May the appellant was added as a defendant in the action and on the same day filed an application to strike out the action on the ground that the Supreme Court as a Court of Admiralty had no jurisdiction to hear it. This application was dismissed on 17th June, and from that order defendant Branco appealed.

*Clerides* for appellant.

*Haji Demetriou* for respondent.

## JUDGMENT :—

STRONGE, C.J. : This appeal is from an order of Thomas, J., dated 17th June, 1933, by which the application of Giacomo Branco, the present appellant, to have the action struck out for want of jurisdiction was dismissed. Mr. Clerides for appellant based his argument on two propositions, the first being that the Supreme Court of Cyprus as a Colonial Court of Admiralty has no jurisdiction to deal with any claim by a mortgagee in respect of his mortgage unless at the time when the proceedings are instituted the vessel or ship has been already arrested under process of the Admiralty Court. The second proposition was that the arrest, while it may be obtained by the mortgagee, must be obtained in proceedings in the Admiralty Court other than those instituted by the mortgagee for the enforcement of his claim.

In Cyprus, Clause 2 of the (Imp.) Cyprus Admiralty Jurisdiction Order, 1893, applies the Colonial Courts of Admiralty Act, 1890, to the Supreme Court of Cyprus as if that Court were a Colonial Court of Admiralty.

By Section 2 (2) of the Admiralty Act of 1890 the jurisdiction of a Colonial Court of Admiralty is made identical with the jurisdiction in Admiralty possessed by the High Court in England.

In *The Yuri Maru* (1) the Privy Council decided that the effect of Section 2 (2) is to limit the jurisdiction of Colonial Courts of Admiralty to the Admiralty Jurisdiction possessed by the High Court in England at the date when the Colonial Courts of Admiralty Act, 1890, was passed.

The question to be considered, therefore, is what was the Admiralty Jurisdiction of the High Court in England in the year 1890 with respect to claims by mortgagees. Prior to 1840, that Court, it is clear, possessed no jurisdiction at all upon questions of mortgages. (*The Neptune* (2); *The Percy* (2)). Then came the Admiralty Practice and Jurisdiction Act, 1840, (3 and 4 Vict., Clause 65) which by Section 3 enacted that—

“ After the passing of this Act whenever any . . . vessel shall be under arrest by process issuing from the said High Court of Admiralty or the proceeds of any vessel having been so arrested shall . . . be in the registry of the said court then in either such case the said court shall have full jurisdiction to take cognizance of all claims . . . in respect of any mortgage of such . . . vessel and to decide any suit instituted by such person in respect of any such claims ”.

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(1) (1927) A.C. 906.

(2) Eng. and Emp. Digest, Vol. 1, p. 118.

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By Section 11 of the (Imp.) Admiralty Court Act, 1861 (24 Vict., Clause 10) jurisdiction was given to the High Court of Admiralty over claims in respect of mortgages registered under the Merchant Shipping Act, 1854, "whether the ship or the proceeds thereof be under arrest of the said court or not." I read this section as dispensing in the case of registered mortgages with a requirement imposed by Section 3 of the 1840 Act in the case of unregistered mortgages, viz., that the vessel or the proceeds thereof should be under arrest when the mortgage proceedings were instituted. It must not be forgotten that although a mortgagee was debarred, prior to the passing of the 1840 Act, from enforcing his claim in the Admiralty Court he could always take proceedings in the Equity Court and it is not, I think, unreasonable to suppose that the Legislature was aware of this and in relaxing the rule that a mortgagee could not take any proceedings in the Admiralty Court decided on account of his already having a remedy in Equity to relax it only to the extent of allowing such proceedings to be instituted in cases where the vessel at the time of their institution was already under the control of the Admiralty Court. If the word "whenever" in Section 3 of the 1840 Act does not import a condition precedent and the section did not make arrest a necessary preliminary to the institution of a mortgagee's proceedings, there would appear to have been no need for the words "whether the ship or the proceeds thereof be under arrest or not" in Section 11 of the Admiralty Court Act of 1861.

That Section 3 of the Act of 1840 in the opinion of the learned authors of Williams and Bruce's *Admiralty Practice* makes the arrest of the vessel a necessary preliminary to the institution of proceedings by a mortgagee in the Admiralty Court for the purpose of enforcing his claim is, I think, apparent from the following passages—I quote from the 1902 edition the latest available here—at p. 43, in dealing with the effect of Section 3, the learned authors say: "Neither did it (*Scil.* the Admiralty Court) allow the mortgagee to institute a suit against any property not under the control of the Court." Again at p. 44, the paragraph immediately succeeding the passage just quoted is as follows:—"It must not, however, be forgotten that the jurisdiction conferred by the third Section of the 3 and 4 Vict., Clause 65, though limited to cases where the ship is *already* arrested or the proceeds are in Court . . ."

Such a construction of the section is, I think, lent colour to by reason of the fact that in at least one other instance arrest of the vessel must indisputably precede the institution of proceedings to enforce the claim. Such is the case in regard to claims for building, equipping or repairing of a ship which Section 4 of the Admiralty Act of 1861 gives

jurisdiction to the High Court of Admiralty to entertain "if at the time of the institution of the cause the ship or proceeds thereof are under arrest of the Court." In regard to this section, Lord Atkinson, in the opening portion of his judgment in *The Foong Tai* (1), says: "The ship not having been arrested till after the institution of the suit, Section 4 of the Act of 1861 does not apply." The wording of Section 4 of the Act of 1861 does, undoubtedly, state the requirement of arrest as preliminary to the taking of proceedings in language clearer and more explicit than that used in Section 3 of the Act of 1840, but it does at all events preclude any argument that such a construction of Section 3 creates a requirement otherwise unknown and without parallel in the Admiralty Court. The learned counsel for the appellant referred the Court to the note of a Canadian case—*Finnegan v. S. S. Northwest*—at page 18 of Supplement No. 8 to the English and Empire Digest. From the statement of the case there given it is impossible to say with certainty what were the reasons which influenced the Court in arriving at the decision that it had no jurisdiction to entertain the claim, but from the fact that the statement "the ship was not under arrest on seizure at the time of the institution of the action" immediately precedes the statement of the decision of the Court, it would appear that that fact was material to the decision and that the Court rested its judgment in part at all events on the fact that the vessel had not been arrested when the proceedings were instituted.

The forms of affidavit by a mortgagee to lead to arrest which are to be found in Williams and Bruce's *Admiralty Practice* (1902 edition, p. 626) and in Roscoe's *Admiralty Forms and Precedents* (1884 edition, p. 67, Form 58) refer only to registered mortgages and, therefore, throw no light on the question now under consideration since proceedings in the case of registered mortgages can be instituted by virtue of Section 11 of the Act of 1861 whether the ship is under arrest or not.

The form of affidavit, however, which appears in Roscoe's *Admiralty Practice* (1903 edition, p. 566, Form 7) is apparently intended for use in the case of an unregistered mortgage and from the fact that it is headed "title of action" and begins with the words "I, A.B., of L., the plaintiff in the above-named action, make oath," etc., it would seem to lend some support to the view that arrest in the case of mortgage proceedings may be obtained and effected after the institution of the action. This form is wholly at variance with the view entertained by the authorities to which I have already referred—that arrest must precede the institution of the mortgage proceedings—and it must, therefore, I think,

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be regarded as inapplicable to cases where the mortgage is unregistered. The forms of indorsements of writs for claims in respect of mortgages given in the books on Admiralty Practice do not appear to me to contain anything inconsistent with the construction of Section 3 of the Act of 1840 contended for by appellant's counsel. Thus the form in Roscoe's *Admiralty Practice* (3rd edition, 1903, p. 561) is for use by an unregistered mortgagee, while the form at p. 626 of Williams and Bruce's *Admiralty Practice* (1902 edition) is adaptable by the inclusion or exclusion of the word "(registered)" to the case of a registered or unregistered mortgage. In neither of these two forms, so far as I can see, is anything to be found inconsistent with the fact of the vessel's being already under arrest.

Mr. Haji Demetriou for the respondent contended that the order appealed from was a final order within the meaning of Rule 165 of the local Admiralty Rules and that consequently no appeal lay. I entertain no doubt that the order was interlocutory and not final inasmuch as it was not competent for the Court at the hearing of the application upon which the order was made to determine the main question in dispute in the action, viz., the existence or non-existence of any liability to the mortgagee. Rule 50 of the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction was also relied upon by counsel for the respondent in support of the contention that arrest of the ship need not be effected prior to the institution of mortgagee proceedings. These rules from the Schedule to the (Imp.) Cyprus Admiralty Jurisdiction Order, 1893, and that Order by Clause 7 enacts that they are to be the rules of the Cyprus Supreme Court in its Admiralty Jurisdiction. Rule 50 of these rules is, roughly speaking, to the same effect as Order V, Rule 16, of the English Rules of the Supreme Court and provides that in an action in *rem* any party may at . . . any time after the issue of the writ of summons apply to the Court . . . for the issue of a warrant for the arrest of property. Forms of affidavit to obtain arrest (Form C) and of the warrant of arrest (Form D) are given in Schedule I to these rules. These forms are of a general nature and not especially adapted for use in particular cases. The form of affidavit to obtain arrest is headed "In the Supreme Court of Cyprus Admiralty Jurisdiction" and underneath these words appears the word "(Title)" in Italics. The heading to the form of warrant for arrest is the same as that of the affidavit save that the words "Title of Action" are substituted for the words "Title". In neither form is there anything to indicate that the person applying for the arrest is the person named as plaintiff in the title of the action. It was urged on respondent's behalf that by virtue of Rule 50 it is in no wise necessary that the vessel should be already under arrest

at the time when the mortgagee institutes his proceedings and that such arrest may be effected at any time after the proceedings have been instituted. I think, however, that Rule 50 must be read *exceptis* or *excipiendis* and that as legislative enactment (binding on the Admiralty Court of this Colony) has declared and enacted that in two instances proceedings can only be instituted if the vessel is already under arrest, Rule 50 can only be read as authorizing arrest after the issue of the writ in proceedings other than these two and not as overriding express statutory provisions. If the words of Rule 50 empowering arrest in an action *in rem* at any time after the issue of the writ of summons are to be read as overriding Section 3 of the Act of 1840 and as empowering a mortgagee to institute proceedings in respect of his mortgage before the vessel is arrested, then it is clear that they must also be regarded as overriding Section 4 of the Admiralty Act of 1861 and as enabling claims in respect of building, repairing and equipping to be instituted before arrest of the vessel has been effected. In other words, to whatever extent Rule 50 is capable of being used in support of the contention that arrest need not precede the institution of mortgage proceedings it is equally an argument that arrest need not precede the institution of proceedings in respect of claims for building, repairing and equipping. But as regards these last mentioned claims it appears to be well settled (*vide* Lord Atkinson's judgment in *The Foong Tai* already referred to) that notwithstanding Order V, Rule 16 (corresponding to local Rule 50) arrest must precede the institution of the proceedings, hence it follows that if Section 3 of the Act, 1840, makes arrest a necessary preliminary to mortgage proceedings (p. 50) does not enable that preliminary to be dispensed with.

In the case now before us it is not disputed by counsel for the respondent that the arrest of the motor vessel "Arrow" was effected after the mortgagee's writ of summons had been issued, and as I am of opinion, for the reasons just given, that Section 3 of the Act of 1840 makes the arrest of the property a necessary preliminary to the institution of such proceedings, it follows that the Court was, in my humble judgment, without jurisdiction to entertain this action. This appeal, therefore, should be allowed and the application granted with costs both in this Court and the Court below.

CREAN, J. : From a perusal of the Record in this case it appears that the present applicant filed two actions in the District Court of Famagusta-Larnaca on the 16th day of February, 1933.

In the affidavit of the applicant sworn on the 22nd May, 1933, in support of his application to be joined as a defendant in these proceedings, he says that the master of the boat

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and the owner borrowed from him on two bottomry bonds for towing and repairs to the boat. And that they also borrowed from him another sum for necessaries. He further says on these transactions he brought the two actions above referred to and obtained judgments. Writs of execution were issued by the District Court and the motor boat "Arrow" was seized by the deputy sheriff and sold by public auction by order of the Famagusta Court on the 16th February, 1933. The applicant herein was the highest bidder and the "Arrow" was knocked down to him at the price of £503.

The Admiralty Court Act was passed in 1840 and it is described as an act to improve the practice and extend the jurisdiction of the High Court of Admiralty in England. Section 3 of the Act enacts that whenever a vessel shall be arrested or proceeds brought into registry, the Court shall have jurisdiction over the claims of mortgagees. Section 4 gives the Court of Admiralty power to decide all questions of title to the ship, or the proceeds thereof remaining in the registry, arising in any cause of possession, salvage, damage, wages or bottomry, which shall be instituted in the said Court after the passing of the Act.

This jurisdiction of the High Court of Admiralty in England was extended by the Admiralty Court Act, 1861. Amongst other things jurisdiction was given over any claim for building, equipping or repairing if, at the institution of the cause the ship was under arrest, jurisdiction was given as to claims for necessaries, for damage by any ship, to decide questions as to ownership, salvage and wages. In addition, if a ship were mortgaged and the mortgage registered under the Merchant Shipping Act, 1854, the Court was given jurisdiction over any claim in respect of such mortgage.

By the Cyprus Admiralty Jurisdiction Order in Council, 1893, the Colonial Courts of Admiralty Act, 1890, was applied to the Supreme Court of Cyprus as if that Court were a Colonial Court of Admiralty. In the same Order in Council by Clause 4 it is enacted that any Admiralty jurisdiction exercisable by the District Courts ceased, except, that as to salvage cases conferred on those Courts by the Cyprus Wrecks Law, 1886.

The actions by the present applicant instituted in the District Court of Famagusta arose out of claims of bottomry, repairs and necessaries. Claims such as these appear to me to be exclusively matters within the jurisdiction of the Court of Admiralty in Cyprus, consequently it is not clear to me how the District Court of Famagusta made the orders referred to in the affidavit of applicant of the 22nd May and ordered the "Arrow" to be put up for sale by public auction.

In action 60/33 the debt was incurred on the 15th February, 1933, on the following day a writ of summons was issued to recover *that amount*, which seems to me peculiarly expeditious. I think it is also peculiar that these two actions were instituted on the same day when the debts on which they are based refer solely to disbursements for the ship "Arrow". If both actions had been consolidated then the claim would have been outside the jurisdiction of the District Court.

But even if the judgments of applicant were beyond the jurisdiction of the District Court, I think he would have had a right to intervene in these proceedings on the ground that he has a genuine claim for repairs done to the ship, necessaries, etc.

The plaintiffs in this case issued a writ in *rem*. Immediately on the issue of the writ they applied for the arrest of the ship. This order was granted and the "Arrow" was arrested by the Court of Admiralty in Cyprus.

The applicant herein was joined as a defendant and applied to a Judge of the Court of Admiralty to strike out the proceedings on the ground that there was no jurisdiction in the Court to entertain the suit. It was submitted that unless the ship was under arrest at the time of the institution of the suit the Court had no jurisdiction as it was one founded on a mortgage which was not registered under the Merchant Shipping Act of 1854.

The ship herein was not under arrest when the writ was issued, nor was the mortgage of the plaintiff, which grounds his claim, registered under the Merchant Shipping Act. As neither of these conditions were fulfilled, it is submitted, on behalf of the applicant, that this Court of Admiralty acted without jurisdiction in issuing the writ of summons and ordering the arrest of the ship.

The authorities quoted by counsel for the applicant seem to support his contention that the ship must be under arrest before a mortgagee can institute his action unless the mortgage on the ship is registered under the Merchant Shipping Act of 1854.

The case of *Finnigan v. S. S. Northwest* (Supt. No. 8, Eng. and Emp. Digest, p. 18) must, I think, be taken as an authority in applicant's favour. And in the case of *Foong Tai v. Buchheister and Co.* (1) it is said by Lord Atkinson: "The ship not having been arrested till after the institution of the action, Section 4 of the Act of 1861 does not apply." This dictum indicates that it is a *sine qua non* to the institution of the action that the ship be under arrest before such institution.

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(1) (1908) A.C. 466.



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This section gives the High Court of Admiralty in England jurisdiction over any claim for the building, equipping or repairing of any ship, if at the time of institution of the cause the ship or the proceeds thereof are under the arrest of the Court.

Now, as has been stated, the Colonial Courts of Admiralty Act, 1890, is applied to Cyprus by the Cyprus Admiralty Jurisdiction Order, 1893, and in this Imperial Order in Council of 1893 the same jurisdiction is given to the Court in this Colony as is conferred by the above Act of 1890 upon a Colonial Court of Admiralty, which is the jurisdiction of the High Court of Admiralty in England.

The last clause of the above Order in Council of 1893 sets out that "the Rules contained in the Schedule hereto shall, until revoked or varied, be the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction, and shall have effect as if they had been made by the proper authority and approved by Her Majesty in Council under the seventh Section of the said Act, and may be revoked, varied, or added to in the same manner as if they had been made and approved under the said section." Rule 50 in this Schedule reads "in an action in *rem*, any party may at the time of, or at any time after the writ of summons apply to the Court or a Judge for the issue of a warrant for the arrest of property."

In the same Rule the party making the application is directed to file an affidavit which is to be in the form prescribed in these Rules.

Rule 52 directs what the affidavit shall contain in an action for wages, necessities, equipping or repairing any ship. But there is nothing in this rule which directs the deponent to state that the ship or proceeds thereof are under arrest. Therefore, the inference is, that it is not essential to the bringing of an action for equipping, building or repairing that the ship should be under arrest at the time of the institution of the cause and so the rule appears to me to be in conflict with dictum in *Foong Tai v. Buchheister and Co.*

The wording of Rules 50 and 52 is quite clear. Rule 50 does not specifically except a mortgagee from taking benefit under it in an action in *rem*. If a mortgagee is to be excluded from coming under Rule 50 he can only be so excluded by holding that the rule does not contemplate a mortgagee being a party in an action in *rem* because there is no provision in the Admiralty Court in England for a mortgagee bringing such an action unless certain conditions are fulfilled.

By so holding, it appears to me that it would be considerably limiting the meaning of words of the rule. I am unable to say that such a limitation was intended in face

of the clear and unambiguous words used, and of the existence of Rule 52 which indicates that the practice in Cyprus is to vary from that in England as to actions for equipping, repairing and building.

If the rule is to be interpreted as suggested by counsel for the applicant, the words "Subject to the law and practice prevailing in the High Court of Admiralty in England" must be taken and understood to precede the actual words of the rule which run:—In an action in *rem* any party may at the time, etc.

The point raised by this application is one of great difficulty; but, to import these words into this rule does not appear to me to be reasonable. The more reasonable interpretation is, in my opinion, to take the words in their natural meaning and as they stand.

And as those words are general and do not indicate that there is any restriction to be put on a mortgagee in the bringing of his action in the Court of Admiralty in Cyprus, I think the plaintiff mortgagee herein should be allowed to continue his action in its present form and that this application should be dismissed.

SERTSIOS, J.: This is an application by one Giacomo Branco, an additional defendant by order of the Court in the Admiralty Action No. 1/33, by which he applies to this Court to review the order made by Mr. Justice Thomas, of the Supreme Court, in the above mentioned Admiralty action on the 17th June, 1933.

The application has been made under Rules 165, 166 and 167 of the Cyprus Admiralty Jurisdiction Order in Council, 1893, and the applicant now applies that this Court may set aside the order given by the learned Judge on the date in question on the ground that the Court had no jurisdiction to entertain the action in question.

Mr. Clerides for applicant argued in this Court that the Supreme Court, in its capacity as a Colonial Court of Admiralty, has by virtue of Section 2 (2) of the Colonial Court of Admiralty Act of 1890, the same jurisdiction as that of the High Court of Admiralty of England. Consequently, in the same way as the Admiralty Division of the High Court of England, it will not entertain claims for mortgages of ships, unless either the mortgage is registered under the Merchant Shipping Acts, 1894 to 1923, or, where the mortgage has not been so registered, the ship itself is under arrest by warrant of the Court in an action within the jurisdiction of such Court.

He, further, submitted that there having been no allegation on the part of the plaintiff that the mortgage of the defendant's motor boat "Arrow" was registered under the laws mentioned, the Admiralty Court of Cyprus would

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have jurisdiction to entertain the present action only if the defendant's motor boat was arrested by a warrant of the Court in an action within its jurisdiction, as provided by Section 3 of the Admiralty Court Act, 1840. Mr. Clerides, moreover, argued that the provision laid down in Section 3 of the Law in question has not been followed, inasmuch as the vessel was not arrested till after the institution of the present action, and that, therefore, the Court had no jurisdiction to entertain this action. He submitted, lastly, that the order of the 17th June, 1933, dismissing Giacomo Branco's application was wrong.

Mr. Haji Dimitriou, counsel for the respondent Bank, on the other hand, argued, firstly, that the Court had ample jurisdiction to entertain the action, and, secondly, that the order made by the Court below was a final one, and, therefore, applicant was not entitled to apply to this Court to review it, as being contrary to Clause 165 of the Cyprus Admiralty Jurisdiction Order in Council, 1893. Now, dealing with this latter point of Mr. Haji Dimitriou, Clause 165 of the Order in Council in question provides that any party to an action may apply to the Court to review any order made by a judge not being a final order or judgment disposing of the claim in the action. But what is a final order or judgment? In the case *Bozson v. Altringham Urban District Council* (1), Lord Alverstone, C.J., stated the following in this connection:—

“It seems to me that the real test for determining this question ought to be this:

“Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order.”

In the case *Salaman v. Warner and others* (2), it was held that an order dismissing an action upon the hearing of a point of law was not a final order; and further, that “a final order is one made in such an application or proceeding that for whichever side the decision is given, it will, if it stands, determine the matter in litigation.”

Now, in the present case, the order made by the Court below was on a legal point, namely on a question of jurisdiction. Court below held that the Admiralty Court of Cyprus had jurisdiction to entertain this action, but did not decide on the merits of the action, and thus the order, as made, did not finally dispose of the rights of the parties, which rights in litigation will only be determined upon the hearing of the action itself. That being so, the order made by the Court below was not final, but one of an interlocutory

(1) (1903) 1 K.B. 548.

(2) (1891) 1 Q.B. 784.

nature. Consequently, the applicants rightly and within the meaning of Clause 165 of the Cyprus Admiralty Jurisdiction Order in Council, 1893, applied to this Court to review the order made by the learned Judge in the Court below.

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Coming now to the question as to whether the Admiralty Court, Cyprus, had jurisdiction to entertain the present action, I notice that the claim is based upon a mortgage of the defendant's vessel "Arrow", which is not claimed to have been registered according to the provisions of the Merchant Shipping Act, 1894. Consequently, the provision laid down in Section 11 of the Admiralty Court Act, 1861, is not applicable. Therefore, in dealing with the question before us, Court will have to be guided by Section 3 of the Admiralty Court Act, 1840, which deals with the jurisdiction of the Court over claims of mortgages generally. The section in question reads as follows: "Whenever any ship or vessel shall be *under arrest* by process issuing from the High Court of Admiralty, or the proceeds of any ship or vessel having been so arrested shall have been brought into and be in the Registry of the said Court, in either such case the said Court shall have 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 cause of action respectively." Now, what is required by this Section 3 of the Act mentioned is that the ship or vessel shall be under arrest by a process issuing from the High Court of Admiralty, naturally in an action within the jurisdiction of such Court, and that the proceeds of any ship or vessel having been so arrested shall have been brought into and be in the Registry of such Court. This having been done by such a process issuing from the Court in an action within its jurisdiction, the Admiralty Court shall have full jurisdiction to take cognizance of all claims and causes of action of any person in respect of *any such mortgage of such ship or vessel*, and to decide any suit instituted by any such person in respect of any such claims or cause of action respectively. In my view the wording of this section is clear. What confers jurisdiction upon the Court under this section is the arrest of the vessel or ship or of the proceeds thereof by process issuing from the said Court. Such process, in my opinion, should issue in an action within the jurisdiction of the High Court of Admiralty other than the suit instituted by the mortgagee. This clearly appears from the wording of the section. It reads:—"In either such case the said Court shall have full jurisdiction to take cognizance of all claims and causes of action of any person, etc. . . . and to decide any suit instituted by any such person in respect of any such claims or cause of action respectively."

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This, in my view, is with reference to an action being instituted after the arrest of the ship or vessel, etc., shall have taken place. Had it been with reference to arrest after the institution of the action by the mortgagee, the legislator would have clearly stated so. The section clearly speaks of claims and causes of action and of any suit instituted by the mortgagee, etc., after it has first dealt with the arrest of the ship or vessel, etc. You cannot arrest first the ship or proceeds thereof and then bring the action, *e.g.*; upon a mortgage, and this section clearly speaks of claims and causes of action at the hands of the mortgagee following the arrest of vessel or ship, etc. So the arrest cannot reasonably take place in the course of such claims or causes of action, inasmuch as such claims or such a suit would follow the arrest of the ship or vessel within the meaning of Section 3 of the Admiralty Court Act, 1840. There is, however, no doubt that an arrest by process issuing from the High Court of Admiralty must be based upon a proper legal machinery, and such legal machinery ought to be the action instituted before the Admiralty Court, having jurisdiction to entertain it, independently of the arrest of the ship or vessel, which, however, might be properly arrested in the course of such action by a process issuing from the same High Court of Admiralty. Consequently, when such an arrest, as required by Section 3 mentioned, will have taken place in the course of an action within the jurisdiction of the Admiralty Court, a jurisdiction is founded, enabling the High Court of Admiralty to entertain any claims or any suit instituted by a mortgagee of the ship or vessel under arrest. In support of this view, that the arrest should have taken place in a suit within the jurisdiction of the Court of Admiralty, I quote a passage from p. 43 of the third edition of the treatise of Williams and Bruce's *Admiralty Practice* which reads :

“ In order to obviate this state of things, express provision was made by the third Section of the Admiralty Practice and Jurisdiction Act of 1840 (3 and 4 Vict., Clause 65), which provides that whenever any ship or vessel shall be under arrest *by process issuing from the Court* (Y), etc.” On same page in note (y) referring to the above expression “ *by process issuing from the Court* ” it is explained what is meant by it, the respective passage reading as follows : “ The arrest must be in a suit which the Court of Admiralty would have had jurisdiction to try,” reference at the same time being made to *The Evangelistria* reported in 2 P.D. 241. From this note it is quite clear that the arrest should take place in a different action which the Admiralty Court would have had jurisdiction to try, and not in the action instituted by the mortgagee. As I have already

stated, the arrest of a ship or of the proceeds thereof in a suit within the jurisdiction of the Admiralty Court is that which gives jurisdiction to such Court to entertain subsequent claims of a mortgagee in respect of such ship or proceeds thereof already under the arrest and control of such Court. This is clearly the view taken on this point by Roscoe in his treatise on *Admiralty Jurisdiction and Practice*, 3rd edition, on p. 275, Chapter VIII, from which I quote a passage having direct bearing on the subject under consideration. It reads: "The Admiralty Court, which possessed no original jurisdiction over mortgages of ships, has now by Statute Jurisdiction in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act, 1894, whether or not the ship or proceeds are under the arrest of the Court. *But if any ship*, such as a foreign one, the mortgage of which is unregistered, is under the arrest of the Court or the proceeds have been brought into the Registry, *then a jurisdiction is founded.*" And in note (c) *ibidem* I read the following statement: "Such an arrest must be *de jure* as well as *de facto.*" The arrest, namely, which is necessary to found the jurisdiction of the Admiralty Division of the High Court over claims by mortgagees of a foreign ship under 3 and 4 Vict., Clause 65, must be in a cause over which the Court has jurisdiction, and a mere *de facto* arrest is not sufficient. (See *The Evangelistria* (1)).

From the above it is clear that a jurisdiction, enabling the Admiralty Court to entertain a claim of a mortgagee in the case of an unregistered mortgage of a ship, is founded only when such a ship is under the arrest of the Court or the proceeds thereof have been brought into the Registry by a process issuing from the High Court of Admiralty in an action which such Court would have jurisdiction to entertain.

The same view is taken by William and Bruce, the learned authors of the treatise on *Admiralty Practice*, on p. 44, referring to the case *The Evangelistria*, in 3 Asp. 264, as follows:—

"It must not, however, be forgotten that the jurisdiction conferred by the third Section of the 3 and 4 Vict., Clause 65, *though limited to cases where the mortgaged ship is already arrested, or the proceeds are in Court*, extends to unregistered and equitable mortgages as well as to registered mortgages, and exists whether such mortgages be upon British or upon foreign ships."

It is thus clear that the jurisdiction conferred by the third Section of the 3 and 4 Vict., Clause 65, is limited only to cases where the mortgaged ship is *already* arrested, or the proceeds are in Court.

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(1) (1876) 3 Asp. 264; 46 L.J. (Adm.) 1; 35 L.T. 410. Mew's *Digest*, Vol. 18, Col. 241.

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That such ought to be the interpretation to be placed upon Section 3 of the Admiralty Court Act, 1840, it becomes also evident from Section 4 of the Admiralty Court Act, 1861, referring to claims for building, equipping, or repairing of ships which reads :— “ The High Court of Admiralty shall have jurisdiction over any claim for the building, equipping or repairing of any ship, if at the time of the institution of the cause the ship or the proceeds thereof are under the arrest of the Court.”

The wording of the above section is, *mutatis mutandis*, the same as that of Section 3 of the Admiralty Court Act, 1840, which quoted again, for the purposes of the point under consideration reads :— “ Whenever any ship or vessel shall be under arrest by process issuing from the High Court of Admiralty, or the proceeds of any ship or vessel having been so arrested shall have been brought into and be in the registry of the said Court, in either such case the said 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 respectively.”

It is therefore obvious that in either of the above quoted sections, the jurisdiction is conferred upon the Court to entertain such an action or suit respectively only upon the ship or proceeds thereof having been under arrest of the Court at the time of the institution of the suit or action in respect of any claims or cause of action respectively. Such was indeed the interpretation placed upon Section 4 of the Admiralty Court Act, 1861, and by analogy upon Section 3 of the Admiralty Court Act, 1840, by Lord Atkinson in the Privy Council appeal case *Foong Tai and Company v. Buchheister and Company* (1), in the judgment of the Judicial Committee delivered by him, in which *inter alia* he stated the following having direct bearing on the point under consideration :— “ The writ (in the action) was issued and served on 22nd September, 1906. The ship was arrested by the Marshal of the Court on 14th November, 1906. The ship not having been arrested till after the institution of the suit, Section 4 of the Act of 1861 does not apply.”

From the above it is also quite clear that the arrest of the ship or vessel, etc., should take place before and not after the institution of the action, under Section 4 of the Admiralty Act, 1861, which view, for the reasons I have already explained, equally applies to Section 3 of the Admiralty Act, 1840.

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(1) (1908) A.C. 458.

I may now make a reference to some other decided cases in which the same view was adopted by the High Court of Admiralty in England. In the case, for instance, of *Finnigan v. S. S. Northwest* (1), the defendant moved for an order to set aside the writ of summons, etc., for want of jurisdiction. On the hearing, Finnigan, the plaintiff, 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, however, was not under arrest or seizure at the time of the institution of the action, and it was, therefore, held that the Court was without jurisdiction to entertain the claim.*

In the case *The Fortitude* (2) the substance of which is given in the English and Empire Digest, Vol. 1, p. 119, the ship was arrested at suit of mariners for wages, but not the freights, which was, therefore, not in the hands of the Court, and it was held that the Court will not exercise its ordinary jurisdiction, or that given by the Admiralty Court Act, 1840 (Clause 65), at the instance of the mortgagee, to adjudicate questions as to ownership of the freight. From this decision it would appear that under Section 3 of the Admiralty Court Act, 1840, the freight itself also should be under the control of the Court and not the ship alone, as in the above mentioned case, before a mortgagee could by an action claim from the Court to adjudicate questions as to ownership of the freight as, otherwise, the Court would have no jurisdiction to entertain the action within the meaning of Section 3 of the Admiralty Court Act, 1840.

Mr. Haji Dimitriou for the respondent Bank argued in this Court that from Section 3 of the Admiralty Act, 1840, it is not clear whether the arrest should be in the action itself or in other proceedings. He further added that, in any event, he bases mainly his case on Rule 50 of the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction.

Now, as regards the meaning of Section 3 of the Admiralty Act, 1840, I have already stated at some length that, in my own opinion, in view of the wording itself of the section and of the authorities I have cited, etc., the arrest of the ship, etc., should take place in an action which the Admiralty Court has jurisdiction to entertain, before a mortgagee of the ship or vessel may be enabled to institute an action against the ship in question.

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(1) (1920) 20 Exch. C.R. 180, cited in Eng. and Emp. Digest, Suppt. No. 8, p. 18.

(2) (1843) 2 Wm. Rob. 217 ; 2 Notes of Cases 515.



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As regards Rule 50, upon which he mainly bases his case, as stated, in my view that Rule is to all intents and purposes a re-enactment of Order V, Rule 16, of the Rules of the Supreme Court of England, which reads :— “ In Admiralty actions *in rem* a warrant for the arrest of property may be issued at the instance either of the plaintiff or of the defendant at any time after the writ of summons has issued, but no warrant of arrest should be issued until an affidavit by the party or his agent has been filed, etc.”.

I have already stated that, when any ship, the mortgage of which is unregistered, is under the arrest of the Court, or the proceeds have been brought into the Registry, then a jurisdiction is founded. The *arrest*, that is to say, of the ship, etc., is a *conditio sine qua non* for the purpose of founding the jurisdiction enabling the Admiralty Court to entertain an action instituted by the mortgagee of the ship or vessel. That being so, the arrest of the ship or vessel must precede the institution of the action by the mortgagee, as, otherwise, as stated, Court would not have jurisdiction to entertain the mortgagee's action. So the vital point is that arrest of the ship should take place *de jure*, as I have already stated, namely in an action within the jurisdiction of the Admiralty Court, and *de facto*, before the institution of the action by the mortgagee. Rule 50, however, as well as Rule 16 of Order V of the Rules of the Supreme Court of England, states that in an action *in rem* any party *may* at the time of, or at any time after the issue of the writ of summons apply to the Court for the issue of a warrant for the arrest of property, namely it makes it optional on the part of either party to do so. But under Section 3 of the Admiralty Act, 1840, which says : “ When a ship or proceeds thereof shall be arrested ”, it is essential that the ship *shall* be arrested in order to enable the Court to exercise its Admiralty Jurisdiction with regard to the mortgagee's action. The Rules of Court mentioned, however, do not consider it to be essential, when under them it is left to the discretion of either party to apply to the Court for the issue of a warrant of arrest of property. It is true that on p. 256 of Williams and Bruce's *Admiralty Practice* in note (k) it is stated that, notwithstanding the use of the word “ *may* ” in Rule 16, Order V, of the Rules of the Supreme Court of England, the plaintiff *must* take out a warrant of arrest, but this is with a view of enabling the mortgagee to obtain security of the *res*, as stated in the note, and not for the purpose of conferring jurisdiction upon the Court to entertain the mortgagee's action. In my view, therefore, Rule 50 of the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction, and Order V, Rule 16, of the Rules of the Supreme Court of England, lay down the procedure to be followed after the institution of

an action *in rem* by the mortgagee before the Admiralty Court having already jurisdiction under Section 3 of the Admiralty Act, 1840, to entertain such an action. Rule 50, therefore, operates on the assumption that the Court of Admiralty has already jurisdiction to entertain the action by virtue of the provision of Section 3 of the Admiralty Act, 1840, having been complied with. A *Rule of Court* is only a rule arranging a procedure for the purposes of giving effect to the provisions of the law, and it cannot, as such, override the Law.

I wish now to say only a few words as regards Form No. 7, appearing on p. 566 of Roscoe's *Admiralty Practice*, 3rd edition. On p. 542 of the same treatise in the footnote (a) there is the following remark: "The following selection from the *Judicature Act Forms* contains those which are peculiar to Admiralty actions, with a few *additional* forms more especially applicable to shipping actions."

In my humble opinion the Form No. 7 in question is apparently one of the additional forms, referred to in the note mentioned, for indicating how in an action of mortgage of a ship an affidavit should be made for the purpose of giving effect to the provision laid down in Order V, Rule 16, of the Rules of the Supreme Court of England.

In the circumstances, in view of all that I have stated at some length, I consider that the Admiralty Court, Cyprus, had no jurisdiction to entertain the action instituted by the mortgagee, the Bank, and I, therefore, am of the humble opinion that the application of defendant Giacomo Branco should be granted, and the order made by the learned Mr. Justice Thomas, sitting as a Judge of the Supreme Court in its Admiralty Jurisdiction, be set aside with costs both in this Court and in the Court below.

*Appeal allowed.*

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