

B. FOOTNOTE TO THE C.M.I. QUESTIONNAIRE ON MARITIME LIENS AND MORTGAGES

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In advising the Australian position on maritime liens and mortgages to the Comité Maritime International, the question arose as to whether or not a mortgagee of a mortgage registered under the Shipping Registration Act 1981 (Cth) could still arrest the vessel, in an action in rem in the Admiralty jurisdiction, for a breach of the mortgage.

The following article discusses this most important question. The author of the article and the Journal would welcome correspondence on the subject.

Can the mortgagee of a breached or impaired mortgage registered under the Shipping Registration Act 1981 (Cth) still arrest the vessel, in an action *in rem* in the Admiralty jurisdiction?

In the C.M.I. Questionnaire and Response, to be published in the next issue of the Journal, one of the questions (question seven) raised a problem which could not readily be resolved before answering the Questionnaire. Doubtless it will be resolved the first time a disgruntled mortgagee seeks in Admiralty to arrest a vessel over which the mortgagee has a mortgage registered under the Shipping Registration Act 1981 (Cth). The question which raised the difficulty was "[w]hat is the manner of enforcement of mortgages and hypotheques?" The answer given by the Australian respondents was that

[p]rior to the passing of the Shipping Registration Act 1981 (Cth) the procedure was to use the remedies available under the Admiralty Court Act 1840 (Imp.) or the Admiralty Court Act 1861 (Imp.) and in practice the remedy in the 1861 Act of an action *in rem* against the vessel was most likely (although an action *in personam* was also available). Since the passing of the Shipping Registration Act 1981 a question has arisen as to whether the *in rem* remedy is still available. If not, it seems that there may only be the limited remedy available under the 1840 Act.

This "footnote" expands upon that above answer (which of necessity sidestepped the issue which it raised).

Until Australia Day last year, when the new Australian Shipping Register became effective under the Shipping Registration Act 1981 (Cth), the substantive statutory law in Australia in relation to ships' mortgages was set out in the Merchant Shipping Act 1894 (Imp.). That Act, as is well known, was part of Australian law. The general law of mortgage augmented the particular provisions of that Act and together they made up the substantive law on ships' mortgages. Initially, there was no Admiralty jurisdiction to entertain a mortgagee's claim and mortgagees had to resort to the common law courts. They

would always have had available to them the right to claim possession in accordance with the terms of the collateral deed which generally accompanied a ship's mortgage and, even in the absence of such a deed, the general law relating to mortgages entitled a mortgagee, where the mortgagor defaulted under the mortgage, to actual or constructive possession of the vessel. It was not until mortgages became proper subjects of Admiralty jurisdiction that they attracted the advantages that flowed with that jurisdiction, including the peculiarities of the action *in rem* and the ability of the mortgagee to use the Court's power to arrest the vessel.

The Admiralty Court Acts 1840 and 1861 (Imp.) (still applicable in Australia) created and extended the jurisdiction of the Admiralty Court to entertain actions by mortgagees. The earlier Act simply enabled a mortgagee to present a claim where the vessel, the subject of the mortgage, was already under arrest of the Admiralty Court or where proceeds had been brought into the Court. It provided no power to the mortgagee to require that the Court actually arrest the vessel. The Admiralty jurisdiction was extended in 1861 to include jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act 1854 (Imp.). The jurisdiction was available whether or not the ship or the proceeds were already under arrest. Furthermore, by virtue of sections 11 and 35 of the 1861 Act, proceedings could be brought either *in rem* or *in personam*. The provisions in the 1840 Act still subsisted, however, and appear not to have been limited to the enforcement of mortgages which were registered under the Merchant Shipping Act 1854 (Imp.) (that is, mortgages over British ships).

Both the Admiralty Court Act 1840 (Imp.) and the Admiralty Court Act 1861 (Imp.) also empowered the Court to hear disputes about ownership and possession of vessels. Section 4 of the 1840 Act empowered the Court to "decide all Questions as to the Title to or Ownership of any Ship or Vessel . . . arising in any Cause of Possession . . .". Section 8 of the 1861 Act empowered the Court to decide all questions arising between "Co-owners . . . touching . . . Ownership, Possession . . .".

A few years prior to the passing of the Admiralty Court Act 1840 (Imp.) a mortgagee had argued that a mortgagee in possession was akin to an owner: *In re The "Neptune"*.¹ The Court, in that case, expressly disagreed and referred to the provisions in the forerunner of the Merchant Shipping Act which expressly stated that a mortgagee in possession was to be treated as the owner only to the extent necessary to protect his security. That section has been re-enacted in the subsequent Merchant Shipping Acts and in the Shipping Registration

¹ (1824) 3 Hagg. 129; 166 E.R. 354.

