

COMMON PLEAS.

HILARY TERM, 1859.

Reported by E. C. JONES, Esq., Barrister-at-Law.

SCATCHERD v. THE EQUITABLE FIRE INSURANCE COMPANY.

Registration of vessels—Mortgagor considered owner when registered—Insurance of mortgagee's interest.

Upon an action for insurance upon a vessel under the usual interim receipt.

Held, that the mortgagor of a non-registered vessel had not such an interest as was saleable under a *fi. fa.*, the 23rd sec. of the statute 5 Vic. ch. 5, only declaring that the registered owner, although he shall have mortgaged the vessel, shall be considered to be the owner thereof; and that by a purchase under a *fi. fa.* of the mortgagor's interest in a non-registered vessel, the legal estate did not pass. The plaintiff, at the trial, claiming as owner under a sale as above stated, and the judge ruling against him, applied and was allowed to prove his interest as mortgagee.

Upon a motion for a nonsuit upon that ground.

Held, that it was a matter in the discretion of the judge at *nisi prius* to permit such a variance in the line of proof, and the defendants not shewing themselves damaged by the exercise of this discretion, a nonsuit was refused.

The declaration states, that, on the 1st of April, 1858, plaintiff applied to defendants to insure against fire in the sum of \$5000, the hull, standing rigging and machinery of the steamer "Forest City," of which the plaintiff was the owner, as then lying at Port Stanley, for one month, from the 1st of April, and plaintiff paid the premium, and defendants granted plaintiff a receipt therefor, and also insured in the sum of \$5000 the said property, until within thirty days from that date a policy should be issued, if approved by the local directors at Montreal, or until the insurance should be cancelled by defendants. That afterwards, and whilst the insurance created by the receipt was in force, before the policy issued and before the local directors approved or cancelled the same, the steamer was accidentally destroyed and damaged by fire, to the value of £1500, whilst still plaintiff's property; yet defendants have not paid. Second count for money had and received.

Pleas to 1st count: 1st. Did not issue the receipt. 2nd. The property not the plaintiff's. 3rd. That the receipt was subject to all the terms and conditions of the policy in use by defendants, among which is the following: "All persons insured by this company, sustaining any loss or damage by fire, are forthwith to give notice to the agent through whom insured, or to the nearest agent, and, within one calendar month after such loss or damage has occurred, are to deliver in as particular an account of their loss or damage as the nature of the case will admit of, and, if required, make proof of the same by their oath or affirmation, according to the form used in the said office, and by the production of the books of account and other proper vouchers, and give such further information thereon as shall be necessary, and shall, if required, procure a certificate under the hands of three or more respectable householders nearest to the place where the fire has happened, and not concerned in such loss, importing they are acquainted with the character and circumstances of the person insured, and do know or verily believe that he, &c., really and by misfortune, without any kind of fraud or evil practice, has sustained by such fire loss and damage to the amount therein mentioned. Until such affidavit, account and certificate are produced, and such explanation given, the amount of the loss shall not be payable. Also, if there be found to be any false swearing or attempt at fraud, collusion, or wilful mis-statement on the part or in the behalf of the person insured, or if it should appear that the fire shall have been occasioned by any wilful act or connivance on his part, he shall forfeit all claim to restitution or payment by virtue of his policy." That defendants required plaintiff to furnish them with a statement shewing his title and interest in the steamer, together with all deeds and instruments evidencing such title and interest, and to furnish them with copies of all accounts and transactions between plaintiff and one Paul Phipps, and to state what securities plaintiff then held, or, at the effecting the insurance on the said steamer, did hold for securing payment of any debt due from Phipps to plaintiff, and how and for what consideration plaintiff acquired the interest of Phipps in the steamer, and whether the interest of the plaintiff in the steamer was that of owner or mortgagee, and required plaintiff to make proof of the said deeds, instruments, accounts, matters and things under his oath, none of which plaintiff has done, contrary to the condition, &c. 4th. Plea to second

count never indebted. 5th. To the first count that the insurance was effected through the fraud, misrepresentation and concealment of the agent of the plaintiff, through whom the same was effected.

Replication takes issue on 1st, 2nd, 4th, and 5th pleas. To the 3rd plea, that defendants did not at any time before the commencement of this suit require the plaintiff to do as in that plea is alleged, defendants deny.

The trial took place at London, in November, 1858, before Burns, J. The receipt for insurance, signed by the defendants' agent at London, and dated the 1st of April, 1858, was proved. It was as follows: "Received of Thomas Scatcherd, Esq., the sum of \$16.63, for the insurance of \$5000, agreeable to instructions received this day, for which a policy will be issued by the Equitable Assurance Company, within 30 days from this date, if approved of by their local directors at Montreal, or otherwise this insurance to be cancelled and a *pro rata* premium returned for the unexpired term. (Signed, &c.)

"This receipt is subject to all the terms and conditions of the policy in use by the company at the date hereof."

To prove property in the plaintiff, was put in an exemplification of a judgment (under the seal of the Court of Common Pleas) recovered by Thomas Mason v. Paul Phipps, for £311 damages and £15 17s. 3d. costs, in an action on promises. Judgment entered the 10th of April, 1857. A *fi. fa.* issued to the Sheriff of Elgin on this judgment, and on the 27th of June, 1857, he sold the vessel, executing a bill of sale by which, after the usual recitals, the sheriff, in consideration of £14, granted, bargained, sold, assigned and set over "as much as in me lieth by virtue of the said writ and of my office," to the plaintiff, the said steamer, goods and chattels, 'urniture, tackle, anchors and appurtenances. *Habendum* all the estate, right, title, interest, claim and demand which the said Paul Phipps had in the same, to plaintiff, his executors, administrators and assigns. The sheriff proved that this sale was subject to mortgages, one to one Morton, the other to plaintiff: that the plaintiff claimed a mortgage of \$4000 on her, and on this account she sold only for £14. Paul Phipps was called as a witness, and swore he formerly owned the "Forest City;" that she was worth \$10,000, and was burned in April, 1858. On cross-examination he stated that he had effected an insurance on her for the plaintiff, in the Times and Beacon office, for a term that expired in March, 1858: that he applied to the same office for a further insurance, to commence from such expiration, and it was refused, because, as he swore he believed, that Company would not insure for a month: that he then applied for the present insurance to the defendants' agent, and did not tell him that the Times and Beacon would insure for so short a time, but told him they would not insure for less—he thought—than six months. He said he was under an indictment for having caused the firing of the vessel. The destruction of the steamer, except what the boiler and old iron might be worth, was proved.

The defendants' counsel objected, that no title to the vessel in Phipps was shewn; that the Provincial statute 8 Vic. ch. 5, is repealed by the imperial statute 17 and 18 Vic. ch. 104, under which every vessel must be registered, and that no registry having been shewn with respect to this vessel, no title to her is proved; and that the title relied on being the sheriff's deed, and the sale having been sworn to be subject to two mortgages, one claimed by the plaintiff to be held by himself, Phipps, if he had any title at all, had only an equity of redemption, which was not, on the 27th of June, 1858, subject to be sold on a *fi. fa.*, for the act 20 Vic. ch. 3—by the 11th sec. whereof the interest or equity of redemption, in chattels mortgaged, of the mortgagor was made saleable in execution—did not come into force until the 1st of August, 1857.

The plaintiff's counsel then, by leave of the learned judge, (the defendants' counsel strenuously objecting,) put in a mortgage of this vessel dated the 9th of May, 1857, from Paul Phipps to the plaintiff for £942 10s., and there rested his case.

The defendants' counsel urged that the plaintiff should be required to elect, whether he claimed as owner or as mortgagee, admitting that a mortgagee's interest was insurable. This was declined, and the learned judge allowed the case to proceed, to settle the issues, and reserved leave to the defendants to move to enter a nonsuit on any or either of the objections raised. On the defence it was then proved that when Phipps applied to defendants'