

TORONTO ADMIRALTY DISTRICT.

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HIS MAJESTY THE KING.....PLAINTIFF;

AGAINST

THE SHIP "H. B. TUTTLE."

Motion for Pleadings—Release of ship—Giving of Bond.

No ship after being arrested can be released except by order of a Judge or by a release issued by the Registrar.

Where a ship escaped from the custody of the Marshall and no bond was given an order for pleadings was in the meantime withheld.

MOTION in Chambers for an order for pleadings.

Notice of motion for an order for pleadings and that a Bond be delivered was filed on the 5th September, 1904, and after several adjournments was argued on the 15th December 1904. The facts of the case are further set forth in the reasons for judgment.

A. G. Murray, for Plaintiff;

E. G. Morris, for Defendant.

HODGINS, L.J., now (January 5th, 1905) delivered judgment.

The proceedings before me on this interlocutory application discloses several irregular and unexplained proceedings on the part of some of the officials concerned in the following matters.

On the 2nd August, 1904, a writ of summons and warrant of arrest were issued out of this court at the instance of the Government of Ontario against the Ship "*H. B. Tuttle*," for injuries caused by her to the Point Bridge in Manitoulin. On the 4th August the ship was arrested at French River by the Collector of Customs at that port. On the 8th August the following

telegram from the Public Works Department was sent to the solicitors for the Crown at Gore Bay :

“*H. B. Tuttle* was sold by Marshall, Admiralty Court, in 1903. Claim now invalid. Attorney advises release.”

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On the following day the above telegram was cancelled by the following to the same solicitor :

“Message of yesterday cancelled. On further information with regard to the *Tuttle* withdraw order for release at once.”

This telegram was supplemented by the following on the same day :

“On reading your letter of sixth, Attorney General desires *Tuttle* held and wire of yesterday cancelled.”

But it was admitted during the argument that some person interested in the ship had obtained from the Public Works Department (whether from the head or a subordinate officer of the department has not been disclosed), a copy of the first mentioned telegram advising release of the ship. A copy of this telegram appears to have been telegraphed to the Collector of Customs to whom the warrant of arrest had been sent and in whose custody the ship then was, who without any communication with the solicitor for the Crown to whom the telegram had been addressed, and without any order of the Judge, or direction from the Registrar of the court, or any other authorization than the copy of the telegram mentioned above, released the ship *Tuttle* from the arrest which had been made on the 4th August under authority of the warrant of arrest which had issued from this court on the 2nd of the same month.

The rules of this Admiralty Court respecting the release of ships and property arrested under its warrants are set out in rules 53 to 59. Ships so arrested are in the custody of the court and can only be released by order of the Judge, or by a release issued by the Registrar under the prescribed conditions as to security.

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On the 12th August the Collector of Customs at Little Current sent the following telegram to the solicitor for the Crown :

“ Have steered steamer *Tuttle* for Buffalo to save further expense, on copy of McNaughton’s telegram eighth. Send formal release.”

The act of the collector in releasing the *Tuttle* “on copy of McNaughton’s telegram,” the first telegram, appears to have been clearly unauthorized and in entire disregard of the rules of this court above cited, authorizing releases of “property arrested by warrant.”

No explanation has been given by any official of the Public Works Department of the circumstances under which a copy of the first or McNaughton’s telegram was furnished to some party interested in the ship. Nor has any explanation been given by the Collector of Customs of the circumstances under which he released the ship without the authority which the Admiralty rules prescribe.

I cannot on this interlocutory application for pleadings, and a bond, try the questions involved in the arrest and release of the ship on the eleventh of August last. All the facts effecting these questions have not been proved or explained and they must therefore be reserved for the trial.

On the twelfth of August, an appearance was entered by a solicitor for the ship *Tuttle* and the owners thereof.

Mr. Murray, as solicitor for the Crown, in his affidavit states that “no release was sent to the Customs officer as requested by his telegram, but immediately requested the Public Works Department to have the ship arrested at Windsor by His Majesty’s Collector of Customs there, in whose hands I had previously placed a warrant of arrest; and I am informed that the Collector of Customs at Windsor did duly arrest the said ship, but that she escaped from his custody as appears from the telegram

now shown to me and marked exhibit C hereto." The telegram is as follows from the Collector of Customs: "Windsor, August 17, 1904: *Tuttle* arrested on Saturday but escaped later; am sending full report to Department, Toronto."

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Some of the facts respecting the arrest of the *Tuttle* appear to be as follows:

On the 13th August the following telegram was sent from the Attorney-General's office to the Collector of Customs at Amherstburgh (not Windsor): "Arrest steam barge *H. B. Tuttle* on passing channel there on warrant from Maritime Court at instance of Public Works Department of Ontario."

On the same day a Customs officer of the Amherstburgh office went on board the *Tuttle* and showed the Master the telegram and "placed the ship under arrest." The vessel however proceeded for about two miles and then ran aground. The detailed statement of the Customs officer in making the arrest is set forth in his affidavit. But he is silent as to the escape.

Neither the "full report" of the Collector of Customs at Windsor, nor a report from the Collector of Customs at Amherstburgh whose officer made the arrest, as to how the ship escaped from custody has been furnished on this interlocutory application.

The full and consecutive history of the proceedings effecting the arrest and release, of the re-arrest and the escape of the ship is therefore incomplete and unsatisfactory. But from what appears, I think the fact of the arrest and improper release of the ship at French River is *primâ facie* established, and that the onus of proving that the ship was lawfully released from custody by the Collector of Customs at French River lies therefore on the defendant's ship and her owners.

Then, as to the bond moved for by the Crown, I find that the correspondence between the solicitors shows that

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the solicitor for the owners as late as the 26th September 1904,—over a month after the alleged release by the Collector of Customs at French River agreed to give a bond. I must therefore hold that the owners are bound to give the bond agreed upon. After the bond has been given and approved an order for pleadings may issue.

Costs are reserved for the hearing.

Solicitor for Plaintiffs: *A. G. Murray,*

Solicitor for Defendants: *E. G. Morris.*
