

QUEBEC ADMIRALTY DISTRICT

BETWEEN:

1934
Nov. 20.

DELMA C. OUTHOUSE AND ERNEST }
H. HIMMELMAN }

PLAINTIFFS;

AND

STEAMER THORSHAVN DEFENDANT.

Admiralty—Jurisdiction—Action in rem—Oil pumped overboard by a ship causing damage—Damage done by a ship.

Plaintiffs were the owners of a large number of live lobsters lying in crates in the waters of the Strait of Canso, N.S., for refreshment purposes, while being transferred from Magdalene Islands, P.Q., to Gloucester, Mass. Defendant steamer ran aground in the Strait of Canso and in order to lighten the ship a large part of its cargo of oil was pumped into the waters of the strait. Plaintiff claimed this was carried by the winds and tide to the resting place of the lobsters, causing damage to the lobsters, crates and connecting lines. Plaintiff Outhouse also claimed for loss of freight.

Defendant contended that the court was without jurisdiction to entertain the action.

Held: That damage by a ship means damage done by those in charge of a ship, with the ship as the noxious instrument.

- (1) (1884) 111 U.S. Rep., 335, at 345.
- (2) (1920) 36 T.L.R., 815.
- (3) (1863) 3 B. & S., 917 at 929.
- (4) (1900) 188 Ill., 133, at 138.
- (5) (1903) L.R. 1 Ch. D., 586.
- (6) (1900) L.R. 1 Ch. D., 421.
- (7) (1904) App. Cas., 342.
- (8) (1905) 42 Sc.L.R., 762.

MOTION by defendant that plaintiffs' action be dismissed and the arrest of the steamer *Thorshavn* quashed, and that the bail bond furnished on behalf of the *Thorshavn* be cancelled and annulled.

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The motion was argued before the Honourable Mr. Justice Phillippe Demers L.J.A., Quebec Admiralty District, at Montreal.

R. C. Holden, K.C., for the defendant, argued: That the jurisdiction of this court is limited to the Admiralty jurisdiction which the High Court in England had in 1890, when the Imperial Legislature enacted the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict., c. 27). That the only jurisdiction over causes for damage is to be found: (a) In s. 7 of The Admiralty Act, 1861 (24 Vict., c. 10) which gives jurisdiction over "any claim for *damage done by a ship*," and (b) In s. VI of The Admiralty Court Act, 1840 (3-4 Vict., c. 65) which gives jurisdiction over claims and demands in the nature of "*damage received by any ship* or seagoing vessel." That the plaintiffs' statement of claim alleges that the damage was caused by the oil which formed part of the ship's cargo and had been pumped overboard and that this is not *damage done by a ship*, nor is the claim of the plaintiff, Outhouse, for loss of freight *damage done by a ship* nor *damage received by any ship*. That there is no jurisdiction in Admiralty, and in any event there is no maritime lien or action *in rem*. The following authorities were cited by Mr. Holden in support of his contentions: Mayers Admiralty Law & Practice (1916), pp. 111, 115; *The Vera Cruz* (1884), 9 P.D. 96; *The Theta* (1894), 7 Asp. M.C. 480; *Currie v. McKnight* (1896), 8 Asp. M.C. 193; *St. Lawrence Transportation Co. Ltd. v. Schooner Amedee T.* (1924), Ex. C.R. 204; *Mulvey v. The Barge "Neosho"* (1920), 19 Ex. C.R. 1; *Barber v. The Ship "Netherland"* (1909), 12 Ex. C.R. 252; *The Victoria* (1887), 6 Asp. M.C. 120; *The Rigel* (1912), 12 Asp. M.C. 192; *The Circe* (1905), 10 Asp. M.C. 149.

C. R. McKenzie, K.C., for plaintiffs, argued *contra*.

That the act of the defendant ship in the use of its pumps in pumping out oil as the originating and proximate cause of the damage to plaintiffs' property, must be regarded as *damage done by the ship*. That if the cause of action

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has been established the plaintiff should be given his remedy in the court which is best qualified to consider the merits of the case. That the ship was actually doing something with its equipment, namely, its pumps, the operation of which, through the ejection of oil, has caused damage to the plaintiffs. That there is no question of priorities but merely that of a procedural right. That under s. 35 of the Admiralty Act of 1861 the jurisdiction conferred may be exercised either by proceedings *in rem* or by proceedings *in personam*. That consequently when any damage is done by a ship under s. 7 of the Act proceedings may be instituted *in rem* against the offending ship. Mr. McKenzie cited the following authorities: *Chr. Knudsen* (1932), 43 Lloyds List Law Reports 423; *The "Santa Rita"* (1910), 176 Fed. Rep. 890; *The Clara Killam* (1870), L.R. 3 A. & E. 161; *Good v. London Steam-ship Owners' Mutual Protecting Association* (1871), L.R. 6, C.P. 563.

DEMERS L.J.A., now (November 20, 1934), delivered the following judgment:

It seems that damage by a ship means damage done by those in charge of a ship, with the ship as the noxious instrument (1).

These words do not mean that the ship must come in contact with the thing damaged; a ship may be responsible for its excessive waves.

I am of opinion also that when we speak of damages by a thing, we do not mean necessarily a damage caused by the whole body. We include damage by a part of that body.

Therefore, damages caused by the fires of a ship or by her pumps are damages by the ship.

For these reasons the motion is dismissed with costs.

Judgment accordingly.

(1) *The Vera Cruz* (1884), 9 P.D. 96 at 101.