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BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

GOODWIN JOHNSON LIMITED .....PLAINTIFF;

AND

THE SHIP (SCOW) *A.T. & B. No. 28*
THE SHIP (SCOW) *E.S.M. No. X* ....
THE SHIP (SCOW) *Marpole II* ..... } DEFENDANTS.

Shipping—Tug and tow—Liability damage caused to property of third parties—Wrong tow joined as defendant in action in rem—Tow under control of independent contractors—Owners of tow not liable.

Held: That no claim for damages against one tow joined as defendant in an action *in rem* in error for another tow can be maintained even though both tows are in the same ownership.

2. That a tow under the control of independent contractors cannot be held liable for damage done by her to property of third parties caused by the negligence of the tug.

3. That a tow cannot be made liable for charges in an action *in rem* when her owners are not personally responsible; a ship is not liable for the negligence of the servants of a charterer by demise.

ACTION by plaintiff claiming compensation for damage done to its booming ground allegedly caused by defendant scows.

The action was tried before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

H. R. Bray, Q.C. for plaintiff.

John I. Bird for defendants.

The facts and questions of law raised are stated in the reasons for judgment.

SIDNEY SMITH D.J.A. now (March 19, 1953) delivered the following judgment:

In this case the plaintiff claims compensation for damage done to its booming ground at Moodyville, Vancouver Harbour, by three registered scows named respectively, *A.T. & B. No. 28* (owned by James Aitken, Jr.), *E.S.M. No. X* (owned by Canadian Forest Products Limited) and *Marpole II* (owned by Marpole Towing Company Limited). The suit is brought *in rem* for the enforcement of a maritime

lien in each case, and the statement of claim alleges negligence on the part of the "owners and/or operators of the said scows, their servant or servants, agent or agents". The scows are usually referred to in the books as "dumb barges"; they are rectangular in form, without motive power, without steering power and without crew. They are towed by tugs from place to place. The misadventure out of which the claims arose was brought about in this way:

The said scows with others were moored at a scow pool immediately to the westward of the plaintiff's booming ground on 2 December, 1949, which was a day of high westerly winds increasing at times to gale force. About 8 a.m. the tug *Goblin* owned by the Gulf of Georgia Towing Co. Ltd., arrived at the scow pool to take the scow *E.S.M. No. X* in tow. The tug's engineer stepped on board the scow, cast off her mooring lines, and was about to make fast the tug's towing hawser when her Master saw another scow, the *I.T. 40,* loaded with ties drifting towards the booming ground. Leaving the engineer on the scow, the Master made towards *I.T. 40* with the intention of towing her to safety. Thus abandoned, the *E.S.M. No. 10,* with the *Marpole* scow fast alongside, drifted towards and into the booming ground where the *I.T. 40* had already arrived. This resulted in damage to the booming ground which consists of floats enclosing spaces in which log booms are made up, with houses and machinery necessary for that work. Two other tugs came to the assistance of the *Goblin,* viz., the *Gnome* also owned by Gulf of Georgia Towing Co. Ltd., and the *Green Point* owned by the Marpole Towing Company Ltd. By about 10 a.m. these three tugs had succeeded in clearing the three scows from the booming ground. But that did not quite end the matter; for shortly afterwards the scow *I.T. 40,* scow *A.T. & B. No. 28* and the *Marpole* scow again broke loose and again drifted into the booming grounds doing further damage. But by noon, with the help of the two other tugs, the scows were again returned to the scow pool, and this time remained there.

I shall deal first with the *Marpole* scow for, unfortunately for the plaintiff, the action was brought against the wrong scow, due to certain confusion in the reading of her name. The plaintiff arrested scow *Marpole II* which was elsewhere

1953

GOODWIN JOHNSON LIMITED v. THE SHIP (SCOW) A.T. & B. No. 28 et al

Sidney Smith D.J.A.

at the time. The scow involved in the mêlée was the *Marpole XI*. This is established conclusively by the evidence. The claim against the *Marpole II* therefore cannot be maintained notwithstanding that she and the *Marpole XI* are in the same ownership. 30 Hals. 947, note (*d*).

The same result must be reached with respect to the scow *E.S.M. No. X*. The evidence is clear that at all material times this scow was under the control of independent contractors, namely, the Gulf of Georgia Towing Co. Ltd., the owners of the tug *Goblin*. There was nothing here in the nature of master and servant relationship between those in charge of the tug and the owners of the tow; so no liability can be fastened on the innocent scow for any damage done by her to property of third parties caused by the negligence of the tug. 30 Hals. 847. This claim also fails.

The legal position of scow *A.T. & B. No. 28* is somewhat different. She was under charter to the Vancouver Tugboat Co. Ltd. by way of charter by demise. This Company was accordingly in sole control of the scow's movements and if there was negligence in properly securing her in the scow pool, or otherwise, it was the negligence of the charterers or their servants, and not of her owners. This raises the question whether the scow can be made liable in an action *in rem* though her owners are not personally responsible. There are many cases one way and the other. The principal ones answering in the affirmative are *The Ticonderoga* (1); *The Lemington* (2); *The Tasmania* (3) and *The Ripon City* (4). The contrary view is expressed in such cases as *The Parlement Belge* (5); *The Castlegate* (6); *The Utopia* (7) and *The Sylvan Arrow* (8).

The decisions and dicta of these and similar authorities have been much discussed in the relevant text-books, but in the view I take it becomes unnecessary to consider the various contrasting judgments. I do not seek to travel beyond the particular issue that concerns me here, namely, whether in a damage action a maritime lien is enforceable

(1) (1857) S.W. 215.
(2) (1874) 2 Asp. 475.
(3) (1888) 13 P.D. 110.
(4) (1897) P. 226.
(5) (1880) 5 P.D. 197.
(6) (1893) A.C. 38.
(7) (1893) A.C. 492.
(8) (1923) P. 220.

against an innocent vessel under a voluntary charter by demise where the negligence, if any, is on the part of the charterer's servants or agents. For my present purpose the most helpful case is *The Utopia, supra.* This is the most recent relevant decision of the Judicial Committee. It concerns a collision between two ships, and not the less so because one of them, *The Utopia,* was submerged with only her funnel and masts above water. In consequence of the *Utopia's* showing improper lights the other vessel collided with her. But the port authorities in Gibraltar Bay, where this took place, had taken charge of her, so that they were to blame and not the Master. The Judicial Committee held that the ship was not liable because her owners were not personally responsible, and stated the general principle thus at p. 499:

> It was suggested in argument that, as the action against the Utopia is an action *in rem,* the ship may be held liable, though there be no liability in the owners. Such contention appears to their Lordships to be contrary to principles of maritime law now well recognized . . . The foundation of the lien is the negligence of the owners or their servants at the time of the collision, and if that be not proved no lien comes into existence, and the ship is no more liable than any other property which the owners at the time of collision may have possessed.

This principle was approved by the High Court of Australia in *Rosenfeld Hillas & Co. Proprietary Ltd.* v. *The Fort Laramie* (1).

The decision in the *Utopia* would appear the governing authority. There is nothing in the letter or spirit of the language I have quoted to justify the proposition that the ship is liable for the negligence of the servants of a charterer by demise. On the contrary, there is affirmation of the principle that the liability of the ship and the liability of the shipowner must march together, But in *The Ripon City, supra,* Mr. Justice Gorell Barnes deals with the case of a chartered ship in this language (p. 244):

> The principle upon which owners who have handed over the possession and control of a vessel to charterers . . . are liable to have their property taken to satisfy claims in respect of matters which give rise to maritime liens, may, in my opinion, be deduced from the general principles I have above stated and thus expressed. As maritime liens are recognized by law, persons who are allowed by those interested in a vessel to have possession of her for the purpose of using or employing her in the ordinary manner, must be deemed to have received authority from those interested in her to subject the vessel to claims in respect of

(1) (1923) 31 Com. L.R. 56 at 63.

1953

GOODWIN JOHNSON LIMITED v. THE SHIP (SCOW) A.T. & B. No. 28 et al

Sidney Smith D.J.A.

which maritime liens may attach to her arising out of matters occurring in the ordinary course of her use or employment, unless the parties have so acted towards each other that the party asserting the lien is not entitled to rely on such presumed authority. In my opinion, it is right in principle and only reasonable, in order to secure prudent navigation, that third persons whose property is damaged by negligence in the navigation of a vessel by those in charge of her should not be deprived of the security of the vessel by arrangement between the persons interested in her and those in possession of her . . . The persons interested in a vessel in placing her in the possession and control of other persons, to be used or employed in the ordinary way, must contemplate that claims may arise against her in respect of rights given by the maritime law, and may be taken to have authorized those persons to subject the vessel to those claims.

The *Ripon City* concerned the enforcement of a Master's lien for disbursements, and the learned judge, at p. 239, thought the decision in *The Utopia* did not affect the question before him. Nevertheless, it has been dealt with in the text-books as authority for the general proposition that a ship may be liable *in rem* though there be no liability in her owners, so that no judgment could be obtained against them personally. With the greatest deference to the learned judge, I doubt if the principle he lays down would be followed in a final Court of Appeal. The assumption made by the learned judge is far-reaching and raises, it seems to me, an unusual conception of agency. If the servants of a charterer may be regarded as the agents of the shipowner so as to create a maritime lien upon the vessel, why may they not be so regarded for the purpose of imposing personal liability on the shipowner? This is contrary to all that was said in *The Utopia, supra.*

The only later case touching the point is the *Sylvan Arrow* (1). That was a case of collision in which the chartered vessel had been surrendered by compulsion of law to the U.S. government, and those on board were the servants of that government at the time of the collision. The question was whether the sovereign charter by demise carried total immunity. Hill J., in a valued judgment, held that as the transfer of possession and control was brought about by force of law no action *in rem* could be brought against the ship, even after she had been freed from requisition. He was therefore in the happy position of being able to reconcile his judgment with all the authorities I have mentioned. But he thought that some day

(1) (1923) P. 220.

what I have called the "affirmative" cases, would have to be re-examined by a higher Court "in the light of the principles so clearly laid down . . . by the Privy Council in *The Utopia*".

It is my opinion that in the circumstances here a maritime lien did not arise and so could not be enforced against the scow *A.T. & B. No. 28*.

The action must therefore be dismissed with costs.

Judgment accordingly.