1925

Jan. 3.
April 6.

BRITISH COLUMBIA ADMIRALTY DISTRICT

COMMERCIAL PACIFIC CABLE CO.....PLAINTIFF;

AGAINST

THE *PRINCE ALBERT*

Shipping—Exchequer Court—Jurisdiction—Colonial Court of Admiralty Act, 1890 (Imp.)—R.S.C., 1906, c. 141, sections 3 and 4.

Plaintiff company was owner, or licensee and bailee, of a submarine trans-pacific (Honolulu) cable, and in sole control and operation thereof. Defendant wilfully anchored to said cable, off Montara point, near San Francisco, on high seas, using it as a deep sea anchor, contrary to all rules of good seamanship, and with the object of keeping herself in a favourable position off the coast, for smuggling liquor into the United States, and thereby damaged the said cable. Hence this action. The ship was arrested within the jurisdiction of this court to answer the claim for such damages, and it was contended that the court had no jurisdiction to entertain such action.

Held, that the words "subject to the provisions of this Act" in section 2 (2) of the Colonial Courts of Admiralty Act, 1890, did not reduce the jurisdiction of this court below that of the High Court of Justice in England.

2. That furthermore the words "within Canada" and "throughout Canada and the waters thereof" in sections 3 and 4 of the Admiralty Act of 1891, (R.S.C., 1906, c. 141), did not limit this court's jurisdiction to those merely domestic matters which, with all their attendant circumstances, arise within Canada's borders, and that this court had jurisdiction in the present action.

ACTIONS to recover damages resulting from the acts of defendant in using plaintiff's cable as a deep sea anchor.

The action was tried before the Honourable Mr. Justice Martin at Vancouver, B.C.

E. C. Mayers for plaintiff.

L. G. McPhillips, K.C., and *R. M. Maitland* for defendant.

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

MARTIN L.J.A., now this 6th day of April, 1925, delivered judgment.

These are two consolidated actions for damages amounting to $191,000 done to the plaintiff's submarine Trans-Pacific (Honolulu) cable by the defendant ship in November, 1923, and again in January, 1924, on the high seas

about 26 miles off Montara point near San Francisco south of the Farallon Islands, California, by knowingly and wrongfully anchoring the said ship thereto and thereby causing it to break or become inefficient. The plaintiff company is a foreign corporation, resident in the United States, and the ship was arrested within the jurisdiction (in this port) to answer said claim for damages, but it is objected *in limine* that in such circumstances this court has no jurisdiction to entertain such an action.

The defendant's counsel supports his submission by the decision of the Supreme Court in the *D. C. Whitney* v. *St. Clair Navigation Co.* (1), but in that case the vessel was arrested not in Canadian waters in the ordinary sense but in the Detroit river when lawfully navigating its waters pursuant to International rights especially conferred by article VII of the Ashburton Treaty of 1842 between Great Britain and the United States and hence Mr. Justice Davies said (McLennan and Duff JJ. concurring), p. 309:—

> I do not think that the *D. C. Whitney*, a foreign ship, while sailing from one port of a foreign country to another port of that country and passing through, in the course of her voyage, one of the channels declared by convention or treaty to be equally free and open to the ships, vessels and boats of both countries, can be said to be within any jurisdiction conferred on any Canadian court by the sovereign authority in the control of the Dominion of Canada, even though that channel happened to be Canadian waters.

And at p. 311:—

> Jurisdiction only attaches to the *res* when it comes or is brought within the control or submits to the jurisdiction of the court and not till then. Such jurisdiction does not exist against a ship passing along the coast in the exercise of innocent passage or through channels or arms of the sea which, by International law or special convention, are declared free and open to the ships of her nationality, unless expressly given by statute, I do not think it is possible successfully to argue that the right to initiate an action, make affidavits and issue a warrant, can exist before the foreign ship even comes within our territorial jurisdiction.

Being of this opinion the court declined (p. 310) to entertain any discussion as to the alleged limited character of the Admiralty jurisdiction conferred upon the Exchequer Court of Canada as this question did not arise for adjudication. Mr. Justice Idington, who dissented, based his judgment upon the ground that in fact that part of the river's

(1) [1906] 38 S.C.R. 303.

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channel in which the ship was navigating was Canadian territory to such an extent that, p. 320:—

> We can suppose this arrest of the appellant to have taken place on the Thames in England.

and therefore the court had jurisdiction over the *res* being arrested within its jurisdiction. At page 324 the learned judge, after a review of several leading authorities, says:—

> This case rests upon the maritime lien that arises from a collision and attaches to the offending vessel by virtue of such collision and the resulting damages in favour (to the extent thereof) of the owners of the innocent and damaged vessel.
>
> Wherever the offender goes, she is subject to that lien, and it becomes the duty of the court having such right to enforce a lien of that kind whenever the offender comes within its jurisdiction, upon being applied to, to take steps to enforce the lien. To refuse it would be a denial of justice. Yet questions might in the exercise of such jurisdiction so arise that a proper discretion might lead to refusal to exercise it.

The exact question raised in the Supreme Court upon the effect of the Ashburton treaty was, apparently, not raised in the court below (the Toronto Admiralty District of this court, because that treaty is not mentioned by the learned judge in his reasons (1), and he deals with his jurisdiction in the light of many authorities, upon the broad ground that where a tort is committed by any ship in foreign waters or upon the high seas it is answerable for that tort in any Court of Admiralty in whose jurisdiction it may be found even if the action is between foreigners, and concludes thus, p. 8:—

> I must therefore hold that this Canadian Court of Admiralty having the same jurisdiction over the like places, persons, matters and things as the High Court of Admiralty in England, has jurisdiction to try the maritime question of collision raised by the pleadings in this case.

To the cases cited by my learned brother, I think it only necessary to add the *A. L. Smith* v. *The Ont. Gravel Co.* (2) and the very recent one of the *Jupiter No. 2* (3), a decision on disputed possession by Lord Merivale, affirmed on appeal, wherein he is thus reported:

> He said that the subject matter of the action—a ship lying in an English port—was a subject matter over which that court had jurisdiction, and although the court had a discretionary power to refuse juris-

(1) [1905] 10 Ex. C.R. 1. (2) [1914] 51 S.C.R. 39.
(3) [1925] 69 Sol. J. 547; 94 L.J. Adm. 59 at p. 69; [1925] P. 69.

diction in an action between foreigners as to the ownership of a foreign vessel, he did not think that the present case was one in which he ought so to refuse jurisdiction.

The defendant's counsel laid great stress upon the words "subject to the provisions of this Act" in sec. 2 (2) of the Colonial Courts of Admiralty Act, 1890, cap 26, as in some way reducing the jurisdiction of this court below that of the "High Court of England," which is declared to possess "in like manner and to as full an extent," and sections 3 and 4 of the Canadian Admiralty Act of 1891 (cap. 141, R.S.C.) are referred to and it is submitted that their effect is to "limit territorially or otherwise the extent of such (High Court) jurisdiction" as may be done under sec. 3 of the Act of 1890. A careful consideration of these sections does not however in my opinion support this view, and the expressions in said sections of our Canadian Act "within Canada," and "throughout Canada and the waters thereof," etc., do not limit this court's jurisdiction to those merely domestic matters which with all their attendant circumstances arise within Canada's borders; such a view is moreover at complete variance with the concluding directions in sec. 2, that the newly established Canadian court "shall have the same regard as that (High) Court to International law and the comity of nations." The correct view of the effect of the said statutes is, I think, that taken by Idington J. in the *D. C. Whitney* case *supra*:—

> The jurisdiction of the court must be exercised within Canada. Again it must be exercised throughout Canada and the waters thereof. These terms designate the place within which the jurisdiction must be exercised; and the place within which the appellant came and was seized clearly and indisputably was within the area thus designated. That by no means implies that the offences or the contract out of which the necessity for proceedings may arise *in rem* or *in personam*, must have taken place within Canada or upon the waters thereof.

And at page 320:—

> It seems to me as if to all intents and purposes the result is just the same as if the Parliament and Sovereign Powers that enacted the "Colonial Courts of Admiralty Act of 1890" had constituted the Canadian Court a branch of the High Court in England for convenience sake, to exercise the powers which that court might at the time of the passing of the Act have been endowed with.

In this court the jurisdiction now questioned has been exercised in several cases for more than 20 years to my know-

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ledge and no good reason has been shown in this case for discontinuing to do so.

Turning briefly to the facts, it is sufficient to say that I have no doubt that the defendant ship wilfully caused the serious injury complained of to the cable, by wrongfully using the same as a deep sea anchor in a place and manner contrary to all rules of good seamanship with the object of keeping herself in a favourable position off the Californian coast for the purpose of smuggling liquor into the United States, and I regret to say that in essentials I can place no reliance upon the very unsatisfactory evidence of the principal witnesses on her behalf, and in particular her master J. F. Nichol. What was done was in short an extraordinary and reprehensible abuse of the rights of navigation, and where a ship is found conducting herself in the unprecedented and unseamanship way this vessel was doing, it has herself to blame if its more than suspicious conduct make it difficult for it to establish clearly the propriety of such action.

The damage done here was not occasioned by the lawful endeavour to make a port in the actual course of navigation but in the attempt to keep a fixed position on the high seas away from a port with the object of thereby assisting in the unlawful importation of goods into a foreign country.

Objection was also taken to the right of the plaintiff company to maintain the action but at the least it is the licensee or bailee of the cable, and in sole control and operation thereof, and in such circumstances that possession would be sufficient to found an action for damages thereto of the nature disclosed by the facts before me—*The Clara Killam* (1); *Glenwood Lumber Co.* v. *Phillips* (2); *The Swift* (3); *The Winkfield* (4), and *The Zelo* (5).

In the first case which was the first one of that description, in the Admiralty Court Sir Robert Phillmore said, p. 165:—

> I must consider that the telegraph cable was lawfully placed at the bottom of the sea, and in the spot where it received the injury. I must

(1) [1870] L.R. 3 A. & E. 161.
(2) [1904] A.C. 405 and 410.
(3) [1901] P. 168.
(4) [1902] P. 42.
(5) [1922] P. 9.

also consider that the vessel which did the injury to it was in the exercise of her right both in navigating the surface of the sea, and in dropping her anchors when and where she let them go. The law requires that each party should exercise his right so as if possible, to avoid a conflict with the rights of the other.

The ship was held liable because though she had in a gale properly dropped her anchors which fouled the cable, yet in weighing them she did so in a way which, contrary to ordinary nautical skill, caused unnecessary injury to it. In the case at bar, the circumstances as have been shown are much stronger against the offending ship and constitute a wilful improper use of the cable contrary to all nautical usage, and therefor judgment will be entered in favour of the plaintiff for the damage so occasioned, the amount thereof to be assessed by the Registrar with merchants in the usual way.

Judgment accordingly.