CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

ON APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT. 1913 Sept. 17.

BETWEEN:

THE SYDNEY, CAPE BRETON and MONTREAL STEAMSHIP COMPANY.....(PLAINTIFF) APPELLANT;

AND

THE HARBOUR COMMISSIONERS OF MONTREAL.....(DEFENDANTS) RESPONDENT.

Construction of Statutes—Shipping—Injury to Ship—Action against Harbour Commissioners—Prescription—56-57 Vict. (U.K.) c. 61—Applicability to Admiralty actions in Exchequer Court of Canada.

Held, (reversing the judgment of the Deputy Local Judge) that the *Public Authorities Protection Act*, 1893 (56-57 Vict. U.K. c. 61) does not apply to Admiralty proceedings in the Exchequer Court of Canada; and that the six month's prescription mentioned in sec. 1 thereof cannot be set up in bar of an action against a board of Harbour Commissioners charging negligence which resulted in injury to a ship.

APPEAL from the following judgment of the Honourable Mr. Justice Dunlop, Deputy Local Judge of the Quebec Admiralty District, pronounced on the 2nd June, 1913:—

DUNLOP, D. Lo. J.:—There is no question but that the action was taken more than six months after the

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accident occurred, and the question to be decided is not without difficulty.

The parties, by their counsel, have sent me elaborate factums.

The plaintiff contends, first, that the question of prescription must be decided by the *lex fori*, and that the only prescription applicable is the prescription of two years enacted by article 2261 of the Civil Code of this Province; while, on the other hand, the defendants contend that the Imperial statute, *Public Authorities Protection Act*, 56-57 Vict. cap. 61, applies and that plaintiff's action is barred , also that the six month's prescription mentioned in said Act applies, and that plaintiffs' action was barred and prescribed when it was instituted.

In order to elucidate this question, it will be necessary to refer to the different statutues applicable to the present case. *The Admiralty Act* (54-55 Vict.) (Dom.) cap. 29, sections 3 and 4 is in the following terms:

Section 3 reads in part as follows : "shall, within " Canada, have and exercise all the jurisdiction, " powers and authority conferred by the said Act and " by this Act."

Section 4 reads in part: "shall, as well in such parts " of Canada as have heretofore been beyond the reach " of the process of any Vice-Admiralty Court, as else- " where therein, have all rights and remedies in all " matters (including cases of contract and tort and " proceedings *in rem* and *in personam*), arising out of " or connected with navigation, shipping, trade or " commerce, which may be had or enforced in any " Colonial Court of Admiralty under *The Colonial* " *Courts of Admiralty Act, 1890.*"

Section 2, paragraph 2, of the *Colonial Courts of Admiralty Act, 1890*, reads: "The jurisdiction of a

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" Colonial Court of Admiralty shall, subject to the pro-
" visions of this Act, be over the like places, persons,
" matters and things, as the Admiralty jurisdiction
" of the High Court in England whether existing by
"virtue of any statute or otherwise, and the Colonial
"Court of Admiralty may exercise such jurisdiction in
" like manner and to as full an extent as the High
" Court in England, and shall have the same regard
" as that Court to international law and the comity
" of nations."

It is evident that the rights and remedies referred to in section 4 of the *Admiralty Act*, 1891, as being enforceable in any Colonial Court of Admiralty under the *Colonial Courts of Admiralty Act*, 1890, acording to the terms of this latter Act, can only be enforced in like manner and to as full an extent as the High Court in England.

I am of opinion that any statute which, in England, affects the manner or the extent of the exercise of Admiralty jurisdiction in the High Court must affect the manner and the extent of the exercise of such jurisdiction in any Colonial Court of Admiralty.

The Imperial Statute 56 and 57, Vict. cap. 61, entitled the *Public Authorities Protection Act*, 1893 is such an enactment. This statute, in part, provides as follows:—

"Where after the commencement of this Act any
" action, prosecution or other proceeding is commenced
" in the United Kingdom against any person for any
" act done in pursuance, or execution, or intended
" execution of any Act of Parliament, or of any public
" duty or authority, or in respect of any alleged neglect
" or default in the execution of any such act, duty or
" authority, the following provisions shall have effect:
" (*a*) The action, prosecution or proceeding shall not

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" lie or be instituted unless it is commenced within six " months next after the act, neglect or default com- " plained of, or, in case of a continuance of injury or " damage, within six months next after the ceasing " thereof."

This statute affects the manner and extent of the exercise of Admiralty jurisdiction in England as well as the rights and remedies of persons before the Admiralty Courts. This is evident both from the statute itself and its schedule and from jurisprudence.

For instance, the Act repealed section 27 of the *Harbours Act*, 1814, and section 93 of the *Passengers Act*, 1855, (now forming part of *The Merchants Shipping Act*) and section 24 of the *Dockyard Ports Regulation Act*, 1865.

Defendants have cited in their factum several decisions applicable to the present case, namely, *The Ydun* (1), *Williams* v. *Mersey Docks* (2), *The Johannesburg* (3).

The fact that section 1 of the *Public Authorities Protection Act* refers to a prosecution or other proceedings commenced in the United Kingdom does not prevent the application of that Act to the jurisdiction of Colonial Courts of Admiralty. The fact that it affects the Admiralty jurisdiction in England is sufficient to make it applicable to the jurisdiction of a Colonial Court of Admiralty.

The principle to be followed is contained in subparagraph (a) of the proviso to section 2 of *The Colonial Courts of Admiralty Act*, 1890, which declares:

" Any enactment in an Act of the Imperial Parliament " referring to the Admiralty jurisdiction of the High " Court in England, when applied to a Colonial Court " of Admiralty in a British possession, shall be read as

(1) (1899) Prob. 236. (2) (1905) 1 K.B. 804.
(3) (1907) Prob. 65.

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" if the name of that possession were therein sub-
" stituted for England and Wales."

At the date of the passing of this Act (1890) the *Public Authorities Protection Act* had not been enacted; but it is quite evident that in applying the terms of paragraph 2 of section 2 of *The Colonial Courts of Admiralty Act*, 1890, determining the jurisdiction of the Colonial Court to be exercised in like manner and to as full an extent as the High Court in England, the name of the British Possession is to be read for the term "United Kingdom" in the same manner as for the words "England and Wales", on the principle that, in any event, the greater includes the less.

The present question, in my judgment, seems to be absolutely disposed of by Rule 228 of this Court which reads as follows:—

"In all cases not provided for by these Rules, the
" practice for the time being in force in respect to
" Admiralty proceedings in the High Court of Justice
" in England shall be followed."

This case is not provided for by our Rules. Therefore, under Rule 228, reference must be made to the practice in force in England, and that practice is governed by the *Public Authorities Protection Act*, which the judges in the *Ydun* case declared to be an enactment affecting the procedure and practice of the Courts. Inasmuch as they applied it in an Admiralty proceeding, it clearly follows that it is to be applied in this Court, under this Rule.

The case referred to will be found reported in the Law Reports,(1) where it was held by the Court of Appeal (A. L. Smith, Vaughan-Williams and Romer, L.JJ., affirming the decision of the president, that the defendants were acting in pursuance of their public duties so

(1) (1899) Prob. 236.

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that sec. 1 of the *Public Authorities Protection Act*, 1893, applied, and as that statute, dealing with procedure only, was retrospective, the action was barred after the expiration of six months from the default complained of.

It has not been established, in my opinion, that article 2261 of the Civil Code ever applied to a case like the present, even prior to the passing of the *Public Authorities Protection Act*, 1893, and if it ever did apply, the effect of the passing of that statute would alter the law and enact a prescription of six months.

Diligence must be used in proceedings.

I do not find that in England, prior to the passing of that Act, there was any limitation of time under which an action, such as the present, should be brought. The authors say: "should be brought in a reasonable time, " taking into consideration the facts and circumstances " of the case."(1)

In the case of *Williams* v. *Mersey Docks and Harbour Board*, above referred to (2) it was held that the action could not be maintained, inasmuch as the right of action of the deceased, if alive, would have been barred by the *Public Authorities Protection Act*, 1893 section 1 (a), that is, by six months, by the prescription under the *Fatal Accidents Acts*, 1846 referred to in the report of said case. The prescription would have been much longer.

No precedents applicable to the present case have been cited by the parties, and I do not think that the question has before been raised in Canada.

After a most careful consideration of the present case and of the factums filed by the parties, I have come to the conclusion that plaintiff's action is barred and prescribed, more than six months having elapsed

(1) See Maclachlan on Shipping, 5th ed. 72, 785, and 1044; Marsden on Collisions, 6 ed. p. 74.

(2) (1905) 1 K. B. 804.

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between the date of the accident and the institution of the present action.

I am therefore of opinion that the demurrer filed by the defendants must be maintained, and that plaintiff's action be dismissed, with costs, and judgment is given accordingly.

From this judgment an appeal was taken by the plaintiff to the Exchequer Court of Canada.

September 9th, 1913.

The appeal was now heard before the Honourable Mr. Justice Cassels.

A. R. Holden, K.C., for the appellant, submitted that the *Public Authorities Protection Act* (U.K.) 1893, is not in force in Canada *ex proprio vigore*, and Rule 228 of the general rules and orders regulating the practice and procedure in Admiralty cases in the Exchequer Court cannot be held to invoke its provisions. The subject-matter of the Imperial Act is a right and does not fall within the domain of "practice." (See Bouvier's Law Dictionary, *verbo* "Practice"; Stroud's Judicial Dictionary, *verbo* "Practice"; *Encyclopaedia of The Laws of England*;(1) *Re Osler*;(2) *Attorney-General* v. *Sillem*; (3) Beal's *Cardinal Rules of Legal Interpretation*(4).

Sir A. R. Angers, K.C., and *Arnold Wainwright*, K.C., for the respondent, contended that under section 2 of *The Colonial Courts of Admiralty Act*, 1890, the jurisdiction of the Exchequer Court of Canada was the same as that of the High Court in England. That the *Public Authorities Protection Act*, 1893, (U.K.) applied to Admiralty proceedings in the High Court is apparent from the language of that statute itself, and is estab-

(1) Vol. 10 p. 284.
(2) 7 Ont. P.R. 80.
(3) 10 H.L. c. 704.
(4) 2nd Ed. p. 392.

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lished by cases decided in England. (*The Ydun*;(1) *Williams* v. *Mersey Docks*;(2) *The Johannesburg*(3).

The point is absolutely disposed of by the provisions of Rule 228 of the Admiralty practice in the Exchequer Court of Canada:—"In all cases not "provided for by these Rules, the practice for the "time being in force in respect to Admiralty pro- "ceedings in the High Court of Justice in England "shall be followed." This case is not provided for by the Canadian rules, and the English practice comprehends the provisions of the *Public Authorities Protection Act*, 1893.

There is no question that the subject-matter of that statute is procedure; and "practice" and "procedure" are interchangeable terms in the law. See *Webster's International Dictionary, verbo* "Practice."

CASSELS, J. now (September 17th, 1913) delivered judgment.

This is an appeal from the judgment of Mr. Justice Dunlop, Deputy Local Judge, allowing the demurrer of the defendants and dismissing the action with costs.

Since the hearing of the appeal I have carefully considered the arguments of the counsel, both oral and written, the statutes relating to the case, and the reasons for judgment of the learned Judge below.

As the learned Judge states, the question to be decided is not without difficulty.

Having the greatest respect for the opinion of the learned Judge I am reluctantly unable to bring my mind to the same conclusion that he has arrived at.

The Colonial Courts of Admiralty Act, 1890, (53-54 V. (U.K.), cap. 27), is intituled "An Act to amend the

(1) (1899) Prob. 236. (2) (1905) 1 K.B. 804.
(3) (1907) Prob. 65.

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" Law respecting the exercise of Admiralty Jurisdiction
" in Her Majesty's Dominions and elsewhere out of
" the United Kingdom."

Section 2, sub-sec. 1 of this statute reads as follows:—

"Every Court of law, in a British possession,
" which is for the time being declared in pursuance
" of this Act to be a Court of Admiralty, or which,
" if no such declaration is in force in the possession,
" has therein original unlimited civil jurisdiction
" shall be a Court of Admiralty, with the jurisdiction
" in this Act mentioned, and may, for the purpose
" of that jurisdiction, exercise all the powers which
" it possesses for the purpose of its other civil
" jurisdiction; and such court, in reference to the
" jurisdiction conferred by this Act, is in this Act
" referred to as a Colonial Court of Admiralty.
" Where in a British possession the Governor is
" the sole judicial authority, the expression "court
" of law" for the purposes of this section includes
" such Governor.

Section 2, sub-sec. 2 is as follows:

" The jurisdiction of a Colonial Court of Admiralty
" shall, subject to the provisions of this Act, be
" over the like places, persons, matters and things,
" as the Admiralty Jurisdiction of the High Court
" in England, whether existing by virtue of any
" statute or otherwise, and the Colonial Court of
" Admiralty may exercise such jurisdiction in like
" manner and to as full an extent as the High Court
" in England, and shall have the same regard as that
" court to international law and the comity of
" nations."

The statute provided (section 7) for making of rules of Court "for regulating the procedure and practice (including fees and costs) in a Court in a British

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possession *in the exercise of the jurisdiction* conferred by this Act." Subsequent to the passage of this Act Admiralty rules were drafted and after being approved of by Her Majesty in Council came into force on 10th June, 1893.

The Dominion statute, cap. 29, 54–55 Vict. was assented to 31st July, 1891.

It is conceded by the learned Judge in his reasons that at the time of the passing of *The Colonial Courts of Admiralty Act, 1890*, and until the first of January, 1894, there was no limitation of time within which an action such as the present should be brought. It is in each case a question of diligence.

The plaintiffs on the other hand invoke the limitation in the Civil Code of Quebec.

This is a question to be determined at the trial. if the Code governs, the action is commenced in time. It is a question of diligence. Then the facts will appear at the trial.

I do not give any decision on this question.

The learned Judge's decision rests upon the ground that an Imperial Statute, cap. 61, 56–57 Vict., is applicable to Admiralty proceedings in Canada, and bars the action after a lapse of six months.

This statute is intituled "An Act to generalize and " amend certain Statutory provisions for the protection " of Persons acting in execution of statutory and other " public Duties."

At the time of the enactment it would have been easy to have made it applicable to Canada, had Parliament so intended.

Instead of so enacting it is limited to actions, prosecutions and proceedings commenced *in the United Kingdom*; and it enacts that the action shall not lie or be instituted unless it is commenced within six months.

It is not correct to state that sec. 27 of the *Imperial Harbours, Act* 1814, is repealed.

Section 2 of cap. 61 states: "There shall be "repealed *as to the United Kingdom*, etc."

This sub-section 2 clearly indicates, if it were not otherwise clear, that the enactment was only intended to apply to the United Kingdom.

Therefore unless there is other ground for making it applicable to Admiralty proceedings in Canada it clearly does not apply.

Proviso (a) to sub-section 3 of section 2 of the *Colonial Courts of Admiralty*, 1890, is invoked as drawing in the provision of the *Public Authorities Protection Act*, 1893.

This proviso (a) is as follows:

"Any enactment in an Act of the Imperial "Parliament referring to the Admiralty jurisdiction "of the High Court in England, when applied to a "Colonial Court of Admiralty in a British possession "shall be read as if the name of that possession were "therein substituted for England and Wales."

It is unnecessary to consider the question whether this section applies to future legislation or merely to legislation existing at the time of the coming into force of the *Colonial Courts of Admiralty Act*, 1890.

The words "United Kingdom" in the *Public Authorities Protection Act*, 1893, are not the same as "England and Wales", referred to in proviso (a); and I cannot bring my mind to the conclusion that a statute can be construed on the theory that the greater includes the less.

I am of the opinion that the *Public Authorities Protection Act*, 1893, is not in force here by virtue of this proviso (a).

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It is said further that under Rule 228 of the Admiralty Rules this statute (the *Public Authorities Protection Act*, 1913, is in force.

Rule 228 reads as follows:

" In all cases not provided for by these Rules the " practice for the time being in force in respect to " Admiralty proceedings in the High Court of " Justice in England shall be followed."

The *Colonial Courts of Admiralty Act*, 1890, by section 7, provided, as I have pointed out, for the making of Rules regulating the procedure and practice in the exercise of the *jurisdiction conferred.*

It will be noticed that Rule 228 only refers to the "practice."

In the *Ydun* case (1) it was hardly in contest that the provisions of the *Public Authorities Protection Act* were applicable as a defence to an action commenced in the United Kingdom. The question involved was whether it was retroactive, and the Court there held it was, being a matter of procedure.

If under the word "practice" in Rule 228 this statute can be brought in, a plaintiff who had a good cause of action on the 1st of June, 1893, and entitled under the jurisdiction conferred to invoke the aid of the Court say on the 2nd January, 1894, would have found his claim absolutely taken away.

I cannot bring my mind to the conclusion that any such effect can be given to Rule 228.

In the House of Lords in *Attorney-General* v. *Sillem* (2) Lord Westbury remarks:

" A power to regulate the practice of a Court does " not involve or imply any power to alter the extent " or nature of its jurisdiction."..... " Here the word 'practice' is used in the common and ordinary

(1) (1899) P. 236.

(2) 10 H.L. at pp. 720, 723, 724.

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" sense, as denoting the rules that make or guide " the "cursus curiae" and regulate the proceedings " in a cause within the walls or limits of the Court " itself."..... " The right to bring an action is " very distinct from the regulations that apply to " the action when brought, and which constitute " the practice of the Court in which it is instituted."

On the whole case after the best consideration I can give to it, I am of opinion that the demurrer fails.

The appeal is allowed with costs including the costs in the Court below.

Judgment accordingly. (1)

Solicitors for appellant: *Meredith, MacPherson, Hague, Holden & Shaugnessy.*

Solicitor for respondent: *A. R. Angers.*

(1) This judgment was unanimously affirmed on appeal to the Supreme Court of Canada.