NOVA SCOTIA ADMIRALTY DISTRICT.

HEATER .... PLAINTIFF.

1910
May 12

AGAINST

ANDERSON *et al.* Part Owners of the *SS. Abeona* .... } DEFENDANTS.

Shipping—Jurisdiction—Contract made without reference or application to Court—Security for return of ship.

Where the majority owners of a ship, desiring to make use of the ship, without application to the Court, execute a bond under seal to the minority owners, conditioned for the safe return of the ship to a port mentioned, or, in default, payment of a fixed money penalty, such contract is not one which the Court has jurisdiction to enforce, differing in this respect from a bond executed under the same circumstances in the Court, which is not a contract between the parties but is a security given to the Court.

The *Bagnall,* (12 Jur. 1008) followed.

ACTION on a bond dated the 1st day of June, 1909, in the sum of $2500, being the value of plaintiff's share in said ship registered in Barbadoes, the condition being, among other things, that defendants would within six months from said 1st day of June, 1909, bring the said ship *Abeona* to the port of Lunenburg in good condition and repair or pay plaintiff said sum of $2500. Breach of the condition was alleged.

May 12, 1910.

The case came on for hearing.

S. A. Chesley, K. C., and *J. J. Richie, K. C.,* for defendants took the preliminary objection that the court had no jurisdiction as the bond in question was an ordinary common law bond. The effect of taking such a bond is to merge plaintiff's right of action in Admiralty in a common law debt under seal. There is no direct authority, but we rely on the case of *Goodwyn* v. *Goodwyn.* (1) When plaintiff accepted the bond under seal he abandoned his remedy in the Admiralty Court, which has no further jurisdiction in

(1) Yelv, 39

1910
HEATER
v.
ANDERSON.

Argument of Counsel.

the matter. The statute gives the court jurisdiction to decide all questions arising between the co-owners or any of them, touching the ownership, possession employment and earnings of any ship registered &c. We submit that there is no such question to be decided here as all these questions were settled between the owners themselves. The question now is simply as to the enforcement of the bond. A later authority is *East India Co.* v. *Lewis*; (1) ; also *Luke* v. *Aldern* (2). In that case the rule worked the reverse way, and it was held that a legacy which would otherwise have lapsed was merged in a sealed security and was a debt and enforceable. In Admiralty a special form of bond is to be used. (3). In this case the parties have contracted themselves out of the Admiralty Court. After the bond was taken the minority owners could not come into court and get bail or bring an action of restraint. [THE COURT. You say that the contract ousts the jurisdiction?] Yes. [THE COURT. I will hear the other side.]

T. S. Rogers, K. C., and *H. B. Stairs*, contra. The objection should have been raised before. *The Louisa*, (4). The appearance should have been marked "under protest." As regard to main point, we do not rely upon the Act of 1861, s. 8., but upon the inherent jurisdiction of the court in maritime matters. The counterclaim is in the nature of a cross action for necessaries and is not within section 8, which applies only to ships registered in Canada while this vessel is a British ship registered at Barbadoes, and we object to the jurisdiction of this court to deal with it. The *Lady Clermont*, (5). As to jurisdiction in the action on the bond see Williams & Bruce (6). *The Cawdor*, (7). We base our claim

(1) 3 C. & P. 358.
(2) 2 Vern. 31.
(3) Williams and Bruce, 296.
(4) 9 Jur. 676.
(5) 3Mar. Law Cas. 508.
(6) At p. 8.
(7) (1900) P. 47.

1910
HEATER
v.
ANDERSON.
Argument of Counsel.

on the ancient jurisdiction of the Court in cases of possession and restraint. *Abbott on Shipping* (1). The worst that can be said of the security we took is that it is a contract, but it is a contract referring to the possession of a ship. It was taken to insure the bringing back of the ship to the port of Lunenburg where the owners were, and to bring her back into this jurisdiction so that the plaintiff might have his remedy against her. There is ample authority for the proposition that where the court has jurisdiction over the main subject-matter all subsequent matters are equally within the jurisdiction of the court.

Bidly v. *Egglesfield* (2); *The Catherine* (3). The latter case is as near this as we can get. In *Menetone* v. *Gibbons* (4), it was held that where the court has jurisdiction over the subject-matter no incidental matter will deprive it of its jurisdiction. The bond in this case is not in the form that a bail-bond would be in, but it is essentially a security to the plaintiff for the return of the ship to the jurisdiction, and the facts that it is under seal and that there are no sureties are not material.

Ritchie, K. C., in reply. The case of *The Catherine* was an action of salvage over which the court had jurisdiction, and all that was decided was that in that case the jurisdiction of the court was not ousted by the fact that there was an agreement made on land. That case is altogether different from the case at bar. The court has never had jurisdiction over a common law contract made between the parties under seal whether they were co-owners or not. Because the contract happens to be made about a ship it does not follow that this court has jurisdiction. In this case the dissenting owner, instead of going into Admiralty, made a common law contract. In the case of *The Catherine* the first question

(1) P. 119.
(2) 2 Lev. 25.
(3) 12 Jur. 682.
(4) 3 T. R. 267.

1910
HEATER
v.
ANDERSON.
Argument of Counsel.

to be decided was whether it was salvage or not, and you cannot get more out of it than this that the court was not ousted of its jurisdiction because the contract was made on land instead of on the deck of the ship. An element to be considered is that the bond cannot be enforced and the accounts cannot be gone into as between the parties.

[THE COURT:—If that is so it is a very one-sided transaction, and it should appear on the pleadings. I will do my best to prevent any money being taken out of court if there is any question of account. I will adjourn to any day agreed upon, and I will order pleadings in the meantime.]

May 10th 1910, (The matter having been adjourned to this date).

Richie, K. C., and *Chesley, K.C.*, renewed the objection taken on behalf of defendants and cited, in addition to the cases previously referred to, *The Bagnall* (1); and *The Ebrezia* (2); and Williams & Bruce (3). There is an American decision to the effect that a policy of marine insurance comes within the jurisdiction of the Admiralty Court, but it has been disregarded in England, and it is not fully approved in the United States. (4). There is no jurisdiction to take the accounts in this court.

Rogers, K. C., in reply. We admit that the counterclaim cannot be proceeded with as the vessel is registered in Barbadoes. Plaintiff should have accounted as master for what he took in that capacity and he did so. Mixed up with this is his liability as owner. We do not contend that we are not liable to pay for our share of the vessel, and we would not object to a deduction of what plaintiff owes on the purchase money. We are also willing to account for the commission of

(1) 12 Jur. 1008.
(2) 12 Jur. 143.
(3) 3rd Ed. 11.
(4) (1891) 1 Q. B. 293.

$100 received from the vendors. Under the Act of 1840, if money were paid in, the court would have jurisdiction to decide as to the ownership of funds in the registry and might found jurisdiction on that principale to decide the question of our liability.

[THE COURT. I might keep the money there, but I could not try the question of liability on a promissory note, for instance.] The court has jurisdiction to settle the question of title, and there is no dispute as to amount or liability. We admit liability for the share of the purchase money and also for the commission. The case of *The Bagnall*, cited by the other side, was decided on the ground that the whole proceeding was statutory. The statute was passed, among other things, to enable the salvors more readily to obtain salvage. It enabled the receiver of wrecks to hold the ship or to let it go on taking satisfactory security. No form of security was provided, and the point was that the ship had been in the custody of the receiver of wrecks, whose right to detain her was purely statutory. The bond was given to get her back into the custody of the receiver of wrecks, and it was held that by the bondsmen submitting themselves to the jurisdiction of the court they could not give jurisdiction over a matter which was simply statutory.

[THE COURT:—The action was in admiralty on the bond?] Yes. The bond was taken after the action by the receiver.

[THE COURT:—Had the ship been arrested?] I do not think so.

[THE COURT:—Then I do not see how it got before him]. In the case of *Ridly* v. *Egglesfield* (1) goods were purchased on land which had been taken piratically on the sea, and in an action in admiralty there was an

(1) 2 Lev. 25.

1910
HEATER
v.
ANDERSON.
Reasons for
Judgment.

attempt to get the Court of Kings Bench to interfere but that court refused to do so on the ground that the matter was one over which the Admiralty Court originally had jurisdiction.

Lambert v. *Aeretree* (1), is very like this except that the proceedings were taken in the first instance in admiralty. We had a right to security, and we have it in the form of a bond or contract in reference to an essentially maritime matter. No other court than a Court of Admiralty has jurisdiction as to disputes between the owners of a ship as to the use of the ship. The whole spirit of the thing is that it is a security for an interest in a ship which is only cognizable in admiralty.

[THE COURT:—It is an agreement that he will bring this share of the ship back, or that he will pay $2,500.]

DRYSDALE, D. L. J. now (May 29th, 1910) delivered judgment.

Objection is taken to the jurisdiction of this court to enforce payment of the bond sued on herein, and I am of the opinion that objection is well founded. The bond here is a contract made between the parties without any reference or application to this court, and differs in that respect from a bond executed in this court at the instance of minority owners from a majority intending to use the ship. In the latter case the bond or bail is not a contract between the parties but is security given to the court, and can of course be enforced here. In the present case I am asked to enforce a bond made between parties, no doubt upon good consideration ; and if this could be done as well might I be asked to enforce any other agreement made between parties respecting the use of the vessel. I can

(1) 1 Ld. Raym. 223.

1910

HEATER
v.
ANDERSON.

Reasons for Judgment.

find no authority for the exercise of any such jurisdiction in this court. On the contrary *The Bagnall* (1) is, I think, in point directly against the power now claimed by plaintiffs.

I must dismiss the action with costs.

Judgment accordingly.

(1) 12 Jur. 1008