

NOVA SCOTIA ADMIRALTY DISTRICT

1935  
Feb. 5.

BETWEEN:

THE LINCOLN PULPWOOD CO. } PLAINTIFF;  
LTD..... }

AND

THE MOTOR VESSEL RIO CASMA. DEFENDANT.

*Admiralty—Jurisdiction—Action in rem—Removal of barge from berth at pier by crew of ship—Improper navigation of ship.*

Plaintiffs' barge, with no one on board, was lying at a berth next to a pier and moored to it. The crew of defendant ship removed the barge from her berth, which was then occupied by the ship, the barge being placed outside the ship in a foul berth, as a result of which the barge suffered damage. Plaintiff brought an action *in rem* to recover the amount of the damage.

*Held:* That the improper navigation of the defendant ship carried out by her master's orders made her the instrument causing the damage to the barge, and that the claim for such damage may be enforced by an action *in rem*.

MOTION to dismiss an action *in rem* brought to recover damages alleged to have been caused by the improper navigation of defendant ship.

The motion was argued before the Honourable Mr. Justice Mellish, Local Judge in Admiralty, at Halifax.

W. C. MacDonald, K.C., and V. B. Fullerton, K.C., for the plaintiff.

H. P. MacKeen, K.C., for the defendant.

MELLISH L.J.A. now (February 5, 1935) rendered the following judgment:

This is a motion to dismiss the action, made on behalf of the defendant ship on the ground of want of jurisdiction.

The plaintiff's barge was lying at a berth next a pier at Bass River partly loaded and moored to the pier, with no one on board. The defendant ship came to the pier and by her crew removed the barge from the pier and took her berth, placing the barge outside the ship in a foul berth. The tide was then falling and as it ebbed the barge suffered damage by reason of being so placed. This is an action *in rem* to recover said damage.

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It is claimed that the damage was not caused by the *Rio Casma* and that consequently the action *in rem* is not maintainable.

It can, I think, be fairly said that the damage was caused by the *Rio Casma* on a falling tide wrongfully taking and keeping the barge's berth so as to exclude the barge from it. She was thus made the instrument causing the damage by her improper navigation, which was deliberately carried out by her master's orders.

There are many cases where a ship is answerable in admiralty in an action *in rem* for damages caused by her improper handling where the ship has not been in collision and the ship does not escape liability by reason of the fact that her crew or some of them might also be liable. In the case of *Graham v. The E. Mayfield* (1) it was decided that where a ship was so manoeuvred as to exclude another from the berth which she was warping into, she was being unreasonably operated and was responsible in damages for excluding that other ship from her berth. *A fortiori* it would appear that a ship should be held liable for excluding another from a berth already occupied by her. No case has I think been cited holding that a ship is not liable in an action *in rem* for damages resulting from her improper navigation. But a case has been cited to us presumably to shew that the docking of the ship in circumstances such as disclosed herein is not an act of navigation. That case is *St. Lawrence Transportation Co. Ltd. v. The Schooner Amedee T.* (2). In that case the plaintiff's scow was tied up to its dock in the harbour of Quebec and as stated in the judgment of Mr. Justice McLennan (p. 205)

the persons in charge of the schooner defendant, in order to come alongside the dock, unmoored or cast off the lines of the plaintiff's scow and let her go adrift on the rocks, without any right or excuse, thereby causing her considerable damage. . . . The question to decide is: Was the damage to the scow done by the schooner by any wrongful act or manoeuvre or negligent navigation on her part in such a manner that it can be said that the schooner was the active cause and instrument of mischief in which happened to the scow?

After quoting from the reasons of Lord Halsbury and Lord Watson in the case of *Currie v. M'Knight* (3) the learned Judge finds (p. 206):

The injuries sustained by plaintiff's scow were not caused by any manoeuvre or movement of the schooner, but by an act of some of

(1) (1913) 14 D.L.R. 505.

(2) (1924) Ex.C.R. 204.

(3) (1897) A.C. 97 at pp. 101 and 106.

her crew . . . . The damage here sought to be recovered did not arise from any wrongful act of navigation of the schooner, and, as the schooner was not the instrument which caused the damage, the present action must fail.

The schooner's arrest was accordingly set aside and the writ of summons *in rem* dismissed.

On the relevant facts, as I understand them, I regret that I am unable to follow this decision, assuming, as I think I must on the facts appearing in the reasons for judgment, that what was done by the crew of the schooner was done at the instance of those properly in command of her. The ship is inanimate and whether she is properly navigated or not must depend upon the conduct of her crew. The securing of a proper berth for a ship is a duty of navigation, and in my opinion it is wrongful navigation, with a view of securing such a berth, by means of the crew or otherwise, to take away the lawful berth of another vessel, for the purpose of using it for one's own ship. And such a proceeding if carried out can I think be fairly said to be using one's ship in an improper manner in order to make her the occupant of another ship's berth.

If it be necessary to make the schooner an instrument causing the damage I should have no difficulty in finding that she was made such an instrument by using her to bring the necessary force to remove the scow from its moorings for her benefit and by placing her in the scow's berth. The purpose of the whole operation was to put the schooner in the berth occupied by the scow which I think it would be difficult to accomplish without making the schooner an instrument in its performance. In my opinion the operation is from first to last one of navigation, and as incident to its performance the scow had necessarily to be moved and was moved by the ship's crew as I assume under her master's orders. Such an act has been held to be an act of the ship (1).

With the greatest deference I do not think that the case relied on, *Currie v. M'Knight* (*supra*) sometimes cited as the *Dunlossit* is precisely in point. It appears from the facts stated in the reasons for judgment, that there were three ships moored alongside a quay at Port Askaig, Sound of Islay, where there is no harbour. The *Dunlossit* was in the centre and the S.S. *Easdale* outside and moored to the

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quay by cables passing over the *Dunlossit's* deck. There was a violent storm and the *Dunlossit* was in serious peril, and her master to enable his ship to get to sea for her protection, after notice to the *Easdale* cut her moorings. The *Easdale* being unable to get up steam was driven ashore and damaged. An action was brought in Scotland by the *Easdale's* owners against the owners of the *Dunlossit* and it was found on the trial as appears from the judgment of Lord Shand that the crew of the *Dunlossit* was entitled to cut the *Easdale's* moorings as she had refused to remove them. This judgment was reversed by the First Division of the Court of Session and the owners of the *Dunlossit* were held liable. This judgment was not appealed from. But the question arose whether by reason of this judgment the plaintiff was entitled to a maritime lien on the proceeds of the sale of the ship *Dunlossit* in preference to the claim of the mortgagee of the ship. The Second Division of the Court of Session held that by the law of Scotland such a lien did not exist. The case in the House of Lords was an appeal from that decision. The House of Lords held that there was no distinction between the law applicable in Scotland and England, but also that in the circumstances a maritime lien did not exist, apparently adopting the findings of fact of the Scotch Court that the injuries sustained by the *Easdale* were not owing to any movement of the *Dunlossit*; they were wholly occasioned by an act of the *Dunlossit's* crew, not done in the course of her navigation, but for the purpose of removing an obstacle which prevented her from starting on her voyage. (See judgment of Lord Watson in *Currie v. M'Knight* (*supra*) at p. 107).

As applied to the case now before this court, the foregoing language would I think be inappropriate.

It may be worth noting that the section of the Imperial Act of 1861 which provides "that the court shall have jurisdiction over any claim for damage done by any ship" and that such claim may be enforced by an action *in rem* does not necessarily imply the existence of a maritime lien. (See Marsden on Collisions at Sea, 9th ed., p. 85).

The facts so far disclosed I think shew that the *Rio Casma* was by those entrusted with her navigation manoeuvred in such a manner as to wrongfully place her in the berth up to that time occupied by the scow and that this in law was the act of the *Rio Casma* as a ship. It is a

special feature of this case that the scow was not set adrift, but by an act of trespass which was doubtless not intended as such, the scow was moored outside the ship and so kept by the hull of the ship outside the ship in a dangerous position which act was the immediate cause of the damage.

It is not surprising, perhaps, that there is an apparent dearth of cases where a state of facts as disclosed herein has been considered. But the general principle of law often seems clear from many cases that the court *can* entertain an action *in rem* against a ship for any damage which she has done as a ship whether by colliding with another object or otherwise.

In my opinion a ship which forcibly takes possession of another ship's lawful berth is liable in such an action for the damage so occasioned and cannot escape such liability by shewing that in obedience to her master's orders she has been assisted in so doing by her crew. In such a case the ship is, I think, "the instrument of mischief and the active cause of the damage."

The motion is dismissed with costs.

*Judgment accordingly.*

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