

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1905
 June 20.

COPE V. S. S. RAVEN AND MAYHEW.

Jurisdiction—Action in rem—Arrest of ship—Action between co-owners for account.

This Court has as large a jurisdiction as the High Court of Admiralty, and therefore in an action between the co-owners of a ship for an account, the ship may be arrested.

MOTION by the defendant Mayhew, joint co-owner of a ship which had been arrested in an action *in rem* at the suit of the plaintiff, the other joint co-owner, to set aside the warrant of arrest and release the ship therefrom.

The motion was argued, at Vancouver, before the Local Judge for the British Columbia Admiralty District, on June 7th and 17th, 1905.

Sir Charles Hibbert Tupper, K.C., in support of the motion :

In substance the points submitted on behalf of the defendant show that there is no authority for proceeding *in rem* under section 8 of 24 Vic. Chapter 10, which provides that the High Court shall have jurisdiction to decide all questions arising between co-owners or any of them touching the ownership, possession or earnings of any ship registered in England and Wales and to settle all accounts in relation thereto between the parties.

This section does not constitute a maritime lien and, therefore, does not give the right to proceed *in rem*. *The Pieve Superieure* (1).

By section 85 of the above Act, however, it was particularly provided in the case of the High Court of Admiralty as follows :—

(1) 43 L. J. Adm. 20.

“The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings *in rem* or by proceedings *in personam*,” and unless the plaintiff can show that this section applies to the colonial courts, it is clear that no action lies *in rem* for an account between co-owners.

This action is brought to have an account taken of the earnings of the steamship *Raven*.

The defendant, Mayhew, submits that section 35 deals in terms only with the practice and procedure in the High Court of Admiralty and that the legislation in England, in 1890, and in Canada, in 1891, conferred jurisdiction on the colonial courts of admiralty and left to the local authorities complete discretion as to the practice and procedure.

The Colonial Courts of Admiralty Act 1890, and our *Admiralty Act, 1891*, provide for the exercise of the jurisdiction conferred.

Our rule 2 is as follows:—“Actions shall be of two kinds. Actions *in rem* and actions *in personam*.”

The notes to this rule in *Howell's Admiralty Prac.* (1) show that the action *in rem* is confined to the cases of a maritime lien, or to cases as to which jurisdiction *in rem* has been conferred by statute.

The cases relied on by the plaintiff are all referable to that provision in the English Act with respect to the procedure in the High Court of Admiralty and, therefore, it is submitted, they have no application to the procedure prescribed under the Acts and Rules in dealing with the practice in this court.

It is clear from the case of *Hall v. The Ship Seaward* (2), that, as late as 1893, there had been no pretension that under the *jurisdictional* provisions of the English Act, now transferred to the colonial courts, one

1905
COPE
v.
STEAMSHIP
RAVEN.
Argument
of Counsel.

(1) P. 13.

(2) 3 Ex. C. R. 268.

1905
 COPE
 v.
 STEAMSHIP
 RAVEN.
 —
 Argument
 of Counsel.
 —

co-owner could either proceed against the ship or arrest the ship in an action for an account.

Inspection of that report will show that the plaintiffs, part owners of the ship, sued the defendants, as part owners, and it was not pretended in the argument that there was either a maritime lien or a right to arrest. The sole question was as to jurisdiction and that is not now disputed.

In the edition of 1902 of *Williams & Bruce*, at page 323 note (k), it is said :—

“An action *in personam* is also usually entitled in the same way as an action *in rem*, deriving its title from the ship or other property in relation to which the claim is made.”

The English cases mentioned in plaintiff's memorandum as authority for proceeding *in rem* are all based on the 35th section of the *Admiralty Courts Act*, 1861.

The narrow point then is, does this section apply to Canadian courts?

The plaintiff bases his contention on :

(1.) Sub-section 2 of section 2 of the *Colonial Courts of Admiralty Act*, 1890.

(2.) And our *Admiralty Act*, 1891, sections 3 and 4.

The defendant's submission is that the sections mentioned deal only with the jurisdiction; and jurisdiction in this case is admitted.

These empowering sections certainly enabled our court to prescribe *procedure* in the same manner as the High Court, and also to re-enact in our rules the provision in question, viz: Section 35 of the Act of 1861.

This was, however, not done. On the contrary rule 2 simply distinguishes the kind of actions which may be brought. The action *in rem* is, therefore, confined under the rules of maritime law to the case of a maritime lien and in the action *in personam* is for all other cases, as this, where jurisdiction is given to our courts.

The plaintiff next invokes rule 37 (d).

This has reference to an action *in rem* (rule 35) where the action is for the "possession" and the words "employment or earnings" should be read, "employment and earnings," incidental relief in the case of an action for possession which is essentially *in rem*. These are the words of the English rules prior to the Act of 1861, when it is admitted there was no jurisdiction in an action for account simply, as this action is.

It is submitted there is nothing in the point made by the plaintiff that an action *in rem* lies under section 5 of the Imperial Act and that this has been recognized in our court.

Section 5 of the Imperial Act does not require section 35 of that Act to give a remedy *in rem*. It is obvious by section 5 and cases referred to that, as the jurisdiction; in the case of a claim for necessaries only applies where the owner is non-resident in the jurisdiction, the remedy *in rem* is the sole means of enforcing the jurisdiction; whereas by section 8, in connection with the case at issue, jurisdiction, is given "on all questions arising between the co-owners." Here it is clear the jurisdiction could only be exercised *in personam* and consequently section 35 of that Act has been applied in England and Wales to authorize proceedings *in rem*, though the same authorities have shown that no maritime lien is constituted.

The two Exchequer court cases cited by the plaintiff in his last memorandum do not carry the principles further.

As to the case of the *Rochester and Pittsburgh Coal and Iron Co.*, v. *The Ship The Garden City*, the plaintiff refers to the report of this case before McDougal L.J. The case, however, went before the Judge of the Exchequer Court on appeal (1) and examination of his

1905
 COPE
 v.
 STEAMSHIP
 RAYEN.
 Argument
 of Counsel.

(1) 7 Ex. C R. 94.

1905
 COPE
 v.
 STEAMSHIP
 RAVEN.

Argument
 of Counsel.

judgment shows that the action *in rem* lies in the case of necessaries supplied under the section above, namely, section 5, wholly irrespective of section 35.

Section 4 of our Act as relied on by plaintiff deals with jurisdiction and not with procedure, except as to the last part thereof which deals with rights and remedies; but a careful reading of this section shows that that portion dealing with rights and remedies is referable only to the *Colonial Courts of Admiralty Act, 1890*, and consequently does not carry the question further than is submitted in the first portion of this memorandum on behalf of the defendant herein.

B. P. Wintemute, contra:

The defendant has admitted that the *Admiralty Courts Act of 1861* is in force in Canada with the exception of section 35; that our court has jurisdiction *in personam* in actions of account between co-owners; that the Court of Admiralty in England has jurisdiction *in rem* by arrest of the ship in actions of this kind.

This action is brought under section 8 of that Imperial Act which defendant admits is in force in Canada.

Section 35 of the *Admiralty Courts Act 1861* provides that the jurisdiction of the High Court of Admiralty may be exercised either by proceedings *in rem* or *in personam*.

The *Colonial Courts of Admiralty Act, 1890* confers jurisdiction on colonial courts.

Sub-section 2 of section 2 provides that a Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England; the word exercise being used in this section in the same sense as in section 35 of the *Admiralty Courts Act, 1861*.

It is submitted that section 2 of the *Colonial Courts of Admiralty Act* makes both sections 8 and 35 of the *Admiralty Courts Act, 1861* apply to colonial courts.

By section 3 of our Admiralty Act it is declared that the Exchequer Court of Canada shall *have and exercise* all the jurisdiction, powers and authority conferred by the *Colonial Courts of Admiralty Act*. This, it is submitted, brings into force in Canada not only section 8 but section 35 of the Imperial Act.

1905
 COPE
 v.
 STEAMSHIP
 RAVEN.
 ———
 Argument
 of Counsel.
 ———

Section 4 of our Act provides that all persons shall have all rights and remedies in all matters, including proceedings *in rem* and *in personam*, arising out of or in connection with shipping as may be had and enforced in any court of Admiralty under the *Colonial Courts of Admiralty Act*.

This, it is submitted, virtually re-enacts section 35 of the *Admiralty Act*, 1861 and empowers our courts to entertain an action *in rem* for an account between co-owners.

Our rules provide for actions *in rem* and *in personam*.

Where an action *in rem* is brought, a warrant for the arrest of the ship may issue, rule 35.

By our rule 37 (d) it is clearly shown that in an action between co-owners relating to earnings of a ship, it is contemplated that a warrant may issue for arrest of the ship. This rule is in words almost identical with the words of section 8 of the Imperial Act and, the plaintiff submits, was intended to apply to proceedings under said section 8.

The English cases clearly show that although no maritime lien exists, there is the same authority for bringing actions *in rem* under sections 4, 5 and 6 of the Admiralty Act, 1861, as under section 8 thereof; sections 4, 5 and 6 requiring section 35 to give a remedy *in rem* as much as section 8 does. (*The Idas* (1); *The Two Ellens* (2); *The Pieve Superiore* (3); *The Cella* (4) *Coorty v The S.S. Colwell* (5).

(1) Br. & L. 65.

(3) L. R. 5 P. C. 482. P. D. 82.

(2) L. R. 4 P. C. 161.

(4) 13 P. D. 82.

(5) 6 Ex. C. R. 196.

1905
 COPE
 v.
 STEAMSHIP
 RAVEN.
 ———
 Reasons for
 Judgment.
 ———

This was an action *in rem* for necessaries under section 5 of the Imperial Act. It was decided that the court had jurisdiction *in rem* notwithstanding that a maritime lien did not exist, and motions to set aside the warrant and writ of summons were dismissed.

The Rochester and Pittsburg Coal and Iron Co. v. The ship The Garden City (1).

This was also an action under section 5 of the Act. It was held that the court had jurisdiction to entertain an action *in rem* although no maritime lien existed.

The plaintiff submits that as our courts have jurisdiction to entertain an action *in rem* under section 5 of the Admiralty Act 1861, they have the same jurisdiction to entertain an action *in rem* for an account under section 8 of the Act, there being no maritime lien in either case.

Rule 4, referring to Form 2, (How. *Adm. Prac.*) (2) provides for the title of an action *in rem*, which is altogether different from the title of an action *in personam* (see Form 3), and it is submitted that the case of *Hall v. The Ship Seaward* (3) was, as shown by the title in the report, an action *in rem*, and consequently a direct authority in the plaintiff's favour.

Jurisdiction *in rem* under sections 5 and 8 having been conferred on the court by the same statutory authority, it is submitted that the cases relied on by the plaintiff are in point and apply to the procedure in our Admiralty Court.

MARTIN, L. J. now (June 20th, 1905,) delivered judgment.

While agreeing with the defendant's counsel that there is no decision on the point raised on this application, yet in view of the clear language of the various

(1) 7 Ex. C. R. 34.

(2) 3 Ex. C. R. 268.

(3) Pp. 15, 97.

statutes under consideration I experience no difficulty in coming to a conclusion thereon.

It is admitted that the joint effect of sections 8 and 35 of the *Admiralty Courts Act*, 1861, is to confer upon the High Court of Admiralty jurisdiction *in rem* in an action for an account between co-owners. But it is submitted that the like jurisdiction is not conferred upon this court by the *Colonial Courts of Admiralty Act*, 1890, section 2, subsec. 2, and *The Admiralty Act*, 1891, sections 3 and 4.

The said subsec. 2 provides that a Colonial Court of Admiralty may exercise admiralty "jurisdiction in like manner and to as full an extent as the High Court in England," and the said jurisdiction "may be exercised either by proceedings *in rem* or by proceedings *in personam*."—Sec. 35.

I am unable to take the view that anything more than the said Acts was necessary to confer jurisdiction upon this court in the premises, and even assuming, as is contended, that rule 37 (d) carries the case no further, it was unnecessary, in my opinion, to provide for by rule that procedure which was authorized by the statute conferring jurisdiction. Furthermore, and in any event, rule 228 declares that, "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." I point out that though the words are "and earnings," in section 8, yet they are "or earnings" in rule 37 (d), and must be so construed.

As was said by the learned judge of the High Court of Admiralty in a decision on the earliest Act in question, other "reasons might be given in support of this construction, but I need not look for motives when the words of the act are plain" (1).

(1) *The Idas Br. & Lush*. 65.

1905
COPE
v.
STEAMSHIP
RAVEN.
Reasons for
Judgment.

1905
COPE
v.
STEAMSHIP
RAVEN.
Reasons for
Judgment.

Suffice it to say that I can find nothing in the said acts or rules which indicates that it was the intention that this court should have less jurisdiction than the High Court of Admiralty. The motion will be dismissed, with costs to the plaintiff in any event.

Judgment accordingly.
