1915
June 18

BRITISH COLUMBIA ADMIRALTY DISTRICT

HIS MAJESTY THE KING.....PLAINTIFF.

v.

THE "DESPATCH".....DEFENDANT.

(No. 1)

Admiralty—Practice—Crown—Security—Stay of Proceedings—Consolidation of Actions.

In an action by the Crown against a ship for damages for a collision and a cross-action *in personam* by the owner of the ship against the master of a government tug for damages resulting from the same collision, the Admiralty Court will entertain a motion under Sec. 34 of the Admiralty Courts Act, 1861, for a stay of proceedings until security for judgment is given by the Crown, and for a consolidation of the actions.

Where the Crown invokes the jurisdiction of the Court as a plaintiff, the Court may make all proper orders against it.

MOTION under sec. 34 of the Admiralty Courts Act, 1861, for a stay of proceedings in an action by the Crown until security is given.

Heard by Mr. Justice Martin, Local Judge of the British Columbia Admiralty District, at Victoria, June 18, 1915. *R. C. Lowe*, for plaintiff; *E. C. Mayers*, for defendant.

MARTIN. L. J. (June 18, 1915) delivered judgment.

This is a motion under sec. 34 of the Admiralty Courts Act, 1861, by the owners of the defendant ship to suspend the proceedings in this cause by the Crown against said ship for damages by collision to the Canadian Government tug "Point Hope" until the Crown has given security to answer a judgment which the defendants hope to recover in a cross cause *in personam* begun by them against one W. D. McDougal the master of the said tug "Point Hope", and servant of the Crown, for damages alleged to have been caused by said tug under his command to the said

ship "Despatch" in the same collision upon which this action is brought, and also that it may be ordered that the two actions shall be tried at the same time and upon the same evidence. The defendant ship "Despatch" has been arrested and bailed, but the "Point Hope" being a King's ship cannot be arrested[1], nor the Crown sued for damages caused thereby, so the officer in charge has been sued *in personam*[2]. I pause to observe that in the case of the *Lord Hobart*[3], a packet in the service of H. M. Post Office, but belonging to private individuals, was arrested, to answer a claim for wages, the Post Office having no objection to such a course in cases of that kind, and having dispensed with the customary notice.[4]

The Crown has refused in this action to give security after demand therefor.

If the Crown were not a party there could be no answer to the application, and indeed it was only opposed on the point on which I desired further argument and authority, *viz.*: as to whether or no it was proper to stay an action by the Crown and so in effect to compel it to give security in its own court. Counsel have been unable to direct my attention to any case exactly in point, but have referred me to the following authorities:[5] I extract from them the general rule, well stated by Osler, J. A., in *Regina v. Grant*, *supra*, (where the question was one of dispensing with a jury), that as regards procedure "the Crown, coming into the High Court is in the same position as the subject" just as, on the other hand, as Burton, J. A. put it[6] when in that Court "The Queen.....cannot be entitled to less rights than those of the meanest of her subjects,"

[1] *The Comus* (1816) 2 Dod, 464; *The Athol* (1842), 1 W. Rob. 374.

[2] Roscoe's Adm. Prac. 3d. ed. 178 (note l), 302; Williams & Bruce Adm. Prac.. 3d. ed. 89, 262; *Hettihewage v. The Queen's Advocate* (1884) 9 A.C. 571, 586; *H.M.S. Sans Pareil* [1900] P. 267; *H.M.S. King Alfred* (1913) 30 T.L.R. 102; *H.M.S. Hawke* (1913) 29 T.L.R. 441; [1913] P. 214.

[3] (1815) 2 Dod. 100.

[4] id. p. 103.

[5] Adm. Rules 33 & 34; Howells Adm. Prac. 26; Roscoe's Adm. Prac. (3d. ed.) 178,324; Williams and Bruce's Adm. Prac. (3d. ed.) 370-2; *Atty.-Genl. v. Brooksbank.* (1827), 1 Y. & J. 439; *The King of Spain v. Hullet* (1833) 1 Cl. & F. 333; *The Cameo* (1862) Lush. 408; *Prioleau v. United States* (1866) L.R. 2 Eq. 659; *The Charkeih* (1873) L.R. 4 A. & E. 120; *Secretary of State for War v. Chubb* (1880) 43 L.T. (N.S.) 83; *Hettihewage v. The Queen's Advocate, supra*; *The Newbattle* (1885) 10 P.D. 33; *Regina v. Grant* (1896) 17 Prac. (Ont.) 165; and *Carr v. Fracis Times & Co.* [1902] A.C. 176 (The Sultan of Muscat's case).

[6] p. 167.

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THE KING v. THE "DESPATCH"

Reasons for Judgment.

and, "I do not think the rights of the defendants are abridged or enlarged by reason of the plaintiff in this case being the Sovereign." Osler, J. A. further remarked[1]:—

"It might have been thought that without the aid of "any special enactment, the mode in which the remedy of "the Crown would be pursued and the relief sought ad- "ministered would be in accordance with the course and "constitution of the forum selected as between subject and "subject, so that the Crown, coming into a forum in which, "as between subject and subject, trial by jury had ceased "to be the general mode of disposing of issues of fact, "except in certain specified cases, would be bound to follow, "or would have the right to take advantage of, the pres- "cribed practice in order to obtain a jury or to deprive "the defendant of his claim for one."

There is an exception, of course, where the dignity of the Crown might be affected, as in the case of the Attorney-General not being required to make discovery on oath, cited in *Prioleau v. United States*, *supra*,[2]. But in my opinion no question of that kind arises here, and by analogy I cite this language of their Lordships of the Privy Council in the *Hettihewage Case*, *supra*,[3].

"The Crown suffers no more indignity or disadvantage by "this species of defence than it would suffer by defences of "a more direct kind, which yet would be clearly admissible; "as, for instance, if a breach of contract sued on by the "Crown were excused on the ground that the wrongful "action of the Crown itself had led up to that breach." This was held even in a case where it was said.[4]

"It is true that the course taken by the Courts below "does practically give an effective execution against the "Crown to the extent of the Crown's claim against the "defendants. But though the Crown is thereby prevented "from recovering its debt, it is not exposed to the indignity "attendant upon process of execution."

In the case of the *Attorney General v. Brooksbank*, *supra*, the courts stayed proceedings on an information filed by the Attorney General against army agents to account to the Crown for certain moneys until certain documents were

[1] p. 169.
[2] p. 664.
[3] p. 589.
[4] p. 588.

produced by the War Office, and in the *Secretary of State for War v. Chubb, supra*, the Court refused to grant the plaintiff an injunction unless the Crown gave the usual undertaking in damages, Jessel, M.R. saying, in answer to the objection "that the Crown could not be bound in such an undertaking:"

"I can see no reason for making an exception in favour "of the Crown in a matter of common and universal prac- "tice. If the Crown cannot give the usual undertaking in "damages, I cannot grant the interim injunction."

If this case had been one brought by a foreign prince instead of by our own Sovereign I should not have reserved judgment, because the former when he comes as a suitor is only acknowledged as a "private individual": *Prioleau v. United States, supra;* and as Brett, M.R. said in *The Newbattle, supra*,[1]

"It has always, however, been held that if a sovereign "prince invokes the jurisdiction of the Court as a plaintiff, "the Court can make all proper orders against him. The "Court has never hesitated to exercise its powers against a "foreign government to this extent."

It was said in *The King of Spain v. Hullet, supra*,[2] that "the practice of the Court is part of the law of the Court", and in *The Cameo, supra*, Dr. Lushington said "the intention of the Act was to put the two contending parties on a fair footing", and this can only be done in the present circumstances by allowing the present application, with costs to the defendant in any event, as the request for security was refused. It is desirable to add that quite apart from the statute the matter is obviously one where the two actions should be consolidated under rules 33 and 34, and as a matter of precaution I make an order to that effect it having been conceded that the cases should be tried together.

Motion granted.

[1] p. 35.

[2] p. 353.