1915
Dec. 2

BRITISH COLUMBIA ADMIRALTY DISTRICT.

HIS MAJESTY THE KING.....PLAINTIFF

v.

THE "DESPATCH".....DEFENDANT

(No. 2).

Admiralty—Jurisdiction—Practice—Crown—Action in rem or personam—Cross-cause—Security—Stay of proceedings.

The Exchequer Court of Canada has jurisdiction under sec. 34 of the Admiralty Courts Act, 1861, to vary or rescind proceedings in admiralty. Rule 228 provides the practice in respect of admiralty proceedings, in cases not specially provided for by the rules, to be that of the High Court of Justice in England.

An action *in personam* against the master of a Government tug, for his negligence in a collision with the plaintiff's ship, is neither an action *in rem* nor *in personam* against the Crown; nor can it be considered a "cross-cause" to a proceeding *in rem* by the Crown against the plaintiff's ship, so as to permit a stay of the Crown's proceedings, under sec. 34 of the Admiralty Courts Act, 1861, until it furnishes security to answer the judgment which may be obtained in the cross-cause.

MOTION by plaintiff under rule 84 of the Admiralty Rules to vary or rescind the order in this action made by MARTIN, L. J., on June 18, 1915, ante, p. 310.

Heard by Mr. Justice Martin, Local Judge of the British Columbia Admiralty District, at Victoria, September 9 and October 7, 1915.

Moresby, for plaintiff; *Bodwell*, K.C., for defendant.

MARTIN, L. J. (December 2, 1915) delivered judgment.

Under Rule 84 the plaintiff moves to "vary or rescind" the order made herein on June 18, last[1], on the ground of lack of jurisdiction to make the same. This objection was not raised upon the former motion which, as is noted in the reasons, was only opposed on the one point therein mentioned, and in an ordinary case it would not be proper to re-open the matter, but as a question of jurisdiction is now

[1] Ante, p. 310, 23 D.L.R. 351, 21 B.C.R. 503.

raised which could be raised at the trial, it is conceded that in the circumstances of this case it would be convenient and desirable to dispose of it at the outset, and the defendant offers no opposition to this being done.

It is first objected that sec. 34 of the Admiralty Courts Act, 1861, has no application to this Court because it is submitted to be a section relating to practice only and one which does not confer jurisdiction, with respect to which it is conceded that this Court possesses the same as the High Court of Admiralty, "to extend the jurisdiction and improve the practice" whereof is stated in the preamble to be the object of the said Act of 1861. Assuming the matter to be one of practice, it is urged that since, in our Rules (made under Sec. 7 of the Colonial Courts of Admiralty Act, 1890, and sec. 25 of the Admiralty Act 1891) there is none corresponding to said sec. 34, therefore there is nothing empowering this Court to exercise the practice jurisdiction conferred thereby. In my opinion, however, that section is one which "gives or defines the right" (as Lord Justice Lush puts it in *Poyser* v. *Minors*,[1] now under consideration, which is one of those "more extensive powers conferred upon the" High Court of Admiralty which it did not formerly possess,[2] and therefore this Court falls heir to the same jurisdiction. It is no objection to the conferring of jurisdiction that the statute which does so, at the same time "denotes the mode of proceeding by which (the) legal right is enforced:" per Lush L. J., *supra*.[3]

But if I should be wrong in this and the matter is to be considered as one of practice then reliance is placed on our Rule No. 228 as follows:

"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."

In my opinion this covers the case and I am justified in this view by the decision of my learned predecessor in this

[1] (1881) 7 Q.B.D. 329 at 333.

[2] *Williams & Bruce's* Adm. Prac. (3d. ed.) 370–1 and cases there cited, particularly *The Seringapatam* (1848) 3 W. Rob. 38 and *The Rougemont* (1893) P. 275.

[3] p. 333.

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Court in *Williamson* v. *The Manauense*,[1] and in *Williamson* v. *Bank of Montreal*.[2]

Then the further objection is taken secondly, that in any event said sec. 34 is inapplicable to the present situation because in the true sense of the expression, the defendant has "not instituted a cross cause" against the plaintiff. This also is a change of front on the part of the Crown since the order now complained of was made, because then the matter was argued and disposed of on the obvious assumption that the Crown in Canada was following the established practice of the Crown in England of assuming responsibility in the Admiralty Court for the act of its servant (McDougal), the master of its ship, under circumstances similar to these, as set out in the cases cited in my judgment. The Crown now takes the position that as there is no action here against it, either *in personam* or *in rem*, but only one *in personam* against its servant, the master, whose actions even if negligent it is not liable for, and now repudiates, on the authority of *Paul v. The King*[3] and *cf. Imperial Japanese Government* v. *Peninsular & Oriental S.N. Co.*,[4] consequently there is no "cross cause" and so it is in strict law a stranger to the proceedings of the defendant against said McDougal. Such an unusual position required corresponding consideration, and after the examination of a large number of authorities, I am forced to the conclusion that the objection must prevail. The expression "cross cause" has been often considered, *e.g.*, in *The Rougemont*, *supra*, wherein the scope of the section is in one respect defined and wherein there is a very instructive argument: *The Charkieh*[5] and see *Williams and Bruce's Adm. Prac. supra*, and whatever else may be said of it, it is clear, to my mind, that there cannot be a "cross cause" unless one at least of the plaintiffs in the principal cause is a defendant in the cross cause. On the other hand the mere fact that a party is a co-plaintiff does not of itself entitle the defendant in the cross cause to obtain security, as is shown by *The Carnarvon Castle*[6], wherein the owners of the cargo, who to save multiplicity and expense had joined in

[1] (1899) 19 C.L.T. 23.
[2] (1899) 6 B.C.R. 486.
[3] (1906) 38 Can. S.C.R. 126.
[4] [1895] A.C. 644.
[5] (1873) L.R. 4 A. & E. 120.
[6] (1878) 3 Asp. M.C. 607.

an action with the owners of the ship, were absolved from liability to give bail. It must be borne in mind that, as Lord Watson said in *Morgan* v. *Castlegate S.S.Co.*,[1] "every proceeding *in rem* is in substance a proceeding against the owner of the ship." The contention that the section applies only to cases where both the principal and cross cause are *in rem* was rejected in *The Charkieh*, *supra*. The exact point raised herein has not come up before; at least no similar case has been cited, and I have been unable to find any. In, for, example, *The Charkieh*, the cross cause was instituted by the Foreign Sovereign Prince, and in *The Newbattle*,[2] the action was brought by "the owners, master, and crew of the Louise Marie," and though that ship was admittedly the property of the King of the Belgians, yet the question was raised by a counterclaim in the same action, and in such circumstances the point now in question did not require consideration. Lord Justice Cotton said,[3]

"It is a reasonable principle that a plaintiff whose "ship cannot be seized, and against whom a cross action "has been brought, shall put the defendant in the same "position as if he (the defendant) were a plaintiff in an "original action, etc."

This brings out the force of the objection now taken: *viz.*, that in fact no cross action has been, brought against the plaintiff herein.

The result is that as the case now presents itself the order which was properly made on the facts then before me must now be rescinded as it appears the case is not within said section 34.

I am fully alive to the injustice which it was strongly pressed upon me might result from this refusal of the Crown to adhere to "the well-established practice in England" in cases of this description (*cf Eastern Trust Co. v. McKenzie Mann & Co.*,[4] on the duty of the Crown in general to ascertain and obey the law), but in the face of the decision in *Paul v. The King*, *supra*, I am powerless to adopt any other course, though my attention has been directed to the apt remarks of Idington J. at p. 136 of that case:

[1] [1893] A.C. 38 at 52.
[2] (1885) 10 P.D. 33.
[3] p. 35.
[4] [1915] A.C. 750 at 759, 22 D.L.R. 410.

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"It certainly seems at this time of day unsatisfactory to "find that one of the vessels, the property of which is in the "Crown, engaged in the business of the Crown, can destroy "through grossest negligence the property of a subject and "he have no remedy at law unless against the possibly "penniless man who has been thus negligent."

With respect to the costs of this motion the plaintiff must pay them in any event of the cause, because the application has been made necessary solely by the omission of the plaintiff to raise these new questions at the outset and an unusual indulgence was granted in opening up the matter. In the very unusual circumstances it is impossible now to dispose of the costs of the original motion upon any fixed principle, so I think the most appropriate course to adopt is not to make any order regarding them.

Motion granted.