BRITISH COLUMBIA ADMIRALTY DISTRICT.

1904
April 13.

THE VERMONT STEAMSHIP COMPANY..... PLAINTIFF;

VS.

THE SHIP "*ABBY PALMER*".....DEFENDANT.

Salvage—Arrest of ship—Release—Payment into court—Appeal—Foreign owner.

1. An application by defendant to pay money out of court which was paid in by him to obtain the release of his ship arrested to answer a claim for salvage will, if the defendant be a foreign resident, be stayed, wholly or partially, pending an appeal to the Exchequer Court to increase the salvage award.
2. Observations upon the scope of bail bonds and the retention of security pending appeal.
3. It is an improper practice, and one which the court will discourage, to arrest property to answer extravagant claims.

MOTION to pay out of court to defendant the excess of security paid into court, $25,000 over and above the amount of the judgment, $4,200, and costs to be taxed.

April 12th 1904.

W. J. Taylor, K.C. for the motion: Judgment has been recovered against us for $4,200 and costs, and the balance of our $25,000 now in court should be paid out.

J. H. Lawson, contra: We are appealing to the Exchequer Court and the hearing is fixed for the 27th of April. The security, or a large proportion of it, should be retained in court to answer whatever final judgment may be given. We do not appeal from the portion of the judgment determining the principle of valuation, or the valuation itself, but we say that the award is inadequate for the services rendered.

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Argument of Counsel.

[*Per Curiam:* The question is one of importance and had better stand till tomorrow so that some authority may be cited.]

April 13th.

J. H. Lawson continues: See sec. 33 of Admiralty Court Act, 1861, in *Howell's Adm. Practice* (1), and *Roscoe's Adm. Practice* (2); *Williams & Bruce's Adm. Practice* (3); *Browne's Adm. Practice* (4); the *St. Olave* (5). Therefore if the ship here had put up bonds the bail would have stood to answer the judgment. The whole policy of Admiralty law is that the property should be preserved to answer plaintiff's demand, and defendants are resident out of the jurisdiction and we cannot recover against them without delay and extra expense if we succeed on the appeal. I am agreeable that the security in court should be reduced, as it is perfectly apparent now that the bail is too high.

[*Per Curiam:* Your claim for $25,000 has turned out to be a preposterous one, and there are some very strong remarks by the judges to the effect that the process of this court must not be used as an engine of oppression by arresting ships for extravagant claims; in future this course must not be followed.]

The claim was made *bonâ fide*, though mistakenly, at such a high figure.

W. J. Taylor, K.C. in reply: We are entitled to payment out of the surplus as asked. See the remarks in *Williams & Bruce* (3); which show the practice. The security there is given under an order 30th December, 1903, for the release from arrest on filing bond to the satisfaction of the Registrar and the cash was deposited as bail for the ship instead of a bond. (See *The Helene* (6), on form of bond, which shows that its form has never

(1) P. 201.
(2) P. 508.
(3) P. 544.
(4) P. 1145.
(5) L. R. 2 A. & E. 360.
(6) P. 544.

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Argument of Counsel.

been altered despite the Act of 1861; the authority to make new this form has not been exercised.) The *St. Olave* case has nothing to do with the point as it turns on the making of repairs; and the observations of Phillmore, J., have nothing to do with this question—a dictum merely and not correct, on face of the decision. An appeal is not a stay of proceedings (2). Mr. Lawson should have some case in support of his application. I refer to the principle of *Marsh* v. *Webb* (3). This is an appeal to the Exchequer Court from the Admiralty Court —see Admiralty Rule 158—different courts, though under same name, a different and distinct branch of jurisdiction. The old form of bond is still in force, and is subject to the decision in *The Helene* (*supra*). It has never been altered. See *Williams & Bruce's Adm. Practice* concerning this (4.) And see *The Berlin* (5). According to this we would have to give a bond if we appealed. We stand ready to pay the judgment recovered against us and having done so it is our right to have our property released; it is a hardship to make us give security for plaintiffs' chance of success in an appeal of a most unusual and speculative kind for which no precedent has been cited; we have lost the use of this $25,000 paid into court in December last to answer a most excessive demand.

J. H. Lawson refers to *Browne's Adm. Practice* (6), and the *St. Olave* (7). *Sheffield* v. *Ball* (8), is before sec. 33 of 1861. See *Pritchard's Digest* (9).

[*Per Curiam:* See *The Annot Lyle* (10), which says that exceptional facts should be shown for a stay. And see *The Ratata* (11).]

(1) Brown & Lush. 426.
(2) Williams & Bruce p. 544; Roscoe, p. 311, Or. 58 R. 16.
(3) 15 Ont. P. R. at p. 67.
(4) Pp. 383, 384.
(5) Pritch. Ad. Dig. vol. 1, p. 368.
(6) P. 115.
(7) L. R. 2 A. & E. 360.
(8) 2 Lees Ecc. 291.
(9) Vol. 1, p. 368.
(10) 11 P. D. 114.
(11) [1897] P. 131.

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W. J. Taylor, K.C. refers to Bowen, J. at p. 118 of the *Annot Lyle*. We are successful parties to the extent of the balance of our security.

Per Curiam: The form of bond authorized by form 17 in our Rules is in its operative parts practically identical with that given in the *Helene* (1), and the Lords of the Privy Council there say that it "must be construed as it always has been." The judgment is on the question of costs, and if the *St. Olave* case conflicts on this point, the former must prevail. And in this respect sec. 33 is stated never to have been acted upon (1), nor in fact does Sir Robert Phillimore say it has been acted on but merely gives his *obiter dictum* on what the object of it was *i.e.* to allow the scope of the bail bond to be widened if the court saw fit to take advantage of the power given it by the statute. The fact is, however, that the bond has not been materially altered, either in England or in Canada.

It is argued that the appeal, under sec. 14 of *The Admiralty Act*, 1891, is still in this court, and therefore the bail bond (or its substitute here, the money in court) is wide enough, since it is conditional, to pay "what may be adjudged * * * in the action," and that the adjudication in appeal is part of the action. But though the present appeal is to the Exchequer Court, and not, as it might be, direct to the Supreme Court, it is in essence an appeal to another tribunal as appears by the discriminating language of rule 158. "Any person who desires to appeal to the Exchequer Court, from any judgment or order of a local judge in admiralty of the said court, shall give security," etc. And by section 9 of *The Admiralty Act* "every local judge in Admiralty shall, within the Admiralty District for which he is appointed, have and exercise the jurisdiction, and the powers and

(1) Williams & Bruce, p. 544.

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authority relating thereto, of the judge of the Exchequer Court" in respect of the Admiralty jurisdiction of that court. And though the jurisdiction of the old Colonial Courts of Admiralty is for the convenient administration of justice conferred upon the Exchequer Court of Canada, just as there is in England a Probate, Divorce and Admiralty Division of the High Court of Justice, yet the admiralty principles, procedure and practice are, as might be expected from the history of the court, quite distinct from the jurisdiction in Exchequer, which indeed primarily appears from the rules and orders specially relating to Admiralty procedure.

One tribunal may well possess and exercise two distinct jurisdictions without in any way merging them; a striking example of which is to be found in this province wherein the Supreme Court thereof exercises, in Canada, the unusual jurisdiction of the old Court for Divorce and Matrimonial causes. In all the circumstances I should feel disposed to hold that while in a strictly technical sense it may be said that the appeal to the Exchequer Court, and not to the Supreme Court of Canada is a proceeding in this court, nevertheless there is no essential difference between such an appeal and the usual appeal in England from the High Court of Admiralty But no case has been cited as to what the practice should be in regard to the retention in court, pending appeal, of more than the sum for which judgment has been given, and doubtless from the fact that an appeal to increase a salvage award is a very rare thing; the plaintiffs' counsel admits he has not been able to find a precedent but simply bases his application on the broad principle that as the practice of this court is singular in seizing the *res* at the beginning of the action to answer the

claim, that distinctive feature should be maintained by preserving the *res* till all litigation is at an end.

The point is a nice one and I feel some difficulty about it, though inclined to hold, should I be forced to give a ruling on it, that in the special circumstances of this case at least, the application should not prevail on this ground.

But it may be entertained on another and safer ground which is, that a stay of procedings may be ordered under Rule 173 pending appeal, and the ordering of a stay "is a pure matter of discretion depending on the particular circumstances of each case" (*The Ratata*, *supra*). And it was said by the Court of Appeal in the *Annot Lyle*, *supra*, that though a stay of proceedings should not be granted in the absence of special circumstances, yet "if in any particular case there is a danger of the appellants not being repaid if their appeal is successful, either because the defendants are foreigners, or for other good reason, this must be shown by affidavit, and may form a ground for ordering a stay."

It being admitted in the case at bar that the defendants are foreigners and resident out of the jurisdiction, in the exercise of my discretion I think the proceedings to pay out would have to be stayed, if the plaintiffs make substantive application therefor, though if there is no objection I shall proceed to deal with this application on the basis of its including a counter request to stay. (This having been agreed to, His Lordship proceeded). The stay should be a partial one only and not extend to more than the additional sum it may appear proper to retain in court pending the appeal, but in fixing any amount I wish it to be clearly understood that I only intend to retain in court any excess over the judgment simply from abundance of caution and as evidencing a wish not to consider myself infallible, but not as in any way meaning that I think

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the judgment should be increased. I feel bound to say that I find myself placed in an unusual position and one of some delicacy by reason of the appeal from me being to a single Judge only, for the Exchequer Court is at present so constituted. In view of what had been said the order will be that the sum of $6,000, be retained in court pending the appeal and the balance will be paid out to the defendant's solicitor. Costs of this motion will be reserved till after the appeal is disposed of.

Order accordingly.