

TORONTO ADMIRALTY DISTRICT.

1908
April 25.

R. O. & A. B. MACKAY.....PLAINTIFFS;

AGAINST

THE SHIP "*POLLUX*".

Shipping—Third party motion—Parties out of jurisdiction—Practice.

There is no provision in the Rules of the Admiralty Division of the Exchequer Court of Canada for an order for an issue of a third party notice under an alleged indemnity, especially if the parties sought to be brought into court in that way reside out of the jurisdiction.

MOTION in Chambers on the 14th April, 1908, by the owner of the defendant ship, for an order for the issue of a third party notice.

The facts brought out on the motion are stated in the reasons for judgment.

J. W. Nesbitt, K.C., counsel for plaintiff.

Featherston Aylesworth, counsel for third party.

F. E. Meredith, K.C., (of the Quebec Bar), and

D. L. McCarthy, K.C., counsel for defendant ship and its owner.

HODGINS, L.J., now (April 25th, 1908), delivered judgment.

The defendant ship *Pollux* is a Norwegian ship, owned by one Ole M. Bugge, of Trondhjem in Norway, and was arrested at Port Dalhousie under a warrant of arrest issued by the plaintiffs claiming the sum of \$4,000 for necessaries supplied to the said ship *Pollux* at the Port of Sarnia, on the 11th day of October, 1907, and at the said port of Sarnia and other ports on other days, and for damages for breach of charter-party.

By a charter-party dated the 19th July and made in New York, between J. H. Winchester & Co., by cable authority from Messrs. Fearnley and Eger, agents for owners, and Carbray, Son & Co., charterers of the City of Quebec, the said owner agreed to let and the said charterers agreed to hire, the said steamship from the time of delivery until the end of the lake season. The charterers to have liberty to sub-let the steamer for all or any part of the time covered by the charter. The charterer to pay for the use and hire of the vessel £600 sterling per month, payable in cash or bills, at the owner's option monthly in advance in London, or as agreed. The hire to continue until delivery at a port in the St. Lawrence River, at the charterer's option.

By a sub-charter-party dated the 21st August, 1907, and made in Quebec between Carbray, Son & Co., direct charterers, agents for owners and R. O. and A. B. MacKay, charterers of the City of Hamilton, Ontario, the said owners agreed to let, and the said charterers agreed to hire the said steamship from the time of delivery to about the 31st October, 1907. The charterers to have liberty to sub-let the steamer for all or any part of the time covered by the charter. The Charterer to pay for the use and hire of the vessel £700 sterling per month payable in cash or bills on Quebec at owner's option monthly in advance or as agreed. The hire to continue until delivery at Erie, Pennsylvania, U.S.

It will not be proper at this stage of the proceedings to make any findings respecting the agencies alleged, or the effect of the differences in the conditions of these respective charter-parties.

The foreign owner of the defendant ship now moves "for an order that a notice by way of third party notice do issue against the said Carbray, Son & Company of Quebec, in the Province of Quebec, ordering the said Carbray, Son & Company to appear personally, or by their

1908
 MACKAY
 Co.
 v.
 THE SHIP
 POLLUX.
 ———
 Reasons for
 Judgment.

1908.
 }
 MACKAY
 v.
 THE SHIP
 POLLUX.
 ———
 Reasons for
 Judgment.
 ———

solicitors, in the present action to answer the claim of the said owner of the ship *Pollux*, the defendant herein, by which the said owner claims to be entitled to indemnity in the premises over against the said Carbray, Son and Company, who are not as yet parties to the present action; and to order the service thereof at Quebec aforesaid."

There is no provision in the Admiralty Rules of this Court for bringing in third parties who are liable to indemnify a defendant respecting a claim made against him by a plaintiff, except by importing the Rules of the High Court of Justice in England, under Rule 228 regulating the practice and procedure in Admiralty cases. Rule 20 of our Rules cannot, I think, be read as applicable to such process for it is expressly limited to "service out of the jurisdiction of a writ of summons or notice of a writ of summons"; while the process to bring in third parties by the English Order XVI, Rule 48 is "a notice (hereinafter called a third party notice) to that effect, stamped with a seal with which writs of summons are sealed."

It may be conceded that were this foreign owner suing these third parties on any contract of indemnity contained in the charter-party executed in New York, or the sub-charter-party executed in Quebec, he would have to commence his suit by a writ of summons, or such other process as the practice of the Superior Court of that province prescribes; but whatever may be the practice of that court, it cannot be made operative in Ontario so as by analogy, or otherwise, to make its process equivalent to the process prescribed by the English rule referred to.

But the principal difficulty in the owner's way is that the third parties sought to be added reside in the Province of Quebec, and in the case of *Spiller v. Bristol Steam Navigation Company* (1), the English Queen's

(1) [1884] 13 Q. B. D. 66.

Bench Division held that rule 48 did not authorize service out of the jurisdiction of the third party notice on a third party domiciled or ordinarily resident in Scotland; and such third party was neither "a necessary or proper party" to the action. This case affirmed the decision in the previous analagous case of *Lenders v. Anderson* (1), that the English court had no power under Order XI, Rules 1 and 2, to allow the service of a writ of summons out of the jurisdiction in actions for breach of contract where the defendant was domiciled or ordinarily resident in Scotland or Ireland. See also *Emanuel v. Symon* (2).

Another difficulty may arise respecting the meaning of the term "indemnity" which Brett, M.R., in *Emanuel v. Symon* thus interpreted in the Court of Appeal. "It seems to me that indemnity in the new rule must have the same meaning it had in the old rule, and that it can only apply to the case where a third person has contracted to indemnify the defendant;" and he held that in the case before him there was no contract to indemnify, adding: "If the defendants' case be true, they may probably recover the same damages against the ship-owner (the third party) of whom they chartered the ship, as the cargo-owner may recover against them; but that is not enough to entitle them to give the third party notice, inasmuch as to entitle them to do so, there must be a contract to indemnify them."

The motion must therefore be dismissed. But as this is the first occasion in which this third party question has been brought before the Admiralty Court, I think there should be no costs.

Judgment accordingly.

Solicitors for plaintiffs: *Nesbitt, Gould & Dickson*;

Solicitors for owners of ship *Pollux*: *Campbell, Meredith, Macpherson, Hague & Holden.*

1908

MACKAY

v.
THE SHIP
POLLUX.Reasons for
Judgment

(1) [1883] 12 Q. B. D. 50.

(2) [1908] I. K. B. 302.