BETWEEN:

IWAI & CO. LTD. AND THE GOSHO CO. LTD. ..... PLAINTIFFS;

AND

THE SHIP *PANAGHIA*, COMPANIA DE NAVEGACION SAPPHO S. A. AND ANGLO CANADIAN SHIPPING CO. LTD. ..... DEFENDANTS.

1959
Dec. 1

1960
July 7

Shipping—Admiralty Act, R.S.C. 1952, c. 1, ss. 18 and 20—Jurisdiction to issue writ of summons—Appeal from order of District Judge dismissed.

Held: That s. 20 of the Admiralty Act R.S.C. 1952, c. 1 is not exhaustive on the question of when actions within the jurisdiction outlined in s. 18 of the Act may be instituted in a registry and does not restrict the exercise of the jurisdiction to the situations therein set out but merely states certain instances where a statutory right is given to commence proceedings in such district, leaving unprescribed the registry in which actions over which the Court has jurisdiction but not falling within any of its clauses may be instituted.

APPEAL from order of the District Judge in Admiralty for the British Columbia Admiralty District.

The appeal was heard before the Honourable Mr. Justice Thurlow at Ottawa.

C. C. I. Merritt for appellant (defendant) Compania de Navegacion Sappho S.A.

J. R. Cunningham for respondents (plaintiffs).

The facts and questions of law raised are stated in the reasons for judgment.

THURLOW J. now (July 7, 1960) delivered the following judgment:

This is an appeal by Compania de Navegacion Sappho S. A. from an order made by Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia

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Admiralty District, dismissing a motion made on behalf of that defendant for an order that the writ of summons herein be set aside on the ground that the Court had no jurisdiction to issue it.

In the endorsement on the writ, the plaintiffs claim as the owners or endorsees of the bills of lading of a quantity of pulp shipped from British Columbia to Japan in the Panamanian ship *Panaghia,* against the defendant Compania de Navegacion Sappho S. A. as owner of the ship and against the defendant Anglo Canadian Shipping Company Limited as charterer of the ship and as carrier, damages for breach of contract constituted by the bills of lading for the carriage of the goods and in tort for damages for negligence of both defendants in and about the carriage of said goods by sea. The defendant Anglo Canadian Shipping Company Limited is a Canadian corporation, carrying on business in British Columbia, and the defendant Compania de Navegacion Sappho S. A. is a Panamanian corporation with no office in British Columbia and not carrying on business there. At the time of the issue of the writ, the *Panaghia* was not in British Columbia, and she has not been arrested in these proceedings.

The question for determination is whether or not the Exchequer Court as a court of admiralty has jurisdiction to entertain and determine the action so commenced.

Under s. 3 of the *Admiralty Act,* R.S.C. 1952, c. 1, first enacted by S. of C. 1934, c. 31, it is provided that the Exchequer Court of Canada shall continue to be a court of admiralty and to have and exercise on its admiralty side general jurisdiction in admiralty. By s. 12, each of several named provinces, including British Columbia, is declared to constitute an admiralty district for the purposes of the *Admiralty Act,* and provision is made for one or more registries in each district. Provision is also made in ss. 4 and 6 for the appointment by the Governor in Council of judges to be designated as District Judges in Admiralty, who are to have and exercise the admiralty jurisdiction of the Court within the districts for which they are appointed. The admiralty jurisdiction of the Court is then outlined in s. 18 in several subsections, which to a considerable extent overlap one another. By s-ss. (1) and (2) of that section, the

Court is given jurisdiction which is generally co-extensive with the admiralty jurisdiction of the High Court of Justice in England, including that described in s. 22 of the *Supreme Court of Judicature (Consolidation) Act, 1925*. This included jurisdiction over claims relating to the carriage of goods in a ship and claims in tort in respect of goods carried in a ship but not when it appeared that any owner or part owner of the ship was domiciled in England. By s. 18(3) and (4) it is then provided:

(3) Notwithstanding anything in this Act or in the Act mentioned in subsection (2), the Court has jurisdiction to hear and determine

(*a*) any claim

(i) arising out of an agreement relating to the use or hire of a ship,

(ii) relating to the carriage of goods in a ship, or

(iii) in tort in respect of goods carried in a ship,

(*b*) any claim for necessaries supplied to a ship, or

(*c*) any claim for general average contribution.

(4) No action *in rem* in respect of any claim mentioned in paragraph (*a*) of subsection (3) is within the jurisdiction of the Court unless it is shown to the Court that at the time of the institution of the proceedings no owner or part owner of the ship was domiciled in Canada.

It is, I think, apparent that the effect of s-ss. (3) and (4) of s. 18 is to eliminate the limitation on the jurisdiction of the Court which is implicit in s-ss. (1) and (2) in cases relating to the carriage of goods in a ship and in tort in respect of goods carried in a ship, where any owner or part owner of the ship is domiciled in Canada, but, at the same time, to prohibit the invoking of jurisdiction under s-s. 3(*a*) by proceedings *in rem* when an owner or part owner of the ship is domiciled in Canada. Jurisdiction in such cases in proceedings *in personam* is, however, unrestricted.

The claims endorsed on the writ in this action appear to fall within clauses (*a*)(ii) and (*a*) (iii) of the subsection, and if the statute went no further it would seem plain that the Court would have jurisdiction under s-s. (3) to hear and determine them in an action *in personam*, if the defendants or some of them are to be found in the territorial area or district in which the Court's jurisdiction is exercised. The principle on which the exercise of a court's

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jurisdiction is founded is stated as follows by Viscount Haldane in *John Russell and Co. Ltd. v. Cayzef, Irvine and Co. Ltd.*[1] at p. 302:

> The root principle of the English law about jurisdiction is that the judges stand in the place of the Sovereign in whose name they administer justice, and that therefore whoever is served with the King's writ, and can be compelled consequently to submit to the decree made, is a person over whom the Courts have jurisdiction. In other countries that is different; in Scotland jurisdiction is to a considerable extent made dependent upon the presence within the jurisdiction of property of the defender who may be outside the jurisdiction. But we are concerned with the rule based upon the English jurisprudence, and that jurisprudence is prima facie as I have stated. It has been extended by the rules which have been made as to service out of the jurisdiction. These rules have been made with scrupulous care because there arose some time ago a conflict between the Scotch Courts and the English Courts about jurisdiction, and the rules were framed with a view of preventing such conflicts from arising again.

Whether the jurisdiction of the Court *in personam* can also be exercised in an admiralty district when no defendant can be served therein is, of course, another matter and depends on the scope of the cases in which, under the rules of the Court, service out of the jurisdiction may be allowed. In the present case, however, this problem does not arise since one of the defendants is resident in British Columbia and was served there. Accordingly, having regard to s. 18(3) and on the assumption that the statute goes no further in limiting the district or the manner in which the jurisdiction conferred by that subsection is to be exercised, it would seem that the action is within the jurisdiction of the Court and was properly launched in the British Columbia registry, regardless of the fact that the other defendant is not resident in the province of British Columbia.

On further examining the statute, one finds that, under the heading "Practice and Procedure", it is provided in s. 19(2) that, subject to s-ss. (3) and (4) of s. 18 and s-s. (1) of s. 20, the jurisdiction of the Court may be exercised either in proceedings *in rem* or in proceedings *in personam*. Whatever the scope and effect of this subsection may be, it is expressly made subject to s-s. (3) of s. 18, which itself begins with the words, "notwithstanding anything in this Act" and proceeds to say that the Court has jurisdiction over "any claim" of the kinds therein described. The jurisdiction so

[1] [1916] 2 A.C. 298.

given is thus not subject to elimination by anything contained in the Act. The manner in which it may be exercised may, of course, be prescribed, and for some cases procedure by action *in rem* is prohibited by s. 18(4) but, subject only to this, given a claim of the kind described in s. 18(3), jurisdiction to be exercised in one kind of proceeding or the other must be held to exist and, in my opinion, the authority of the Court to hear and determine such a claim is not subject to being ousted by s. 20 or by any other provision of the Act.

On behalf of the appellant, it was submitted that the jurisdiction conferred on the Court by s. 18 is exercisable only when one or more of the clauses of s. 20(1) applies and that, since the case as stated in the endorsement does not fall within any of such clauses, the Court is without jurisdiction to entertain the action. Section 20 provides:

> 20. (1) An action may be instituted in any registry when,
>
> (*a*) the ship or property, the subject of the action, is at the time of the institution of the action within the district or division of such registry;
>
> (*b*) the owner or owners of the ship or property, or the owner or owners of the larger number of shares in the ship, or the managing owner, or the ship's husband, reside at the time of the institution of the action within the district or division of such registry;
>
> (*c*) the port of registry of the ship is within the district or division of such registry;
>
> (*d*) the parties so agree by a memorandum signed by them or their attorneys or agents;
>
> (*e*) the action is *in personam* and is founded on any breach or alleged breach within the district or division of such registry, of any contract, wherever made, that is one within the jurisdiction of the Court and, according to the terms thereof, ought to be performed within such district or division; or
>
> (*f*) the action is *in personam* and is in tort in respect of goods carried on a ship into a port within the district or division of such registry.
>
> (2) When an action has been instituted in any registry, no further action shall be instituted in respect of the same matter in any other registry of the Court without the leave of the Judge of the District or division of such other registry, which leave may be granted subject to such terms as to costs and otherwise as he directs.

It will be observed that in this section no distinction is made between the central registry of the Court at Ottawa (which is, however, referred to in s. 27) and the district registries and that, if the appellant's contention is correct, not only is the jurisdiction appearing to be conferred by s. 18 very considerably narrowed, but the overriding provision contained in s. 18(3) cannot be given its full effect.

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It follows, in my opinion, that the appellant's contention cannot be correct and that, despite the argument that statutory authority for commencing this action in the British Columbia Registry of the Court must be found in s. 20(1) if the action is to be properly commenced there, s. 20(1) must be interpreted as a permissive provision relating to procedure, which, in any case, is what in form it appears to be.

There are, however, some additional considerations which I think point to the same conclusion. From s. 18(7) it appears that the group of provisions dealing with practice and procedure in the Court, of which s. 20 is one, are not to be considered exhaustive on that subject. Section 18(7) provides:

> (7) The jurisdiction of the Court on its Admiralty side shall, so far as regards procedure and practice, be exercised in the manner provided by this Act or by general rules and orders, and where no special provision is contained in this Act or in general rules and orders with reference thereto any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it may now be exercised by the Court.

This subsection refers to the "manner in which jurisdiction may now be exercised in the Court". Prior to March 1, 1935, when the *Admiralty Act 1934* came into effect, the *Admiralty Act*, R.S.C. 1927, c. 33, had contained in s. 18 a provision first enacted in 1900 in terms almost identical with those in the present s. 20, save that there were no clauses corresponding to (*e*) and (*f*) in s-s. (1). A similar provision had also been in *The Admiralty Act*, 1891, S. of C. 1891, c. 29, as s. 13. In *The Dunbar and Sullivan Dredging Company v. The Milwaukee*[1], where a foreign ship had been arrested in an action which had been instituted in the Ontario registry of the Court when the ship was not in that district, Hodgins L.J.A. distinguished the judgment of the Supreme Court of Canada in *The D. C. Whitney*[2] and upheld the jurisdiction on a number of grounds, including waiver implied from the owners of the ship having given a bond to obtain the release of the ship from arrest, and this despite the precise wording of clause (*a*) of s. 18 of the Act

[1] (1905) 11 Ex. C.R. 179. [2] (1906) 38 S.C.R. 303.

then in force. And in *The Dunbar and Sullivan Dredging Co. v. The Ships Amazonas and Montezuma and the Davison Steamship Co.*[1], Garrow L.J.A., speaking of s. 18 of that Act, said at p. 500:

> Then comes sec. 18 which under the title "Procedure" begins "Any suit may be instituted *in any Registry* when" etc., the whole very clearly intended not to limit the general jurisdiction of the court, but to supply a guide in the case of a possible conflict between two or more Registry districts. The confusion seems to arise from confounding Admiralty Districts with Registry Districts, the two not being by any means identical, or at least necessarily so.

In that case the jurisdiction of the Court to entertain an action arising from a collision in Canadian waters between foreign vessels was maintained despite the fact that the defendant ship was not in the district when the action was commenced, though she was later arrested there while passing through the district on a voyage between United States ports.

These were cases where jurisdiction was considered to have arisen by reason of the collision giving rise to the right of action having occurred in the admiralty district and which were not covered in s. 18. In *The D. C. Whitney* (*supra*) the parties and ships were also foreign, and the defendant ship was arrested in Canadian waters in a suit instituted when the ship was not in Canada, but the cause of action was based on a collision which had also occurred in the United States. The Supreme Court of Canada set the proceedings aside on the ground that the Court did not have jurisdiction, but it is noteworthy that the judgment was not based on s. 13 of the *Admiralty Act, 1891,* nor is that section referred to anywhere in the report of the case. In *Donald H. Bain Ltd. v. The Ship Martin Bakke*[2], Sidney Smith D.J.A. at p. 243 suggested a view contrary to that expressed in the *Dunbar and Sullivan Dredging* case, but that case apparently had not been drawn to his attention and, in any case, from what he said, it appears that he was not expressing a concluded opinion on the matter. Moreover, the upholding by him of the jurisdiction in the present case, in which he did not give reasons, appears to be opposed to the view suggested in the *Bain* case.

[1](1911) 13 Ex. C.R. 472. [2][1955] Ex. C.R. 241.

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It may also be observed that *Howell's Admiralty Law and Practice,* published in 1893, at p. 14 indicates that the admiralty court then also had jurisdiction *in personam* against the master of a ship in certain instances, and it is not difficult to conceive of such cases arising where none of the clauses of the present s. 20(1) would be applicable or where none of the clauses of the former s. 18 would have been applicable. In such cases, if the appellant's contention is correct, an action could not have been brought in the district in which the master resided and where the court's process and authority would run and there would have been no registry in which it could have been brought, and yet the court undoubtedly had, under s. 3 of the *Admiralty Act, 1891,* "all the jurisdiction, powers and authority conferred by the Colonial Courts of Admiralty Act, 1890".

I am accordingly of the opinion that s. 20 of the present Act is not exhaustive on the question of when actions within the jurisdiction outlined in s. 18 may be instituted in a registry and that, even if it be regarded as compulsory so far as it goes, it does not restrict the exercise of the jurisdiction to the situations therein set out but merely states certain instances wherein a statutory right is specially given to commence the proceedings in such district, leaving unprescribed the registry in which actions over which the Court has jurisdiction but not falling within any of its clauses may be instituted. It seems curious that, in stating situations in which proceedings to invoke the extended jurisdiction conferred by the statute in 1934 might be instituted in particular registries, the draftsmen of clauses (*e*) and (*f*) of s. 20 did not go further, but it is not inconceivable that it may have been regarded as obvious in view of the interpretation which had been put upon the former s. 18 and in view of what Viscount Haldane in the passage cited referred to as "the root principle of the English law about jurisdiction" that s. 20 would not be treated as exhaustive and that there was no need of a clause dealing with the situation where the defendant or one of the defendants was resident in a district and could be served there. It is, of course, apparent that s. 20(1) and particularly clauses (*e*) and (*f*) of that subsection will apply

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to authorize the institution of proceedings in a district in some cases whether any of the defendants is resident there or not and this, I think, is in addition to the right of a plaintiff to take proceedings in any district where the defendant can be found and served.

It follows that the order appealed from is right and should be affirmed. The appeal will be dismissed with costs.

Judgment accordingly.