BETWEEN:

VANCOUVER TUG BOAT COMPANY LIMITED (*Defendant*) ..... } APPELLANT;

AND

PACIFIC LIME COMPANY LIMITED (*Plaintiff*) ..... } RESPONDENT.

1955
Oct. 12
Dec. 15

Shipping—Practice—Misnomer in name of plaintiff a mistake in form only —Correction of misnomer does not substitute a new plaintiff and does not deprive defendant of any right—Appeal from District Judge in Admiralty dismissed.

Held: That it is proper practice to allow the correction of a misnomer in the name of a corporate plaintiff and the defendant is not harmed thereby.

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

The appeal was heard before the Honourable Mr. Justice Ritchie at Vancouver.

John I. Bird and *W. D. C. Tuck* for appellant (defendant).

G. F. McMaster for respondent (plaintiff).

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

RITCHIE J. now (December 15, 1955) delivered the following judgment:

This is an appeal from an order (1) made on March 28, 1955 by Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, granting the respondent leave to amend the style of cause herein by deleting the word "Coast" from the name of the plaintiff.

(1) [1955] Ex. C.R. 142.

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The action was commenced in the British Columbia Admiralty District of this court by a writ of summons issued and filed as of January 27, 1955 in the name of Pacific "Coast" Lime Company Limited as plaintiff against Vancouver Tug Boat Company Limited as defendant. The endorsement on the writ reads:

> *The Plaintiff* is the holder in due course of Bill of Lading No. 1, dated at Blubber Bay, in the Province of British Columbia, the 1st day of February, 1954, for the carriage by sea from Blubber Bay in the Province aforesaid to Seattle, in the State of Washington, one of the states of the United States of America, in a barge of the Defendant 1,050 tons of bulk limestone fines, also known as lime rock, and claims from the Defendant damages for breach of the said contract.

When setting out the style of cause in the statement of claim, which was filed on January 31, 1955, the word "Coast" was included in the name of the plaintiff.

The plaintiff is described in the statement of claim as a shipping company, duly incorporated under the laws of the province of British Columbia, having its registered office at 744 West Hastings Street, Vancouver.

The statement of claim alleges that in purported performance of a contract to carry limestone from Blubber Bay to Seattle the defendant supplied their barge *Straits No. 3* in tow of the Motor vessel *La Garde* and that in consequence of the two vessels being unseaworthy and unfit for the performance of the contract the barge, when off Point No Point in the state of Washington at or about 1.45 o'clock a.m. on February 3, 1954, capsized and the cargo was lost.

Both the writ of summons and the statement of claim were served on the respondent on February 10, 1955. An appearance was entered on behalf of the respondent on February 17, 1955. No statement of defence has been delivered.

On March 16, 1955 the respondent's solicitors gave notice of application for an order granting leave to amend the style of cause by deleting the word "Coast" from the name of the plaintiff as being a misnomer of the respondent. In support of the application to amend, there were read two affidavits of Cecil David Simon sworn March 16, 1955 and March 21, 1955 respectively.

In his first affidavit Mr. Simon, who is associated in the practice of law with the solicitors for the respondent, states that, pursuant to instructions received by him, he caused

the writ of summons to issue herein and that by reason of a clerical error the word "Coast" was included in the name of the plaintiff in both the writ of summons and the statement of claim. Mr. Simon further states he enquired at the office of the Registrar of Companies of British Columbia and was informed there is no company named "Pacific Coast Lime Company Limited".

In his second affidavit Mr. Simon swears that on March 18, 1955 he attended at 744 West Hastings Street in Vancouver and found the Pacific Lime Company Limited listed on the directory in the hallway as having its office in suite 602 at that address and also observed the full name of the company and the words "registered office" on the door of the said suite. Mr. Simon further deposes that on February 21, 1955 he telephoned to the office of the Registrar of Companies at Victoria, B.C. and was informed Pacific Lime Company Limited was on January 27, 1955, and still is, in good standing.

In opposition to the motion there was read the affidavit of William Donald Campbell Tuck, sworn to on March 18, 1955. Mr. Tuck, who is associated in the practice of law with the solicitors for the appellant, in his affidavit states, *inter alia*:

2. THAT this action arises out of a claim for loss of a cargo of lime rock while being carried from Blubber Bay, B.C. to Seattle, Washington, on board a scow in tow of the Tug *M/V LA GARDE* owned by the Defendant.

3. THAT I am informed by Captain Arthur Gallant, Master of the said Tug *LA GARDE* and verily believe, that the said goods were lost as a result of the said Scow capsizing on the 3rd day of February, 1954 and further, that the said goods should and would have been delivered at Seattle, Washington, on the 3rd day of February, 1954, if the said accident had not occurred.

4. THAT I am informed by J. A. Lindsay, Vice President of the Defendant Company and verily believe, that the said goods were carried pursuant to a contract which incorporated the provisions of the Water Carriage of Goods Act, R.S.C. 1936, Cap. 49.

5. That Article III, Rule VI of the Schedule to the said Act provides inter alia, as follows:

> In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

6. THAT the statutory period of one year from the date when the said goods should have been delivered expired on February 3rd, 1955.

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7. THAT I am informed by the Registrar of Companies of the Province of British Columbia and verily believe that as of the date of the commencement of this action, namely, January 27th, 1955, there was not, nor is there now any company in existence in the Province of British Columbia named "Pacific Coast Lime Company Limited".

8. THAT I am advised by Counsel and verily believe that if the Plaintiff's application launched the 16th day of March, 1955, to amend the style of cause herein by substituting or adding a new plaintiff be granted, the Defendant herein will be prejudiced in that it will be deprived of a statutory defence pursuant to Article III, Rule VI of the Schedule to the Water Carriage of Goods Act, R.S.C. 1936, Cap. 49, set forth in paragraph 5 hereof.

The learned Deputy Judge in Admiralty granted the motion, without costs to either party.

In support of the appeal it was submitted:

1. That the writ of summons and statement of claim were a nullity and so incapable of amendment.
2. That the motion made by the respondent was really to substitute a new plaintiff because no such company as Pacific Coast Lime Company Limited was in existence.
3. That if the learned District Judge in Admiralty had authority to deal with the motion he should not have permitted an amendment that deprived the appellant of its defence under the Statute of Limitations.
4. That if the learned District Judge in Admiralty was correct in permitting the amendment he should have ordered the respondent to pay the costs of the application.

Numbers 9 and 73 of The Admiralty General Rules and Orders are

9. The Judge may allow the plaintiff to amend the writ of summons and the indorsements thereon in such manner and on such terms as to the Judge shall seem fit.

73. Any pleading may at any time be amended, either by consent of the parties, or by order of the Judge.

Numerous authorities, none of them directly in point, were cited by counsel.

Clay v. *Oxford* (1) is a case in which the Court of Exchequer decided a writ issued in the name of John Clay as plaintiff after his death could not be amended by substituting the names of his personal representatives.

(1) (1866) L.R. 2 Ex. 54.

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In *Hilton* v. *Sutton Steam Laundry* (1) an action had been instituted by a widow as administratrix of the estate of her husband. Letters of administration did not issue until eight months after the writ had been issued. The Court of Appeal refused to permit the action to proceed in the name of the plaintiff personally rather than in a representative capacity. At page 428 Lord Greene, M. R. said:

> It is very well settled that the court does not allow amendments where the effect of doing so would be to deprive a defendant of any defence open to him under a statutory limitation, and that will be the very effect of allowing this amendment if the principles to which I have referred, laid down by this court in *Ingall* v. *Moran*, [1944] 1 K.B. 160; [1944] 1 All E.R. 97; 113 L.J.K.B. 298; 170 L.T. 57, are applicable to the case. There is only one ground of distinction which has been suggested to us as differentiating this case from that. It is pointed out correctly that, in *Ingall* v. *Moran*, [1944] 1 K.B. 160; [1944] 1 All E.R. 97; 113 L.J.K.B. 298; 170 L.T. 57, the only claim involved, and the only claim that could be brought, was a claim by the personal representative of the deceased, because the benefit of the claim, if it was made good, would enure to the benefit of the estate. It is then pointed out that the position here is now different; that there is no difference of substance between a claim under the Fatal Accidents Acts by a personal representative and a claim by a dependant in his or her personal capacity. In either case, it is said, the cause of action is precisely the same, although the statutes enable two different classes of persons to sue; the beneficiaries of the judgment, if obtained would be the same; the estate of the deceased is not concerned in the matter, and the personal representative was only brought in as the person to sue under the original Act as a matter of convenience and not as a matter of substance.
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> I should not be adverse to discovering any proper distinction which would enable this unfortunate slip to be corrected. Apart from the fact that the solicitors for the respondents in fairness pointed out the difficulty, there appear to be no merits on their side. But the statutory limitation is not concerned with merits. Once the axe falls it falls, and a defendant who is fortunate enough to have acquired the benefit of the statutory limitation is entitled to insist upon his strict rights. He is similarly entitled to insist upon the strict application of the rule that the court will not deprive him of those rights by allowing amendments in pleadings, and so forth. In this case it seems to me that to allow this amendment would be to deprive the respondents of the benefit of sect. 3 of the 1846 Act, by setting the action on its feet again and, in effect validating *ab initio* the original representative writ. The distinction suggested between this case and *Ingall* v. *Moran*, [1944] 1 K.B. 160; [1944] 1 All E.R. 97; 113 L.J.K.B. 298; 170 L.T. 57, is one which, in my opinion, does not produce the result suggested. It is perfectly true that the result is the same whether an action under the Acts is brought by the personal representative or by the dependants. It does not, however, alter the fact that the action, looked at technically, is an action in different capacities, and the capacity in which it is brought must, under R.S.C., Ord. 3, r. 4, be stated in the indorsement on the writ.

(1) [1945] 2 All E.R. 425.

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If that was done in this case, the appellant bound herself to an action in a representative capacity which she did not possess, and, unfortunately, she must take the consequences.

Hudson v. *Fernyhough* (1), a Queen's Bench Division case decided by Lord Coleridge, C.J. and Mathew, J. in 1889, is an instance where the court refused to approve an amendment which in effect took away a legal right which already had accrued to the defendant, but the circumstances were quite different from those which apply to this appeal. The assignee of a debt had brought an action without giving notice of the assignment to the defendant. The plaintiff then applied to add the assignor as a plaintiff. Between the issuing of the writ and the application the Statute of Limitations had barred the remedy. The judgment of Lord Coleridge is short:

> Lord Coleridge, C.J.—As a general rule, the Statute of Limitations is not a plea to be encouraged; but, at the same time, it seems to me that it would be an indefensible practice to take away from a party to a suit a legal right which has already accrued to him by virtue of that statute. In the case that has been cited by the learned counsel for the plaintiff, the matter turned mainly upon a question of costs, for the payment of which the party seeking the amendment was allowed, and both parties were left in precisely the same position after it as they would have been in if no amendment had been rendered necessary by the mistake or slip that had been made. Such cases, however, do not take away a defence that has already accrued, or change the substantial rights of a party to the action. I think, therefore, that this amendment ought not to have been made, and that the defendant's appeal from the learned judge's order should be allowed.

W. Hill & Son v. *Tannerhill* (2) deals with the improper use of a firm name. W. Hill, an individual trading alone and without partners as "W. Hill & Son", issued a writ in the firm name. A rule of court provided that a writ in a firm name could be issued only by two or more persons carrying on business as the firm. The Court of Appeal upheld an order substituting as plaintiff "Walter Hill trading as W. Hill & Son". The order was made after the expiry of the statutory period within which the action could be brought. Scott, L. J. said at page 473:

> Walter Hill had no right to issue a writ in the name of "W. Hill & Son," as if he was issuing a writ in the name of himself and a son whose name he did not give, when, in fact, he had no partner, but traded by himself, for Or. 48A, r. I, does not allow that to be done. A person carrying on business in a firm name by himself may be sued under Or. 48A, r. II, in that name, but that has nothing to do with this case. Mr. Lynskey,

(1) 61 L.T.R. 722. (2) [1944] K.B. 472.

for the defendant, has submitted that, having regard to the rules, the writ as issued in the name of W. Hill & Son ought to have been treated as a nullity and as not disclosing any cause of action because the real plaintiff was not described. At first sight that seemed a good basis for invoking the principle that an amendment in an action will not be allowed after the defendant has become entitled, under any statute of limitations, to a statutory defence to the claim. Mr. Lynskey relied on the well-known decision of this court in *Mabro* v. *Eagle Star, etc., Insurance Co., Ld.*, [1932] 1 K.B. 485, of which the headnote is: "The court will not, under Or. 16, r. 2, allow a person to be added as plaintiff to an action if thereby the defence of the Statute of Limitations would be defeated." Scrutton L.J. said: "The application now before us is that a person named Zok should be added as plaintiff, as being the administrator of his father, who died in March, 1927, that is, two years after the action had been commenced by the Mabros, and who, it is said, was the person interested in the insurance." After referring to Or. 16, r. 2, the lord justice goes on: "In my experience the court has always refused to allow a party or a cause of action to be added where, if it were allowed, the defence of the Statute of Limitations would be defeated. The court has never treated it as just to deprive a defendant of a legal defence." That is a very well-known principle, but it depends on the fact that the amendment turns an action which has become ineffective by reason of the passage of time into an effective action again by the addition of a new plaintiff after the date when the limitation period has elapsed.

And at page 474:

. . . When the writ was issued in the name of "W. Hill & Son" there was an individual person in fact interested in the claim. His description as "W. Hill & Son" was a mistake by a clerk. The question is whether that mistake is more than a mistake in form. In my opinion, it is not. Under Or. 48A, r. I, one person, even if he is carrying on business in a firm name, cannot issue a writ in the firm name, but if a real person does issue the writ in his own name, say, of "W. Hill," the fact that he adds the two additional words "and Son" does not prevent his still being the real plaintiff in the action.

It is not difficult to distinguish the circumstances of this appeal from the line of cases dealing with actions instituted in the name of a dead man, instituted in the name of a personal representative before being properly constituted as such, instituted in a firm name contrary to the provisions of rules of court, or instituted in the name of the wrong plaintiff. Here we have the simple case of an existing corporation instructing that suit be instituted against the appellant for damage occasioned by breach of a contract entered into between it and the appellant. In carrying out its instructions a slip was made in the office of the solicitors for the corporation that had instructed suit be instituted and an extra word was included in its name in setting out the cause of action.

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The respondent asked that the error in its name be corrected, not, as the appellant contends, that a new plaintiff be added or substituted. Correction of such an error does not offend against any of the decisions cited.

The endorsement on the writ of summons mentions a contract entered into between the plaintiff and defendant on February 1, 1954 for the carriage of limestone from Blubber Bay to Seattle. The statement of claim gives the correct address of the plaintiff and refers to the capsizing of the appellant's barge *Straits No. 3* on February 3, 1954 with the resulting loss of a cargo owned by the respondent.

A defendant served with a writ is entitled to know what he is being sued for and by whom. The endorsement on the writ and the contents of the statement of claim gave the appellant no reason for doubt in respect to what it was being sued for or by whom. The appellant was well aware of the existence of the respondent. The appellant was in no way misled by the inclusion of the word "Coast" in the name of the plaintiff set out on the writ of summons and statement of claim served on it on February 10, 1954.

The *Shorter Oxford English Dictionary* defines "misnomer" as "A mistake in naming a person or place." Inclusion of the word "Coast" in the name of the respondent was a misnomer. A mistake in form only. The misnomer in the name of the plaintiff has been corrected.

The error in the respondent's name did not make either the writ of summons or the statement of claim a nullity. Correction of the error did not, as the appellant contends, have the effect of substituting a new plaintiff. The amendment did not deprive the appellant of any right that had accrued to him.

The learned District Judge in Admiralty was correct in granting the application to amend. I am not disposed to interfere with the exercise of his discretion in disposing of the matter of costs on the application to amend.

The appeal will be dismissed with costs, to be taxed.

Judgment accordingly.