ON APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT.

BETWEEN

THE RICHELIEU AND ONTARIO NAVIGATION COMPANY (PLAINTIFFS)........................ APPELLANTS;

1909
Feb. 2

AND

THE STEAMSHIP *IMPERIAL* AND OTHERS (DEFENDANTS)........ RESPONDENTS.

*Shipping—Collision—Action in rem against ship whose owners are in liquidation—Jurisdiction of Exchequer Court — Winding-Up Act—R. S. 1906, c. 144, secs. 22 and 23—Leave to bring action—Practice—"Sequestration."*

*Held*, (reversing the judgment of the Deputy Local Judge) that the jurisdiction of the Exchequer Court in respect of proceedings *in rem* for collision against a ship (whose owners are at the time in liquidation) is not taken away by the provisions of secs. 22 and 23 of the Winding-Up Act (R. S. 1906, c. 144); and where leave is obtained from the proper forum to bring an action, as provided by sec. 22 of the Winding-Up Act, the Exchequer Court is competent to entertain the same.

*Semble*, that the word "sequestration" as used in sec. 23 of the Winding-Up Act means a sequestration to recover payment of a judgment already obtained.

*In re Australian Direct Steam Navigation Co.* (L. R. 20 Eq. 325) referred to.

THIS was an appeal from two judgments of the Deputy Local Judge in Admiralty for the District of Quebec.

The nature of the judgments appealed from, and the findings of the learned trial judge, are stated in the reasons for judgment on appeal.

January 9th, 1909.

The appeal was now argued.

*A. R. Angers, K.C.*, for the appellants;

*C. A. Pope* for the respondent.

1909

THE RICHELIEU AND ONTARIO NAVIGATION Co. v. THE STEAMSHIP IMPERIAL.

Argument of Counsel.

Mr. *Angers* contended that inasmuch as the leave of the Superior Court, which was seized of the winding-up proceedings against the owners of the ship, was obtained to bring the action *in rem* in the Exchequer Court, there was no question as to the competency of the proceedings. (Cites *Marsden on Collisions* (1). By *The Admiralty Act*, 1891, sec. 4, the Exchequer Court is given jurisdiction in all cases of "contract and tort and proceedings *in rem* and *in personam* arising out of or connected with navigation, shipping, trade or commerce," &c., which may be had or enforced in any Colonial Court of Admiralty under the *Colonial Courts of Admiralty Act* (Imp.). This jurisdiction is as wide as the Admiralty Court's in England with reference to actions *in rem* for collision. It could never have been the intention of Parliament to oust the jurisdiction of a federal court, with all its convenient procedure and process, in favour of a provincial court which was never contemplated to exercise admiralty jurisdiction in the ordinary way. The learned trial judge has erred.

Mr. *Pope* argued that the Winding-up Court had no power to grant the order for leave to proceed against the ship in the Exchequer Court. The Superior Court, under all the English authorities, is the proper court to entertain the suit, and it cannot divest itself of its jurisdiction. It cannot delegate what the statute has expressly given it for a special purpose. Moreover, sec. 23 of the Winding-up Act expressly prohibits sequestration of property within the control of the Winding-up Court. There is no technical meaning to be given to "sequestration" as used in the Act. It simply means the detention of property by a court of justice for the purpose of answering a demand that is made. That is exactly what the arrest of a ship is, and as I read sec. 163 of the Imperial Companies Act, it is void in the case of a creditor

(1) 5th ed. pp. 74, 78.

who can prove under the Winding-up—that is when the sequestration takes place after the Winding-up order is made. (*In re Australian Direct Steam Navigation Company*, (1). An arrest by the process of another court cuts out the jurisdiction over the property of the Winding-up Court. The Superior Court has jurisdiction to grant the full remedy open to the plaintiffs in respect of the collision claim; and where the *res* and the parties are before the court the claim must be prosecuted there. *In re Rio Grande Steamship Company* (2).

I submit that the present proceedings are vexatious and unnecessary in that the plaintiffs could and should enforce their lien before the Superior Court.

Mr. *Angers*, in reply, contended that the Superior Court had not the necessary procedure and machinery to try out an admiralty claim for collision; for instance, the court has no power to call in the assistance of a nautical assessor. Again, there is no provision in the procedure of the Superior Court for filing a preliminary act, a matter so essential to obtaining the truth and the whole truth in respect to a collision claim. Nor is there any process for the arrest of the ship in the Superior Court. The *Rio Grande Steamship Company's Case*, cited by counsel for the ship, is not in point, because there the lien was liquidated, and here our damages are not liquidated.

CASSELS, J., now (February 2nd, 1909), delivered judgment.

These appeals are from judgments of Mr. Justice Dunlop, Deputy Local Judge for the Quebec Admiralty District at Montreal, bearing date respectively, the 14th December, 1908 and the 31st December, 1908.

The action is one for damages arising out of a collision in the River St. Lawrence, near Varennes, on the 5th

(1) L. R. 20 Eq. 325. (2) L. R. 5 Ch. D., 282.

1909

THE RICHELIEU AND ONTARIO NAVIGATION Co. *v.* THE STEAMSHIP IMPERIAL.

Reasons for Judgment.

day of July, 1908. The learned trial Judge states the allegations of fact as follows:—

"On the 5th July, 1908, plaintiffs allege that the "steamer *Imperial*, being improperly navigated, came "into collision with the steamboat *Quebec* in the River "St. Lawrence, near Varennes, causing the *Quebec* con-"siderable damage and disabling her; that the *Quebec* "came to anchor, and was subsequently towed up to "Montreal for repairs; that the St. Lawrence Navigation "Co., the owners of the steamboat *Imperial* are in liquida-"tion under the *Winding-Up Act;* that in compliance "with chapter 144, section 22, R. S. C. 1906, the Riche-"lieu and Ontario Navigation Co., the owners of the "*Quebec*, the vessel damaged, applied to the Winding-up "Court, the powers and jurisdiction of which are vested "in the Superior Court, for leave to take an action *in* "*rem* in admiralty against the steamer *Imperial*."

Leave was granted, and admiralty proceedings against the S. S. *Imperial* were instituted. The statement of claim was filed on the 19th October, 1908, and the statement in defence on the 7th November, 1908. By the 14th paragraph of the statement in defence the respondents alleged that the action was not within the jurisdiction of the Court in view of Cap. 144 R. S. 1906 (*The Winding-Up Act*). To this paragraph of the defence the plaintiffs demurred.

The plaintiffs moved to have the questions of law raised by paragraph 14 of the defence and by the plaintiffs' demurrer, determined, and they were fully argued before the learned trial Judge, who, after carefully considering the questions before him, came to the conclusion that the defence raised by paragraph 14 was well founded, and on the 14th December, 1908, pronounced judgment in favour of the defendants.

The finding of the learned Judge is that the Exchequer Court on its admiralty side has no jurisdiction in respect

of this claim by virtue of the provisions of the *Winding-Up Act* (R. S. 1906, ch. 144).

The logical conclusion from this finding that the Court is without jurisdiction followed, and the action was dismissed by judgment pronounced on the 31st December, 1908. The appeals heard before me are from these two judgments. They were fully and ably argued by Mr. Angers, K.C. for the appellants, and Mr. Pope for the respondents.

I have considered the case and I am unable to concur in the decision of the learned trial Judge. The sole question is whether or not the admiralty jurisdiction of the Exchequer Court in respect of such a matter has been taken away by virtue of sections 22 and 23 of the *Winding-Up Act*.

After hearing counsel for both parties, and considering the facts set out in the various affidavits filed, the Judge of the Superior Court of Montreal, being the Judge having jurisdiction in the Winding-up proceedings, made an order giving leave to the plaintiffs to institute proceedings in the Exchequer Court in Admiralty. No appeal was taken from the judgment, and had the order been appealed from it would not likely have been varied, as it was a question of discretion. (*Thames Plate Glass Co* v. *Land and Sea Telegraph Co.* (1). I do not think this order would confer jurisdiction if such jurisdiction had been taken away by the statute; but it has a strong bearing on the question to be considered. The provisions of section 22 of the *Winding-Up Act* (R.S. 1906 ch. 144) read as follows:—

"After the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the Court and subject to such terms as the Court imposes."

The provisions of section 23 are as follows :—

(1) L. R. 6 Ch. 643.

1909

THE RICHELIEU AND ONTARIO NAVIGATION CO. v. THE STEAMSHIP IMPERIAL.

Reasons for Judgment.

" Every attachment, sequestration, distress or execution, put in force against the estate or effects of the company after the making of the winding-up order shall be void ".

Practically similar provisions are to be found in sections 87 and 163 of the *Imperial Companies Act* 1862 (25-26 Vict. chap. 89).

Section 87 :—

" When an order has been made winding up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court and subject to such terms as the Court may impose."

Section 163 :—

" Where any company is being wound up by the Court, or subject to the supervision of the Court, any attachment, sequestration, distress, or execution, put in force against the estate, or effects of the company, after the commencement of the winding-up shall be void to all intents ".

Buckley, in his work on the *Companies Act*, 8th ed. at page 274, states as follows :—

" By section 163, where a company is being wound up by or under the supervision of the court, any attachment, sequestration, distress or execution, put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents. But it was decided in 1864 (1) that section 163 is to be read with and is controlled by the 85th and 87th sections, and that the joint effect of these sections is to put the creditor who desires to proceed to execution after the winding-up order to the necessity of coming to the Court and asking for leave to so proceed, and whether he shall be allowed to proceed or not is a question for the discretion of the Court. It is difficult no doubt to see why the clear and precise provi-

(1) Exhall Mining Co. 4 De G. J. & S. 377.

sions of section 163 should be read as if a distress were a 'proceeding' within section 87, but the Court is now bound by the decision and the many subsequent cases which have followed it".

This statement of the law is amply supported by the authorities.

The first decision was that of *Exhall Mining Co.*, in 1864, reported in 4 De G. J. & S. 377. Then there is the case of *Railway Plant and Steel Co., In re Taylor* (1) in which the judgment was delivered by Hall, V.C. After this decision follows *Lancashire Cotton Spinning Co. Ex. p. Carnelly* (2). This was a judgment of Lord Justices Cotton, Lindley and Bowen, given in 1887. Then comes the case of *Higginshaw Mills* v. *Spinning Co.* (3), that being a decision of Lord Justices Lindley and Lopes in 1896. And see also *Lindley on the Law of Companies* (4). To the like effect will be found a series of decisions in the Ontario Courts: See *In re Lake Superior Native Copper Co.* (5). In *Parker and Clark's Company Law*, (1909) commencing at page 388, numerous authorities are cited. But it will be seen that the judgment of Osler, J. at page 435 of 23 Ont. A. R., in the case of *Shaver* v. *Cotton* is on a different question, namely, the right to proceed against contributories, the Canadian statute not being similar to the English Act in this respect.

The finding of the learned trial Judge and the argument of the respondents are mainly based on two authorities, namely, *In re Australian Direct Steam Navigation Co.* (6) and *The Rio Grande Steamship Co.* (7).

On the question of the jurisdiction of the Exchequer Court on its Admiralty side being ousted, the only matter for consideration, these authorities support the appellants'

(1) L. R. 8 Ch. D. 189.
(2) 35 Ch. D. 656.
(3) (1896) 2 Ch. 544.
(4) 6th ed. at page 907.
(5) 9 Ont. R. 277, at page 283.
(6) L. R. 20 Eq. 325.
(7) L. R. 5 Ch. D. 282.

1909
THE RICHELIEU AND ONTARIO NAVIGATION CO. v. THE STEAMSHIP IMPERIAL.
Reasons for Judgment

contention. The head-note to *In re Australian Direct Steam Navigation Co.*, is as follows:—

"The proper mode of enforcing a maritime lien on a vessel belonging to a company which has been ordered to be wound up is by a proceeding in the winding-up and not by a proceeding *in rem* in the Admiralty Court. The arrest of a vessel by the Admiralty Court is a 'sequestration' within the meaning of the *Companies Act*, 1862, section 163."

Were it not for this judgment of a very able Judge, which seems to have been accepted, I would have thought that "sequestration" as used in section 23 of the Dominion Winding-Up Act, meant a sequestration to recover payment in respect of a judgment already obtained. I have already quoted the provisions of this section. It would have occurred to me that what is contemplated by this section is to prevent judgment creditors who have not already obtained liens, from getting higher rights after the winding-up order had been made.

The result of the proceeding in the present action may be a dismissal of the action. However, in the case of *Re Australian Direct Steam Navigation Co.* (*supra*) no leave had been obtained by the plaintiff. Besides in that case the learned Master of the Rolls only stayed the proceedings upon a sum being carried to a separate account to answer the damages, an order which would not have been made had there been no jurisdiction. The Master of the Rolls evidently treated the case before him as an application for leave to proceed, and refused the leave on security being given.

In the *Rio Grande Steamship Company's Case* (*supra*) the jurisdiction is expressly upheld by the Court of Appeal. An order had been made on the 1st of October, 1875, giving leave to proceed in Admiralty. At page 285, James, L. J. says:—

"An order was made accordingly on the 1st October 1875, and notwithstanding what is stated to have been said by the Vice-Chancellor as to that order, I am of opinion that it was the right order to be made unless the company was able and willing to give the applicant sufficient security for the amount of his debt, and costs, charges and expenses."

I think that the judgments of the 14th and 31st December, 1908 should be reversed, and that the application of the plaintiffs (appellants) to reject paragraph 14 of the defence, should be granted; and that the plaintiffs' action be declared to be within the jurisdiction of the Local Judge in Admiralty for the Admiralty District of Quebec.

I also think that the case should be sent back to the Deputy Local Judge at Montreal for trial before him. The costs of this appeal, and the costs before the Deputy Local Judge to be paid by the defendants (respondents).

*Judgment accordingty.*

Solicitors for appellants: *Angers, Delorimier & Godin.*

Solicitors for respondent: *Lafleur, Macdougall, MacFarlane & Pope.*