ADAM B. MACKAY.....CLAIMANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1927
Dec. 12, 13 & 14.

1928
April 3 & 4.
May 15.

Requisition—Crown—Value of ship—Loss during requisition—Hire—Right to sue alone without co-owners—Rule 9, Order 16 (Eng.)

The S. was requisitioned by the Canadian Government in 1918. In 1924 the claimant was notified of the release of the vessel. At that time she was lying partly submerged, at Kingston, a derelict hulk of no value, and claimant refused to take delivery thereof.

Held, on the facts, that the question of hire disappeared, and that the controversy resumed itself into a question of compensation for the value of the vessel so appropriated, as at the date of the requisition thereof, and not for the profits that could have been made out of the vessel during the period of requisition.

2. That there being no special rule in this Court dealing with the joinder of parties, the practice and procedure of the High Court of Justice, in England, obtains, and the claimant herein was entitled to bring the present action in his own name alone, without joining his co-owners or their assignees. That misjoinder or nonjoinder cannot now defeat a claim.

[As to the right to recover, the Court referred to and followed the judgment in *Gaston-Williams and Wigmore Ltd., et al* v. *The King* (1922) 21 Ex. C.R. 370.]

REFERENCE by the Crown under the provisions of the War Measures Act, 1914.

The action was tried before the Honourable Mr. Justice Audette at Ottawa.

C. C. Robinson, K.C., and *C. V. Langs* for claimant.

O. M. Biggar, K.C., for respondent.

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The facts are stated in the reasons for judgment.

AUDETTE J., now (May 15), 1928, delivered judgment.

This is a Reference, by the Crown, under the provisions of sec. 7 of The War Measures Act, 1914, of a claim

for compensation alleged to be due by reason of the alleged appropriation by His Majesty of the steamship *Sarnor*.

This vessel was duly requisitioned by the Canadian Government on the 25th April, 1918, and on the 29th September, 1924, the claimant was notified by the respondent of the release or delivery of the same; but as at that time the vessel was lying, in the port of Kingston, partly submerged in the inner harbour, a derelict hulk and of no value, the claimant refused to accept delivery thereof. The respondent, by paragraph 4 of its statement in defence, admits that the vessel was at that time a derelict hulk of no value and that the claimant refused delivery of the same and further concurs in the claimant's refusal and accordingly withdraws the notice aforesaid.

In view of these facts, the questions of hire disappears, and the controversy resumes itself into a question of compensation for the value of the vessel so appropriated by the respondent at the date of the requisition, namely the 25th of April, 1918, and not, as was contended at trial what profits the claimant could have made out of the vessel during the period of the requisition. The alea surrounding the question of profit is too uncertain. The vessel in the hands of one person might prove profitable while in the hands of another person might result in insolvency.

However, there are some preliminary questions, raised by the Crown, which should be first dealt with as they both go to the jurisdiction and to the right of instituting the present action.

Counsel for the defence stated he was not raising the point as to whether the right to requisition resides in the Imperial or in the Canadian Government; but contends that the claimant has no right to recover having regard to the absence of statutory authority. Mr. Keith. Responsible Government in the Dominions. Vol. 1, p. 95.

I had occasion to consider this point of law in the case of *Gaston, Williams & Wigmore, Ltd. et al* v. *The King* (1), and for the reasons therein set forth and which I deem unnecessary to repeat here, I find that the action was properly instituted in that respect, coming, as it does, within the ambit of sec. 7 of The War Measures Act, 1914, and that this Court has jurisdiction to hear, determine and adjudicate upon the same and that the Crown, in the rights of the Canadian Government, is the party that requisitioned in its own name and behalf the vessel in question here. See also *The King* v. *Halifax Graving Dock Co. Ltd.* (2).

The genius of the English common law is that no property should be taken from the subject by the sovereign power without proper compensation. See sec. 18, Exchequer Court Act, 1927, R.S., ch. 34. *DeKeyser's Royal Hotel Ltd.* v. *The King* (3); *Newcastle Breweries Ltd.* v. *The King* (4); and per *Lord Atkinson in Central Control Board* v. *Cannon Brewery Co. Ltd.* (5). And, as said in *The Aquitania* (6), the aim of the court is to work out principles which make for justice and seek to avoid the turning away of a *bona fide* suitor without remedy. See also Mr. Keith, Responsible Government in the Dominions, vol. 1, p. 531.

The second preliminary question raised by the respondent is that the claimant

is not entitled to bring this action in his own name alone without joining his co-owners or their assignees.

At the date of the Requisition the claimant Mackay was the sole owner of the *Sarnor*, which was under his full control and he was further entitled to the revenues derived from her, as established by a judgment of the Ontario Courts; but both Bonham and Johnson had, under the agreement of the 1st June, 1916 (exhibit 2), a floating right to an interest in the vessel provided they paid to Mackay the amounts therein mentioned. After protracted litigation between them, these parties—both Bonham and John-

(1) (1922) 21 Ex. C.R. 370.
(2) (1920) 20 Ex. C.R. 44.
(3) (1919) 2 Ch. D. 197 at p. 226.
(4) (1920) 1 K.B. 854.
(5) (1919) A.C. 744 at p. 752.
(6) (1920) 270 Fed. R. 239 at p. 240.

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son—made, in June or July 1922, the payments in question and became thereby interested in the *Sarnor;* and when the present action was instituted in 1926 the position was as above defined and hence the contention of the respondent that all parties having an interest in the vessel should have been made parties hereto.

For better understanding it is perhaps well to mention, *en passant,* that both Bonham and Johnson, after the institution of the present action by Mackay, made application before me to be added as claimants with Mackay; but, as the action was against the Crown, I could not allow them to sue the Crown without a fiat and refused their application. They then made an application to the Crown for a Reference of their claim, and this claim of Bonham and Johnson in respect of the *Sarnor* was duly referred to this Court under a separate reference standing as a case by itself. As all the owners were then before the Court, I suggested, and at my request, the claimants Bonham and Johnson apparently made a second application to be added as parties claimants in the Mackay case. However, this application was strongly and bitterly opposed, both by the Crown, who saw the Court in acquiescing in this application as invading the right of the Minister to refer cases in the manner he saw fit,—and by the claimant Mackay who foresaw as a result, the Crown adducing evidence detrimental to him if these two parties were added claimants.

In view of such strong opposition by all parties in this case to the adding of such parties at this stage, I will allow the matter to stand until after the compensation has been fixed and the time of the distribution of the proceeds has arrived, but I will now decide whether the present action was properly instituted and if Mackay had the right to sue alone. The case of Bonham and Johnson has been submitted to the Court on the evidence adduced in the present case as to the amount of compensation due on the requisition of the *Sarnor.*

The plea in abatement,—such as the one now set up by part 5 of the defence—has been abolished both in England and in this Court. Our Rule 91 reads as follows: "No plea or defence shall be pleaded in abatement. The question

should have been dealt with on motion. *Werderman* v. *Société Générale d'Electricité* (1).

There is no special rule in this Court dealing with this question of joinder of parties; but both sec. 37 of the Exchequer Court Act and Rule 1 of the General Rules and Orders of this Court provide that in such cases the practice and procedure of His Majesty's High Court of Justice in England shall obtain.

Rule 9, of Order 16, found in The Annual Practice, 1926, p. 233, provides:—

> 9. Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued or may, * * * * *

Therefore, misjoinder or nonjoinder cannot now defeat a claim. Cases are cited *ad infinitum* in support of that view in the Annual Practice, and I will limit my citations to the additional cases cited by the claimant, namely, *Sheehan* v. *Great Eastern Ry. Co.* (2); *Roberts* v. *Holland* (3); and more especially *DeHart* v. *Stevenson et al* (4), followed in *Janson* v. *Property Insurance Co. Ltd.* (5).

Turning now to the questions of the determination of the value of the *Sarnor,* at the date of the Requisition, on the 25th April, 1918, the evidence discloses that the *Sarnor* was a wooden steamer built in 1888 and rebuilt in 1896 (that is extensive repairs where renewals were made, probably to maintain her class), in the United States, gross tonnage 1,319.23,—net 1,151.74 and dead 1,978.84; length 227 feet, 36 feet beam, and after being imported into Canada in 1912 at a value of $3,000 for duty, was engaged in the Lake trade chiefly carrying coal, or what is called coarse freight. She was a freighter of coarse cargo.

She was repaired in Canada in 1914 when witness Welch, managed of the Kingston Shipbuilding Co. said it was a shame at that time to lead any man into such a hole as to spending money upon her,—she was not worth repairing. He further said she was in a deplorable condition in 1917 (p. 99), her stern was down 2 feet on the port quarter and twisted. He refused to dock her, unless they put up a

(1) (1881-82) 19 Ch. D. 246.
(2) (1880) 16 Ch. D. 59 at p. 63.
(3) (1893) 1 Q.B.D. 665.
(4) (1875-6) 1 Q.B.D. 313; 45 L.J., Q.B. 575.
(5) (1913) 19 Conn. Cas. 36 (England).

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$60,000 bond. The whole of the beams and cross fastenings were giving away and she was falling away. The vessel was never properly repaired after 1916. In 1918 she had a hog of about 40 inches. Witness Chayer who called her a "cemetery" in 1918 says she was rotten in 1914. Witness also testified to her poor condition in 1917. Witness Noble said it was impossible to repair a vessel and make her as good as new.

Witness Menard said she was in a remarkable bad shape in 1914, no grip in the wood,—would have to rebuild her from the keel up. It was impossible to make the boiler right, it had to be treated by electric welding. The machinery was very old.

In June, 1917, the American Bureau of Shipping refused to grant the *Sarnor* a class, as shewn by exhibit C1 which reads as follows:

June 26, 1917.

A. B. MACKAY, Esq.,
Hamilton, Ont.

Dear Sir:—

SS. Sarnor

The following is an extract from our inspection of this vessel:

On examination of the above vessel as requested at Welland, Ont., found the condition very poor throughout. The stem post is split and open about 1 inch to 2 inches full length inside; it is covered on the outside by a covering board and can only be seen from the inside. The inside ceiling planks are drawn away from the stem post and several of the timbers are very poor.

Pointers at bow drawn away from fastenings.

Wood Fore & Afters Under windless deck where made fast to stem gone.

Shelf pieces throughout holds all badly broken in way of hatches.

Stanchions and mold beams throughout holds several broken and drawn away from fastenings. Stanchions under boiler centre stanchions very poor. Pointers at stern rotten and inside ceiling around tube several planks very poor and rotten.

Caulking on deck hard and old. Top side planking and side planking to 14 foot watermark poor and very dry and in several places loose.

Bulwarks port side aft broken and rotten in places.

In this condition, we cannot grant this vessel a class. She will have to be extensively repaired before we can pass her. Kindly advise what will be done.

Yours truly,

AMERICAN BUREAU OF SHIPPING,
Great Lakes Dept.
Per Mgr.

I shall not tarry by entering into unnecessary details and going into her condition after the Requisition, and the litigation between the claimant and the Canadian Steamship Co. We find she was seized and sold, under an order of the Admiralty Court, at an auction widely advertised and was bought by claimant Mackay on the 25th of April, 1916, for $6,700 when there were a number of bidders for her. Then in May, June and July, 1916, he spent on her $2,800 in repairs including dry-docking and fitting her out. He operated her, but in November, 1916, the *Sarnor* encountered a gale of wind and put into Erie Harbour and sank at the dock. It appears, says witness Mackay, that the vessel had knocked her stem against the abutment of the Lachine Canal some time prior to that and with this terrific storm it opened the oakums out of the seams and she rested at the bottom. She was pumped and taken to Cleveland for repairs at the cost of $1,658. She was finally laid up at Kingston in December where she was repaired and she stayed there until 1917 when she was operated until 8th August, 1917, when she struck the lock of the Lachine Canal and knocked her stem off, which necessitated repairing, and she then proceeded to Ogdensburg, where she was laid up, and claimant said he then had made up his mind to leave her there until he would have straightened out matters with Bonham and Johnson under their agreement exhibit No. 2. This settlement only took place in June or July, 1922.

It is unnecessary to go through the whole evidence establishing that the vessel was old, in bad condition, had a hog or twist. See Ansted, Dictionary of Sea terms, Vo. Hogging, p. 121

She had become an idle boat at a time when she was not fit to be used without extensive repairs for the reasons above set forth, and as in 1918 all available bottom had to be made use of for State purposes, in view of the World War, she was requisitioned.

On the question of the value and of the condition of that vessel at the date of the Requisition we have, as usual, conflicting evidence and the amount claimed is certainly startling, to say the least. We have fundamentally optimistic valuation by a witness who have never set eyes on the

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Sarnor. His valuation is made at his desk, so to speak, on the Kellock tables, using his knowledge of the shipping condition and arriving at an extravagant and inordinate valuation. This manner of fixing such a value upon a vessel may very well do or be told to the marines; but it will not do before a court anxious to do justice between the parties exacting the best evidence of which the case in its nature is susceptible and declining to take for foundation of a decision a conclusion arrived at on hearsay. The information must be traced to its fountain head. If the best evidence is not given it gives rise to thinking that the party had motives not to produce it. Taylor on Evidence, 10 ed. 303.

We are seeking here the market value of the vessel, not the speculative or theoretical value, but her actual value at the date of the Requisition.

On the question of value proper of the vessel at the date of requisition we have very little fundamental evidence. Practically none on behalf of the Crown; but the only and best evidence on this subject has been given by the claimant himself. Asked (p. 82) what the *Sarnor* was worth in April, 1918, at the time of the Requisition, he said that she was worth in April, 1918, the same as in 1916 when he bought her and paid $6,700. And there was this further question put to him, viz.:

Q. As you go on you say: She was bought by public auction, and I suppose our bid would be $25 more than the next highest bidder and that I presume would be the value of that boat at that date?—A. Yes.

Then further on at p. 83 the further questions were asked and answered, viz.:

Q. Then the action (with respect to the *Neff* continued from that time until early in 1918, when it came on for trial before Mr. Justice Hodgins at Toronto?—A. Yes. The *Neff* never came to Canada and we were not going to sue her in the United States.

Q. You did not get the action on accordingly?—A. No. She only came to Canada because I bought her and brought her here, which was the motive for buying her.

Q. And you remember that in your evidence at the trial on that occasion you said at that time, at the time the services were rendered, the *Sarnor* was worth $11,000 if I could have got it out of her?—A. I said that. That is correct.

Now by way of confirmation of claimant. Mackay's testimony on this statement that the *Sarnor* in April, 1918, was worth what he paid for her in 1916, there is the testimony of witness Barnet speaking as to the general market

price of vessels in 1915 and in 1918. His testimony upon that point is that there was a slight drop in 1918 as compared with the year 1915 and that the peak was in 1920.

Moreover, between April, 1916, when the boat was bought and April, 1918, when she was requisitioned, she met with a number of accidents which, although partially repaired, did not obviously tend to improve the vessel.

Taking all the circumstances of the case into consideration, I have come to the conclusion to fixe the compensation for the *Sarnor* at the sum of $11,000, which is the most the vessel could be worth at the time of the requisition.

Therefore there will be judgment as follows:—

1. The compensation for this requisition vessel is hereby fixed at the sum of $11,000, with interest thereon from the 25th April, 1918, to the date hereof.

2. This compensation money however will only be paid after hearing all parties claiming to be entitled to the same, or any part thereof, and the matter of the distribution of these $11,000 may be brought on before the Court by any of the parties interested making a claim thereto, upon giving notice to all interested parties.

3. The claimant is further entitled to the costs of the action.

Judgment accordingly.