1963
Oct. 4
Dec. 16

ONTARIO ADMIRALTY DISTRICT

BETWEEN:

THE TORONTO HARBOUR COMMISSIONERS

PLAINTIFF;

AND

THE SHIP *ROBERT C. NORTON* and the cargo and freight ex the said Ship, WAREHOUSE METALS LTD. and INDUSTRIAL IRON & MACHINERY CO., LIMITED .....DEFENDANTS;

AND

OGELBAY NORTON COMPANY, owner of the said Ship *ROBERT C. NORTON* .....CROSS-CLAIMANT;

AND

WAREHOUSE METALS LTD. and INDUSTRIAL IRON & MACHINERY CO., LIMITED

CROSS-RESPONDENTS.

Shipping—Practice—Jurisdiction of the Court of Admiralty—The Admiralty Act, R S C. 1952, c. 1, s. 18(2), (3) and Schedule "A"—Damage done by a Ship.

On August 22, 1962, the ship *Robert C. Norton* discharged some 7,000 tons of scrap iron on to Pier 50 owned by the plaintiff Commissioners, and as a result of the loading put on it, a portion of the pier collapsed. The plaintiff sued the ship for damages for negligence and the ship successfully moved to add Warehouse Metals Ltd. and Industrial Iron & Machinery Co. Limited, as parties defendant. The defendant ship then cross-claimed against the two added defendants alleging that the responsibility for placing the cargo where it was put lay on them. The plaintiff brought this motion asking that the added defendants be struck out on the ground that the Court had no jurisdiction to deal with the issues raised between the defendant ship and the added defendants. The ship, as defendant in the original action, also moved for a declaration that the Court was without jurisdiction to hear and determine the matters raised in that action.

Held: That the jurisdiction of the Court over any claim for "damage done by a ship" under s. 18(2) of the *Admiralty Act,* is limited to those cases where the damage was done in the navigation or operation of the vessel as a ship and this does not include damage caused by a tort committed in the handling of the cargo after its unloading.

2. That the jurisdiction of the Court over any claim "relating to the carriage of goods in a ship" under s. 18(3) of the *Admiralty Act,* is not broad enough to include the present case because it would appear to relate to goods landed from rather than carried in a ship.

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3 That the jurisdiction of the Court over any claim "in tort in respect of goods carried in a ship" under s 18(3) of the *Admiralty Act*, is likewise not broad enough to include the present case because it is intended to cover damage received by the goods while they are in the ship resulting from some tortious act of those operating the vessel.

4. That both motions succeed, the cross-respondents are struck out and the main action is dismissed.

MOTIONS for a declaration of the Court with respect to jurisdiction and to strike out added defendants.

The motions were heard by the Honourable Mr. Justice Wells, District Judge in Admiralty for the Ontario Admiralty District at Toronto.

Arthur J. Stone for plaintiff.

James J. Mahoney and *Leo E. Schacter, Q.C.* for defendant.

James A. Bradshaw and *John Elder* for The Ship and its Owners.

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

WELLS D.J.A. now (December 16, 1963) delivered the following judgment:

In this matter there are two motions. The first in point of time is brought by counsel for the ship sued as a defendant in the original action asking for a declaration that the Court is without jurisdiction to hear and determine the questions and claims raised. Slightly later in point of time the plaintiff brought a cross-motion asking that the defendants added by the Surrogate Judge, namely, Warehouse Metals Ltd. and Industrial Iron & Machinery Co., Limited, be struck out on the ground that the Court had no jurisdiction to deal with the issues raised between the defendant ship and these parties. It will be convenient, I think, to deal with the plaintiff's motion first.

The plaintiff's claim in this matter is against the ship alleging that it improperly discharged a cargo of some 7972 tons of billet bloom crops on Pier 50 owned by the plaintiff Commissioners; and that on August 22, 1962, when some 7,000 tons of cargo had been discharged, a portion of the pier collapsed, owing to the load put on it by reason of

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the landing of the scrap iron. It is alleged that the collapse was caused entirely by the negligence of the defendant ship and that it did not take sufficient or any care in its method of unloading the cargo but knew or ought to have known that Pier 50 would not support the weight placed upon it. It is also pleaded that this was done in defiance of a by-law of the plaintiff relative to the landing of the metal in the form of ingots or pigs. Subsequently, the ship moved to add the cross-respondents as parties defendant and they were duly added by an order of the Surrogate Judge. No appeal was taken from that order.

The defendant ship then cross-claimed under the rules of Court against the two added defendants on the basis that the responsibility for placing the cargo where it was put lay on the two added defendants and that it was placed there on their instructions. The plaintiff now moved to strike them out on the ground, as I have already stated, that there is no jurisdiction in the Court to deal with these issues. The jurisdiction of the Court of Admiralty is contained in section 18 of *The Admiralty Act,* R.S.C., 1952, c. 1. By subsection (2) thereof there is imported into the section, section 22 of 49 George V, U.K., being the *Supreme Court of Judicature (Consolidation) Act, 1925.* Section 22 of that statute is to be read into section 18 of *The Admiralty Act, 1934,* pursuant to subsection (2) thereof and the section is set out as Schedule A to *The Admiralty Act, 1934.* Subsection (1)(*a*)(iv) provides for jurisdiction over any claim for "Damage done by a Ship". It is on the basis that the issues between the defendant ship and the added defendants do not come within this head of jurisdiction that the plaintiff brings its motion.

If it can be demonstrated that the issues between the cross-claimant and the cross-respondents are not within the jurisdiction of the Court, it is wrongful to proceed further in the cause and the action against them should be dismissed. In a case in the Quebec Admiralty District, *Mulvey v. The Barge Neosho*[1], the matter was considered by Maclennan J. In that case the action was brought *in rem* against the Barge *Neosho* for bodily injuries sustained by the plaintiff who tripped upon the deck of the barge by reason of ropes negligently left there. The only heading of jurisdiction which might justify the case continuing, was

[1] (1919) 19 Can. Ex. C.R. 1.

the head of jurisdiction expressed in the words "Damage done by a Ship." In the *Mulvey v. Neosho* case Maclennan J. reviewed a number of authorities beginning at page three. And at page four he quoted Halsbury L.C., in the case of *Currie v. McKnight*[1] as follows:

> The phrase that it must be the fault of the ship itself is not a mere figurative expression, but it imports, in my opinion, that the ship against which a maritime lien for damages is claimed is the instrument of mischief, and that in order to establish the liability of the ship itself to the maritime lien claimed some act of navigation of the ship itself should either mediately or immediately be the cause of the damage.

It was argued by the plaintiff that the motion came too late, the defendant having appeared and given bail, it was said, had submitted to the jurisdiction of the Court. The learned Judge pointed out that the defendant had appeared under protest and at page six he dealt with the matter as follows:

> The Court cannot get jurisdiction by consent of the parties, as jurisdiction must arise from the subject matter of the claim. Dr. Lushington, in the *Mary Anne*, (1865), Br. and L. 334, said p. 335: "If at any time the Court discover it has no jurisdiction, and the facts show that the Court has no jurisdiction, it cannot proceed further in the cause; the delay of one or both parties cannot confer jurisdiction." The objection raised by defendant is not a mere technical objection which could be waived by appearance and giving bail, if under the statute there is absolute absence of jurisdiction; the *Louisa*, (1863), Br. and L. 59, the *Eleonore*, (1863), Br. and L. 185, *Richet v. The Barbara Boscowitz*, (1894), 3 B.C.R. 445.
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> The application to dismiss by motion is in accordance with the practice in Admiralty matters. I am unable to distinguish this case from the *Theta* and the *Nederland*. The barge here was not the active cause or the noxious instrument of plaintiff's injuries. Damage done not "by" the barge, but "on" the barge is not such damage as gives plaintiff's remedy *in rem* such as he is seeking to exercise in this action. Plaintiff's action therefore fails for want of jurisdiction, and defendant's motion is granted, and the action is dismissed with costs.

Later in the year 1924 the same Judge dealt with the same problems in the case of *The St. Lawrence Transportation Company, Limited v. The Schooner Amedee T.*[2] At page 206 he again referred to the case of *Currie v. McKnight*, to which I have already referred, and at page 206 he quoted a portion of the judgment of Lord Watson at page 106, where he said:

> I think it is of the essence of the rule that the damage in respect of which a maritime lien is admitted must be either the direct result or the natural consequence of a wrongful act or manoeuvre of the ship to which

[1] [1897] App. Cas. 97 at 101. [2] [1924] Ex. C.R. 204.

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it attaches. Such an act or manoeuvre is necessarily due to the want of skill or negligence of the persons by whom the vessel is navigated; but it is, in the language of maritime law, attributed to the ship because the ship in their negligent or unskilful hands is the instrument which causes the damage.

And later, on the same page, Maclennan, L.J.A., summed the matter up as follows:

The damage here sought to be recovered did not arise from any wrongful act of navigation of the schooner, and, as the schooner was not the instrument which caused the damage, the present action must fail. See also *Mulvey v. The Barge Neosho* (1919) 19 Ex. C.R. 1, where I dealt with a claim for damage alleged to have been done by a ship.

There will therefore be judgment for the defendant dismissing the writ of summons *in rem* and the warrant, setting aside the arrest and ordering the release of the bail furnished by defendant, with costs against the plaintiff.

In the case of *The Minerva*[1], Bateson J. dealt with the same problem. The facts stated in the headnote made the issue plain.

The plaintiffs' grain elevator barge was damaged by a portion of the elevator falling on to the deck owing to the breaking of a wire on the derrick of the defendants' steamship from which the barge had been discharging cargo.

By s. 22, sub-s 1(*a*), of the *Judicature (Consolidation) Act, 1925,* the High Court in relation to Admiralty matters has jurisdiction to determine "(iii) any claim for damage received by a ship . . ." and by sub-s. 1(*a*)(iv) to determine "any claim for damage done by a ship."

By s 33, sub-s. 2, the jurisdiction may be exercised either in proceedings in rem or in personam.

It was held that there was jurisdiction under section 22, s-s. 1(*a*)(iii) in relation to "(iii) any claim for damage received by a ship . . ." and also by subsection 1(*a*)(iv) to determine "any claim for damage done by a ship."

In respect of the latter Bateson J. said at page 229:

Further, I think the claim can be put under sub-s. 4, as damage done by a ship I think the damage here may be said to be done by the derrick and its load falling on the *New Perserverance*. That is damage done by the defendants' ship. If part of the ship does the damage I think that is enough—e g , if it were done by an anchor or by a propeller. It is common enough in this Division in its Admiralty Jurisdiction—and, indeed, in the old Admiralty Court—for such cases to be tried and for a vessel to be arrested I quite agree with Mr. Willmer in saying that "done by the ship" connotes the ship as the active cause of damage, if he means the ship or part of it. It will not do, I think, to say that sub-s. 3 only applies if the damage is done by a ship, otherwise there would be no need of sub-s. 3 at all.

[1] [1933] P. 224.

In 1932 Bateson J. again considered the problem in the case *The Chr. Knudsen*[1]. This case it is argued supports the plaintiff's claim. Bateson J. summed the problem up at p. 155:

It is now contended for the defendants that there is no right in rem by the plaintiffs against the *Chr. Knudsen*, a contention based on the ground that what the plaintiffs claim is not "damage done by a ship." The argument put forward by Mr. Noad, for the defendants, as I understand it, is that a right to arrest the ship and proceed in rem is only given in Admiralty to the party who has the ownership of the chattel damaged, and that therefore, as the railway company have no title or interest in the chattel damaged, which he says is the barge, at the time of the accident or at any other time, they have no remedy in rem.

Mr. Hutchinson, for the railway company, relies upon the *Supreme Court of Judicature (Consolidation) Act, 1925*, which by s. 22, sub-s. 1(*a*)(iv), repeats the words of s. 7 of the *Admiralty Court Act, 1861*, and gives jurisdiction, which under s. 33 is exercisable in rem over "any claim for damage done by a ship." The question, therefore, which I have to determine is whether the claim of the plaintiffs is for damage done by a ship. I have not the least doubt that it is. The plaintiffs are the owners of the Stallbridge Dock, and the *Chr. Knudsen* did damage to that dock by sinking the barge and causing an obstruction in the dock. Whether they were negligent in so doing can only be ascertained when the case comes to be tried, but the allegation of the plaintiffs is that the defendants have been negligent, and I must assume that that is true for the purposes of this motion and that they have suffered damage to their property by reason of the alleged negligence of the *Chr. Knudsen*. In these circumstances it seems to me, without any doubt, that they are covered by the words of s. 22.

Finally, I am referred to the decision of Demers L.J.A., in the Quebec case of *Delma C. Outhouse et al. and Ernest H. Himmelman v. Steamer Thorshavn*[2]. Demers L.J.A., said:

It seems that damage by a ship means damage done by those in charge of a ship, with the ship as the noxious instrument. *The Vera Cruz* (1884), 9 P.D. 96 at 101.

These words do not mean that the ship must come in contact with the thing damaged; a ship may be responsible for its excessive waves.

I am of opinion also that when we speak of damages by a thing, we do not mean necessarily a damage caused by the whole body. We include damage by a part of that body.

Therefore, damages caused by the fires of a ship or by her pumps are damages by the ship.

For these reasons the motion is dismissed with costs.

It is to be observed that in all these cases it is some use or action of the ship in the course of its operation and navigation as a ship which must be the cause of the damage. In the case in question the derricks of the ship were un-

[1] [1932] P. 153.

[2] [1935] Ex. C.R. 120 at 122.

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doubtedly used to deposit the scrap iron on the plaintiff's pier, and the allegation against the cross-claimants is that they were liable in part at least, for depositing it in a dangerous place where its weight caused the collapse. Their liability is based on a tort committed in the handling of the cargo after its unloading. I am quite unable to view these actions as constituting even in a remote way "damage done by a ship." It is true that the damage was caused by those handling the unloading. But it was not in the navigation or operation of the vessel as a ship.

The only other heading under which jurisdiction might be claimed is found in section 22 of the *Supreme Court of Judicature (Consolidation) Act, 1925*,—in s-s. 1(*a*)(xii) any claim, (2) relating to the carriage of goods in a ship or (3) in tort in respect of goods carried in a ship.

With respect to the problem before me it would appear to relate to goods landed from rather than carried in a ship. As to the tort in respect of goods carried in a ship, this would be intended to cover, as it appears to me, any damage received by the goods while they are in the ship, resulting from some tortious act of those operating the vessel. I would not deem it wide enough to cover the discharge of goods from the ship to the land where no tortious act against the goods occurred in the handling in such a way as to found a claim within the jurisdiction of the Court. Here of course none such is alleged. The tort was committed against the plaintiffs not the owners of the cargo.

Mr. Stone argues that his claim is covered by these sections. In my opinion he may have a perfectly good claim against those responsible for the placing of the cargo, if he can prove their negligence, but if so it does not lie within the jurisdiction of this Court. Accordingly, his motion will succeed, and the cross-respondents will be struck out with costs against the defendant ship in any event of the cause. The motion brought on behalf of the ship will also succeed, and the action will be dismissed against the defendant with costs. As to any costs of the cross-respondents who also appeared before me, application may be made to me as to the form which this order, if proper to be made, should take.

Order accordingly.