1955

May 7

May 16

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

OWNERS OF *CHINOOK* .....APPELLANT;

AND

DAGMAR SALEM .....RESPONDENT.

Shipping—Practice—O. 12, R. 21A of Supreme Court Rules (England)—Exchequer Court Rule 300—Limitation on amount recoverable as costs when security given in lieu of bail bond.

Held: That the successful party in a collision action is entitled only to one per cent of the amount of security given in lieu of bail bond as costs, and not any greater amount as damages.

2. That Rule 300 of the Exchequer Court Rules does not give jurisdiction to increase the amount recoverable established by O. 12 R. 21A of the Supreme Court Rules (England).

APPEAL from the ruling of the Deputy Registrar for the British Columbia Admiralty District.

The appeal was heard before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

John I. Bird for appellant.

F. A. Sheppard, Q.C. for respondent.

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

SIDNEY SMITH D.J.A. now (May 16, 1955) delivered the following judgment:

I had the benefit of very helpful argument on the point involved here which is narrow, unusual but interesting. It arises by way of appeal from the finding of the Deputy Registrar of this Court at Vancouver.

The owners of the defendant ship, who have partially been successful in a collision action and have been awarded damages and costs, appealed from the Registrar's finding that they are only entitled to 1% of the amount of security given in lieu of bail bond as their costs under this head of expense. Their actual expense of the item amounted to more than $7,000. The owners, instead of putting in bail, borrowed money at interest and give bank securities instead, this course being due to their inability to get a bond here since they were foreigners with no assets in this jurisdiction. They say they should be allowed their actual expense either as (1) damages or (2) costs.

Although the issue was not directly raised before me it may be of service if I say something about these alternatives. The claim for the allowance by way of damages is, I think, answered by the rulings that damages to cover the expense of bailing can only be given where the ship has been arrested wrongfully, for example, where the arrest is malicious or is due to gross negligence, *The Numida* (1). Negligence in this regard refers to the arrest (e.g. the arrest of the wrong ship) and not to the basis of the cause of action; see *The Evangelismos* (2). *The Orion* (undated) ibid, 378n. Here there was no negligence in the procedure. Indeed the ship was not arrested at all, wrongfully or otherwise. Therefore any expenses that the defendant is to be recouped for giving security must be recouped as costs.

Apart from statutory rules, none of these expenses could be recovered even as costs, *The Numida* (*supra*); but there has been a change in England since that decision. The change affects this Court also because of the rule which now appears as O. 12, R21 A of the ordinary Supreme Court Rules (England). This is as follows:

> A commission or fee paid to a person becoming surety to a bail bond or otherwise giving security may be recovered on taxation; provided that the amount of such commission or fee shall not in the aggregate exceed one pound per centum on the amount in which bail is given.

Our Exchequer Court Act, section 35, makes the practice of the English High Court as it stood on 1st January 1928 apply to whatever our own rules do not cover; so the above-cited Rule 21 A applies here; see *The Cape Breton* (3). I am afraid the Rule is intractable and that there is no

(1) (1885) 10 P. 158. (2) (1858) Swabey Adm. 378.
(3) (1907) 11 Ex. C.R. 227.

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departing from it. I think it was Lord Birkenhead who said that one should not leave the safe anchorage of a sure rule. However the defendant points out that our Admiralty Rules make the Exchequer Court Rules apply wherever the Admiralty Rules are silent; and that Rule 300 of the Exchequer Court Rules provides as follows:

> The Court or a Judge may, under special circumstances depart from any limitation in these rules upon the inherent right or power of the Court or a Judge .....

Therefore he submits that I have the power to allow more for the costs of security than 1% of the sum secured and that I should allow more; should in fact allow the full costs.

This is an attractive argument but I am far from satisfied that I have this power. I am not convinced that the 1% limitation is one "in these Rules" (i.e. in the Exchequer Court Rules), or that this limitation is one on my "inherent right or power". If anything I am inclined to think that the cases I have cited show otherwise. Then again is the express prohibition in Rule 21 A to be swept away by virtue of such general expressions? I think not; no matter how meritorious may be the defendants' claim.

Even if I have the power to increase the 1% I do not think it would be proper for me to do so in this case. The unusual expense that defendants had to incur to put up security was due to their impecuniosity. The House of Lords decided in *Liesbosch* v. *S.S. Edison* (1), that extra expenses of a litigant due to his own impecuniosity cannot be recovered as damages; and I think the same principle must apply to the recovery of costs. Suppose for example, the defendant had been an individual and had travelled here to give evidence, but because he had no ready money had to borrow his passage money at interest, could the interest be allowed as costs? It seems to me the answer must be "No".

I therefore affirm the Registrar's finding. Costs will follow the event.

Judgment accordingly.

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(1) [1933] A.C. 449.