1924
May 7.

BRITISH COLUMBIA ADMIRALTY DISTRICT

WRANGELL ..... PLAINTIFF;

AGAINST

THE *STEEL SCIENTIST*

Shipping and seaman—Seaman's wages—Plaintiff resident out of jurisdiction—Security for costs—Delay in making application—Practice—Rule 134, Interpretation.

The defendant ship was arrested on December 3, 1923, the pleadings were closed in February, 1924, and it had been agreed between the parties that the case be tried on the 19th of May, 1924, though a date for trial had not been applied for. On May 6 an application for security for costs was made on the ground of plaintiff being resident out of the jurisdiction, etc.

Held, that, though in this case there had been delay which was not accounted for, and could only be conjectured, yet in the absence of any prejudice thereby occasioned to the other side, the court did not feel justified in refusing an application for security for costs.

2. That Admiralty rule 134, providing for the giving of bail for costs by a non-resident plaintiff or counter-claimant is not intended to be a declaration of the former practice of the court at the time it was passed, but as a definition of the powers conferred *ad hoc* by the new General Rules and Orders of 1892.

APPLICATION by defendant for an order that plaintiff furnish security for costs, being out of the jurisdiction.

Tuesday, May the 6th, 1924.

Application heard before the Honourable Mr. Justice Martin in Chambers, at Victoria.

Arthur Crease for the motion.

Harold Robertson, K.C., contra.

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

MARTIN L.J.A., now this 7th of May, 1924, delivered judgment.

This is an application by the defendant for security for costs on the ground that the plaintiff company is resident out of the jurisdiction and its ship, the *Angvald,* is a foreign one of Norwegian registry. Objection is taken that the application is made too late, the defendant ship having been arrested on the 3rd December last, the pleadings closed early in February, and (though a date for trial has not yet been applied for), an agreement reached prior to the demand for security, that the case should be tried on

the 19th instant, if that date was convenient to the court. Admiralty Rule 134, promulgated in 1892, provides that:—

If any plaintiff (other than a seaman suing for his wages or for the loss of his clothes and effects in a collision), or any defendant making a counter-claim, is not resident in the district in which the action is instituted, the judge may, on the application of the adverse party, order him to give bail for costs.

In the Quebec District of this court, in *Morton Down & Co.* v. *The Lake Simcoe* (1), my esteemed brother Routhier, made an order for security after the defendant had, as here, taken several steps in the action, but gave no reasons for so doing, which is unfortunate because the argument of both counsel proceeded upon the erroneous assumption that Rule 228 governed the matter, thus:—

In all cases not provided for by these Rules the practice for the time being in force in respect to Admiralty proceedings in the High Court of Justice in England shall be followed.

But this rule is excluded by its own terms from any application to this case because it can only be invoked in

cases not provided for by these Rules,

and the "case" is, in fact, entirely provided for by said rule 134 above recited.

While it would not be right for me to assume that my brother Routhier was unaware of rule 134, even though both counsel overlooked it, yet I am left in doubt as to whether or not he did, in fact, consider it in giving his judgment as thus noted in the report:—

Per Curiam: The plaintiffs will give security for costs within thirty days from the date hereof to the amount of $5,000; costs of motion to follow the event.

I have therefore deemed it proper to consider carefully that rule, the subject being of importance and counsel having argued it very fully.

It is beyond dispute that, upon the face of it, the rule is very wide in its terms and if not subject to restriction in its application by the practice of this court it would justify me in ordering security now because the sole condition for the exercise of my unfettered judicial discretion is that the plaintiff

is not resident in the district in which the action is instituted,

which condition admittedly exists herein. No decision upon the scope of the rule has been cited, and it is proper to

(1) [1905] 9 Ex. C.R. 361.

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determine at the outset how it is to be regarded, and as I do so, it is not intended to be a declaration of the former practice of the court at the time (1892) as set out in the reports, or otherwise, but as a definition of the powers conferred, *ad hoc,* by the new " General Rules and Orders " of 1892, to be in force in Canada, after approval by the Governor General in Council and by Her Majesty in Council (*Vide* Rule 229) under the Colonial Courts of Admiralty Act, 1890, and the Admiralty Act, 1891 (Canada). I am confirmed in this opinion by the recent decision of their Lordships of the Privy Council in *Dominion Trust Co.* v. *New York Life Insurance Co.* (1), wherein it was held that our Supreme Court consolidation rule 656, reading as follows:—

> Causes, matters, or appeals may be consolidated by order of the court or judge, in such manner as to the court or judge may seem meet.

is an *absolute* one, and

> leaves the matter so far as *ultra vires* is concerned entirely in the hands of the judge,

and therefore though the consolidating order might have been perhaps *ill judged,* nevertheless it should not be interfered with because there was

> proper material before the court upon which a judgment on the facts could be given.

Their Lordships pointed out that the corresponding English rule differs essentially from our rule because it added the words:—

> to be exercised in the manner in use before the commencement of the principal Act.

thereby introducing a reference to the course of previous decisions.

This indication is important because the Court of Appeal below (2)—was equally divided on the construction of our rule, my brother McPhillips and myself taking the view that it was controlled by the former practice which we thought, erroneously as it turned out, had not been affected by the change in language—*cf.* pp. 372-4. In the absence of any like indication in rule 134 that it is to be restricted by the former practice I do not feel justified in regarding it as any less " absolute " than the said consolidating rule 656, and I am fortified in this opinion by the fact that our excellent Admiralty rules are, as a whole, of a character

(1) [1918] 3 W.W.R. 850; [1919] A.C. 254.

(2) [1916] 23 B.C.R. 344.

which is at once simple, comprehensive, and elastic, so as to meet the conditions of a court which in dealing with maritime affairs wisely does so in a broad way having regard to quickly varying circumstances which are often not so subject to control as are affairs upon the land, and hence is not prone to lay down intractable rules of practice, which might result in injustice in the future in circumstances which could not be foreseen: that at least is the practice I have followed in this court for over a quarter of a century, and, if I may say so, it has been justified by experience.

In deference to the careful argument of plaintiff's counsel, I have closely considered the decision of Dr. Lushington in *The Volant* (1). That was a case of an action and cross-action wherein security for costs was ordered after the act on petition, under the old practice, had been concluded and signed by the respective proctors, and both of them had been assigned to bring their proofs into court, the proceeding being, therefore, at a stage very similar to these before me. Objection was taken that the application should have been made earlier and the court said:—

> According to the practice of other courts, it is, I apprehend, the usual course that applications of this kind should be made in the earliest stage of the proceedings, and, in ordinary cases, I should be disposed to enforce the observance of the same rule in the proceedings in this court. There is, however, this peculiarity in the present case, that the owner of the *Beatitude* is resident abroad, and the original action was entered by another person in his name and without his privity or concurrence. If I had been aware of this circumstance at the time, I should have directed security for the costs to be given in the first instance; and as I am now informed that the bail which has been given will not be liable for the costs for which this application is made, I shall direct security to be given for the same, before I allow the suit to proceed,—the amount of that security I fix at £80.

It is to be observed, first, that the learned judge did not go so far as to recognize such a rule of practice as was contended for, but only that he "should be disposed to enforce" one; second, that he was dealing with a case, obviously of the two British ships (not a foreign one with foreign owner as here) and therefore they would presumably be within the jurisdiction to answer their presumably British owners' liabilities; and third, that the controlling circumstance of his decision must have been that the owner was resident abroad, because he could not, obviously, upon

(1) [1842] 1 W. Rob. 383.

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any principle of justice be dealt with *in poenam* because some other person had "without his privity or occurrence" wrongfully made use of his name to institute proceedings. The report does not suggest that the defendant (*The Volant*) did not know *ab initio* that the owner of the *Beatitude* was resident abroad, nevertheless the belated order for security was made despite that knowledge. I do not find the report a satisfactory one, apart from a decided difference in the facts; in some aspects it is opposed to both the parties before me, and at most it is an expression of an opinion that applications of the kind should be made "in the earliest stage of the proceedings," with which I agree as a general rule, but I do not regard it as a decision (even apart from the said special effect of our rule 134) that would prevent me from exercising my discretion in this case at least. A situation is conceivable wherein a defendant might reasonably not wish to apply for security under circumstances existing at the beginning of the action, but an alteration in them would lead to an application being advisable. Though in this case there has been delay which is not accounted for, and can only be conjectured, yet in the absence of any prejudice thereby occasioned to the other side I do not feel justified in refusing the application, and so an order will issue for security to be given for $1,200 within a time to be spoken to, if counsel cannot agree thereupon.

I need only add that in view of the opinion I formed of the matter it is not necessary for me to discuss the other cases cited to me of decisions in other courts, though they have received my attention, particularly *Re Smith: Bain* v. *Bain* (1); *Wood* v. *The Queen* (2), and *Boston Rubber Shoe Co.* v. *Boston Rubber Co. of Montreal* (3).

As to costs: ordinarily, the application being successful, after the refusal of the demand, I should have given them to the defendant in any event, but because of the delay I think the proper order is to make them in the cause, as was done in the case of the *Lake Simcoe*.

Judgment accordingly.

(1) [1896] 75 L.T. 46. (2) [1876] 7 S.C.R. 631.
(3) [1901] 7 Ex. C.R. 47.