SS. "WORON" v. CAN. AM. SHIPPING Co., Ltd.

[1926] Ex. C.J. No. 5

[1927] 1 D.L.R. 138

Exchequer Court of Canada in Admiralty

Audette, J.

Judgment: November 10, 1926

Counsel:

A. Bull, for appellant

W. M. Griffin, for respondent.

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1 **AUDETTE, J.**:--This is an appeal from the judgment of Martin, L.J. Adm., of the B.C. Admiralty District, [1926] 4 D.L.R. 339, pronounced on July 6, 1926, dismissing the application to set aside the writ and warrant of arrest issued herein, on the ground of want of jurisdiction.

2 The judgment appealed from rests entirely upon s. 5 of the Administration of Justice Act, 1920 (Imp.), c. 81, which however was repealed by the Judicature (Consolidation) Act, 1925 (Imp.), c. 49, as appears by sch. 6 thereof--a matter which seems to have escaped the attention of the Judge of first instance who dismissed the motion. Therefore it becomes unnecessary to consider the effect of the Act of 1920 upon the question before the Court, beyond stating its repeal, and the attention of the Court will be directed solely as to the effect of the Act of 1925 (which came into force on January 1, 1926) upon the proceedings herein instituted on April 30, 1926. However, it is well to add that some of the reasons given for supporting the jurisdiction below upon the Act of 1920, would equally apply to the Act of 1925.

3 It may be stated, as was indeed conceded by all parties, that if the jurisdiction of this Court is limited by the Colonial Courts of Admiralty Act, 1890 (Imp.), c. 27, and the Admiralty Act, 1891 (Can.), c. 29, and to the time at which these Acts were passed, this Court has no jurisdiction to entertain an action *in rem* in the premises and consequently the writ and warrant issued herein must be set aside. Furthermore in order to give this Court jurisdiction to entertain the same, it must be found that s. 22(xii) of the Imperial Act passed in 1925 is in force in Canada.

4 In other words the present controversy is narrowed down to the question as to whether or not this Court is vested with any jurisdiction given to the High Court in England by Imperial statutes passed since 1890, although these statutes do not expressly apply to Canada.

5 This case is one wherein it is sought to proceed *in rem* against the ship for breach of a charterparty--a matter which is not cognizable in this Court under the Act of 1890, nor any subsequent legislation, unless it is found that the Imperial Act of 1925 is in force in Canada *ex proprio vigore* and without express words.

6 From very early times in England the question of jurisdiction between the Court of Admiralty and the Courts of common law has been fought, with more or less vehemence. Prohibitions issuing out of the common law tribunals upon proceedings in the Admiralty were frequent. Godolphin in his age observed that the quarrel had assumed such complexity between the Courts that "betwixt land and water, between contracts made beyond the sea and obligations made at sea, the Admiralty was like a kind of derelict." Hence in dealing with a question of admiralty jurisdiction today one must exercise great care in determining it to be well founded (see Herschell, L.C., in *Mersey Docks & Hbr. Bd. v. Turner*, [1893] A.C. 468, at pp. 481-2).

7 Let us now refer to the Colonial Courts of Admiralty Act, 1890, which defines the jurisdiction of any Colonial Court of Admiralty when created by a Colonial Legislature under the authority of its provisions. Section 2(2) reads as follows:--"(2) The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters, and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations."

8 By s. 3 of the Canadian Admiralty Act, 1891, the Exchequer Court of Canada was created "within Canada, a Colonial Court of Admiralty," and as a Court of Admiralty "shall, within Canada, have and exercise all the jurisdiction, powers and authority conferred by the said Act and by this Act." It must not be overlooked that the jurisdiction given to the Exchequer Court under s. 4 of this Act was confined to rights and remedies in all matters "which may be had or enforced in any Colonial Court of Admiralty under *'The Colonial Courts of Admiralty Act*, 1890.'" Under the law as it stood in England when the Colonial Courts of Admiralty Act was passed there was no jurisdiction to entertain the present action *in rem.* Furthermore the latter Act makes it plain that it confers jurisdiction whether *existing* "by virtue of any statute or otherwise." This word "existing" must, I think, be taken to relate to jurisdiction existing at the date of the Act, and that only. Again by s. 2(3) of the Colonial Courts of Admiralty Act this jurisdiction is expressly given "subject to the provisions of this Act."

9 Passing to s. 3 of the same Act, it is there again provided that the jurisdiction contemplated is the jurisdiction "under this Act." The proviso to that section also expressly states that any such "Colonial law shall not confer any jurisdiction which is not by this Act conferred upon a Colonial Court of Admiralty." Section 4 of the last-mentioned Act only enables a Colonial Legislature to pass laws affecting the jurisdiction or practice of a Colonial Court of Admiralty with the approval of His Majesty, and as we have seen above, under the provisions of s. 3 no such Colonial law could confer any jurisdiction which is not by this Act conferred upon a Colonial Court of Admiralty.

10 When we are confronted by such provisions as those contained in the last-mentioned sections of the Colonial Courts of Admiralty Act, we realize that the Parliament of Canada has only a limited power of legislation in respect of Admiralty jurisdiction. It cannot confer upon the Exchequer Court any jurisdiction which was not conferred by the Imperial Act of 1890 upon a Colonial Court of Admiralty. Clearly the situation is that the legislative authority of Canada over the subject of Admi-

ralty jurisdiction stops short of autonomy. Not only is there a restricted field of legislation, but legislation within that restricted field cannot become effective until His Majesty's pleasure thereon has been publicly signified in this country. That is the situation briefly stated, and it must remain so until the Parliament of Great Britain sees fit to displace it by further legislation.

11 In view of this situation it is but natural that some way out of the difficulties that surround it should be sought. The Judge below, Martin, L.J. Adm., [1926] 4 D.L.R. 339, has found a way out by interpreting the provisions of s. 5 of the Imperial Statute of 1920 (repealed in 1925 as I have before stated) as applying to Canada; but that Act was repealed before the institution of this action and no more need be said about it.

12 The only Act from which the respondent can get any relief is the Imperial Act of 1925 which is intituled, "An Act to consolidate the Judicature Acts, 1873 to 1910, and other enactments relating to the Supreme Court of Judicature in England and the administration of justice therein."

13 The primary territorial scope of this Act obviously does not include this Dominion, and the Act is absolutely silent with respect to its application to the Dominions or the Colonies.

14 The case of *Gauthier v. The King* (1918), 40 D.L.R. 353, discusses a question somewhat similar to the one raised by the judgment below, namely, as to whether the Colonial Courts of Admiralty Act, 1890, is to be taken by construction as speaking always in the present tense (see s. 10 of the Interpretation Act, R.S.C. 1906, c. 1) so that it would impliedly confer upon the Exchequer Court of Canada whatever jurisdiction was given to the High Court of Justice in Admiralty since the year 1890. It is true that the *Gauthier* case dealt with the jurisdiction clauses of the Exchequer Court Act, 1887 (Can.), c. 16, and not with those of the Admiralty Act; but the rules of construction are the same in all cases, and where there is an authoritative interpretation of a contemporary Act to be found it affords great assistance. In the *Gauthier* case the Supreme Court was concerned with the question of whether the Provincial laws invoked by the Exchequer Court Act as part of the law of the Court are to be confined to the provincial laws in force in the year 1887, when the Exchequer Court Act was passed, or whether s. 20 of the Exchequer Court Act contemplates that amendments to the Provincial laws as they come into force from time to time have to be administered in the Exchequer Court. It is abundantly clear from the reasons for judgment of the Judges of the Supreme Court that the liability of the Crown under the Exchequer Court Act must be determined by the general laws of each Province in force *at the time when the Exchequer Court Act* was originally passed, namely, 1887 (see *per* Fitzpatrick, C.J., at pp. 355-6; *per* Anglin, J. (now C.J.C.), at p. 365). At pp. 356-7, the Chief Justice puts the matter in a nutshell when he says:--"Provincial statutes which were in existence at the time when the Dominion accepted a liability form part of the law of the province by reference to which the Dominion has consented that such liability shall be ascertained and regulated, but any statutory modification of such law can only be enacted by Parliament in order to bind the Dominion Government." In the *Gauthier* case the Supreme Court of Canada followed the decisions in the well-known cases of *The King v. Armstrong* (1908), 40 S.C.R. 229; *The King v. Desrosiers* (1908), 41 S.C.R. 71; *The Queen v. Filion* (1895), 24 S.C.R. 482; *Quebec v. The Queen* (1894), 24 S.C.R. 420; *Ryder v. The King* (1905), 36 S.C.R. 462; *The "D.C. Whitney" v. St. Clair Nav. Co.* (1907), 38 S.C.R. 303.

15 So far as the Exchequer Court on its Admiralty side is concerned the Judge who heard the motion, in the British Columbia Admiralty Court, [1926] 4 D.L.R., at p. 341, very truly said:--"There is no decision upon the exact point."--Here we have to deal with an alleged breach of charterparty. And he refers to the *Harris Abattoir Co. v. The "Aledo,"* [1923] 4 D.L.R. 1196, wherein the late

Maclennan, L.J. Adm., decided that an action *in rem* for damages to goods carried or to be carried *out* of a Canadian port to a foreign country could not be entertained for lack of jurisdiction under s. 6 of the Admiralty Act, 1861 (Imp.), c. 10, and the judgment appealed from here, [1926] 4 D.L.R., at p. 341, says that the statute of 1920 (which is now repealed by that of 1925) which repealed this s. 6 of the 1861 Act escaped the attention of the Court and counsel in the "*Aledo*" case. Maclennan, L.J. Adm., may or may not have overlooked the Act of 1920. He may have considered it and come to the conclusion that by s. 21 thereof, s. 5 relied upon applied "only" to England and Wales and thereby excluded Canadian territory. Or he may have considered that the words "England and Wales" mentioned in s. 2(3)(*a*) had reference only to Acts passed before 1890, a view which would seem consistent with s. 2(2). Hence his silence upon the point.

16 In *Wolfe v. SS. "Clearpool*" (1920), 67 D.L.R. 536, at p. 537, Maclennan, L.J. Adm., held, in 1920, that:--"The Exchequer Court derives its admiralty jurisdiction from two statutes, the Colonial Courts of Admiralty Act, 1890 (53-54 Vict., ch. 27 Imperial), and the Admiralty Act, 1891 (54-55 Vict., ch. 29, Canada.) From these statutes it is clear that the jurisdiction of the Exchequer Court, as a Court of Admiralty, is no greater than the admiralty jurisdiction of the High Court in England. The expression 'admiralty jurisdiction of the High Court' does not include any jurisdiction which could not have been exercised by the Admiralty Court before its incorporation into the High Court, or may be conferred by statute giving new admiralty jurisdiction," citing *Bow, McLachlan & Co. v. "Camosun*," [1909] A.C. 597.

17 Adverting to the "*Camosun*" case it will be seen that in that case the Judicial Committee held (p. 608):--"It is clear from these statutes (Colonial Courts of Admiralty Act, and Admiralty Act) that the jurisdiction of the Exchequer Court (in Canada) as a Court of Admiralty is no greater than the Admiralty jurisdiction of the High Court of England," and that the Judicature Acts by which "every Judge of the High Court can exercise every kind of jurisdiction possessed by the High Court . . . . conferred no new Admiralty jurisdiction upon the High Court ...."

18 In the same case, at p. 606, Lord Gorell further says that the Exchequer Court was constituted by the Exchequer Court Act and that it has no common law jurisdiction and that, "its Admiralty jurisdiction is derived under the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict., c. 27 (Imperial), and the Admiralty Act, 1891 . . . ." At p. 608 he says:--"In their Lordships' opinion this case is unaffected by the Judicature Acts . . . ." and if applied it would "alter the Admiralty jurisdiction into a general jurisdiction." Adding at p. 610:--"Therefore, as the Exchequer Court has no general common law jurisdiction, and the respondents had no right under the Admiralty jurisdiction . . . . they could not enforce their counter-claim in that Court."

19 Again at pp. 603-4, in the quotation of Burbidge, J., it is said:--"It is argued that, because a judge of the High Court in England has otherwise authority to hear and decide such a claim . . . . this Court has a like jurisdiction and authority. That, it seems to me is not the effect of the statutes referred to. The jurisdiction which this Court (Canadian) may exercise under the statute mentioned (Acts of 1890, etc.) is the Admiralty jurisdiction, and not the general or common law jurisdiction of the High Court in England." (See Clement's Canadian Constitution, 3rd ed., p. 241).

20 The plain reading of the Act of 1890 ties the jurisdiction of the Canadian Admiralty Court to that of the English High Court as it existed in 1890. Thus the Canadian jurisdiction is, so to speak, static and stereotyped. Canada has the full jurisdiction existing in England at the time of the passing of the Act and no more.

21 Moreover, by the preamble of the Admiralty Act, 1891 (Canada) it is said that the Exchequer Court "shall be a Court of Admiralty, with the jurisdiction in the said Act mentioned." That is the Imperial Act of 1890. (See also *The "W. J. Aikens*" (1893), 4 Ex. C.R. 7.)

22 Therefore the position or jurisdiction of the Judge of the High Court in England is quite different from that of the Admiralty Judge in Canada. Indeed, in *The Cheapside*, [1904] P, 339, at p. 343, wherein the question of jurisdiction with respect to a counterclaim (as in the "*Camosun*" case, *supra*) was again considered, it was also found that:--"The judge of the Court of Admiralty does not cease to be a judge of the High Court because he is judge of the Court of Admiralty, and although as judge of the Court of Admiralty he may have no jurisdiction in such a case as this . . . . as judge of the High Court he has, and whether or not he can blend those two jurisdictions is a matter for his discretion . . . . In this case the judge of the Court of Admiralty has endeavoured to do justice by not dividing the two jurisdictions, but by availing himself of the fact that he has a double jurisdiction, which will enable him to do justice in this way."

23 To return to the question of jurisdiction under the Imperial Act of 1925, s. 22 reads as follows:--"22.(1) The High Court shall, in relation to admiralty matters, have the following jurisdiction (in this Act referred to as 'Admiralty jurisdiction') that is to say--(xii) Any claim--(1) arising out of an agreement relating to the use or hire of a ship; or (2) relating to the carriage of goods in a ship; or (3) in tort in respect of goods carried in a ship; unless it is shown to the court that at the time of the institution of the proceedings any owner or part owner of the ship was domiciled in England: (*b*) Any other jurisdiction formerly vested in the High Court of Admiralty:--(*c*) All admiralty jurisdiction which under or by virtue of any enactment which came into force after the commencement of the Act of 1873 and is not repealed by this Act, was immediately before the commencement of this Act vested in or capable of being exercised by the High Court constituted by the Act of 1873."

24 This Act of 1925 should be read in the light of the "*Camosun*" case, [1909] A.C. 597, which holds, at p. 608 that, the Judicature Acts, by which "every Judge of the High Court can exercise every kind of jurisdiction possessed by the High Court . . . . conferred no new Admiralty jurisdiction upon the High Court ... ."

25 The jurisdiction of the Exchequer Court on its Admiralty side cannot be wider than it was at the time of the passage of the Colonial Courts of Admiralty Act, 1890, unless supplemented by clear and express legislative provisions.

26 As said in Craies, on Statute Law, 3rd ed., p. 79:--"Coke's rule has been adopted by the English Courts, and for modern use is best expressed by Lord Esher in *Sharpe v. Wakefield* (1888), 22 Q.B.D. [239, at p.] 241, 'The words of a statute must be construed as they would have been the day after the statute was passed, unless some subsequent Act has declared that some other construction is to be adopted or has altered the previous statute.'" (See also *The Alina* (1880), 5 Ex. D. 227, at pp. 230 *et seq.*)

27 Again at p. 66:--"If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the law giver." At p. 70 quoting from Lord Brougham in *Gwynne v. Burnell* (1840), 7 Cl. & F. 572, at p. 696, 7 E.R. 1188:--"'If we depart from the plain and obvious meaning . . . . we do not in truth construe the Act, but alter it.'"

28 At p. 113:--"A distinct and unequivocal enactment is also required for the purpose of either adding to or taking from the jurisdiction of a Superior Court of Law ... . 'The Creation,' said Lord

Westbury [L.C., in *A.-G. v. Sillen* (1864), 10 H.L. Cas. 704, at p. 720, 11 E.R. 1200], 'of a new right . . . . is plainly an act which requires (distinct) *legislative authority.*'"

29 Lord Mansfield in *Rex v. Vaughan* (1769), 4 Burr. 2494, at p. 2500, 98 E.R. 308, says that:--"No Act of Parliament made after a colony is planted is construed to extend to it, without express words shewing the intention of the Legislature to be'that it should.'" Lord Blackburn in *The Lauderdale Peerage* (1885), 10 App. Cas. 692, at p. 745, says that after a colony is founded "subsequent legislation in England altering the law does not affect their rights (of the settlers) unless it is expressly made to extend to the province or the colony" (see Tarring On Law Relating to Colonies, 4th ed., pp. 3-4; *Hill v. Brown*, [1894] A.C. 125).

30 The policy of the law that jurisdiction cannot be extended except by clear and unambiguous legislation is attested by all modern books. And we have so far back as the first quarter of the eighteenth century, Gilbert, L.C.B., in *Beeves v. Butler* (1726), Gilb. Rep. 195, at p. 196, 25 E.R. 136, exclaiming:--"God forbid that Judges upon their Oath should make Resolutions to enlarge Jurisdiction."

31 Holt, C.J., in the famous case of *Ashby v. White* (1703), 2 Ld. Raym. 938, at p. 956, 92 E.R. 126, said:--"I agree we ought not to encroach or enlarge our jurisdiction; by so doing we usurp both on the right of the Queen and the people."

32 Later on in the century, Sir W. Scott (Lord Stowell) said in *The Two Friends* (1799), 1 C. Rob. 271, at p. 280, 165 E.R. 174, that, "this Court is not hungry after jurisdiction." Kekewich, J., in *Re Montagu*, [1897] 1 Ch. 685, at p. 693, said:--"It is part of my duty to expound the jurisdiction of the Court. It is no part of my duty to expand it."

33 It is especially true of the jurisdiction of the Admiralty Court, owing to the jealous eye turned upon it by the common law Courts, that the foundations of its jurisdiction have to be made doubly sure (see Roscoe's Adm. Pr., 4th ed., Introduction, *passim*).

34 If any other rule than those above mentioned were to be followed, the result would be that the Court would be *legislating*. It is for the Legislature to enlarge the jurisdiction if it sees fit and it is not a matter for the Court.

35 Now besides the considerations to which I have just adverted, we have the Colonial Laws Validity Act, 1865 (Imp.), c. 63, passed by the Imperial Parliament in 1865 which by s. 1 enacts that:--"An Act of Parliament, or any provision thereof, shall . . . . be said to extend to any colony when it is made applicable to such colony by express words or necessary intendment of any Act of Parliament."

36 Then if we consult text-books on the subject we find, Lefroy, on Canada's Federal System, 1913, p. 51, who says:--"The legislative bodies which have power to make statutes of one sort or another, binding upon Canadians, are the Imperial parliament, the Dominion parliament ... . The British North America Act contains no renunciation of the paramount authority of the Imperial Parliament ... . "At pp. 54-5:--"But the intention of an Imperial Act to apply to self-governing colonies must be clearly expressed."

37 The same view is propounded by Dicey's Law of the Constitution, 8th ed., pp. 100, 102, 103, 108, 109, 114 and 115.

38 See also Todd, Parliamentary Government in the British Colonies, 2nd ed., pp. 29 and 155, wherein at pp. 215-6, after recognizing the paramount authority of the Imperial Parliament to legis-

late for Canada, he says:--"Henceforth it is only such Imperial laws as were in force at the time of the establishment of the colony that apply to the same, not such as may be thereafter enacted; unless 'by express enactment or by necessary intendment' they are made applicable ... ."

39 The same opinion is also to be found in Clement's Canadian Constitution, p. 31; and at pp. 54-5, he says:--"As then the British Parliament may legislate Imperially, that is to say, may extend its enactments to the colonies generally or to some one or more of them in particular, it is important to know when a British Act does so extend. *Prim, facie* the British Parliament must be taken to legislate for the United Kingdom only, and there must be manifest indication of its intent in that respect if a statute is to be read as extending to a colony."

40 Having considered the question of jurisdiction in this case with great care in the light of the authorities cited above, I have reached the conclusion that the Exchequer Court of Canada under s. 22(XII) of the Imperial Judicature Act of 1925 has no jurisdiction to entertain the action in which the proceedings were taken which form the subject of this appeal; and I rest my conclusion upon the fact that this statute not only lacked express words but also "necessary intendment" to bring it into force in Canada.

41 Having reached this conclusion on the question of jurisdiction, I must find that the action in which the writ and warrant were issued is not cognizable by the Court, and that the writ and warrant themselves must be set aside.

42 However, I am glad to realize that the respondent is not deprived of all remedy by reason of this appeal being allowed. The respondent still retains his right to institute an action *in personam*.

43 The appeal will be allowed and the writ and warrant set aside. The whole with costs.