[HIGH COURT OF AUSTRALIA.]

UNION STEAMSHIP COMPANY OF NEW ZEALAND LIMITED . . . . . Applicant;
Plaintiff,

AND

THE SHIP *CARADALE*, HER CARGO AND FREIGHT . . . . . Respondent.
Defendant,

H. C. of A. 1937.

Melbourne, *Feb.* 18, 23.

Dixon J.

Shipping—Collision within territorial waters—Damage to both ships—Action before jury in Supreme Court of State by one ship—Action in High Court in admiralty by other ship—Application to stay action in High Court—Jurisdiction in admiralty of Supreme Court considered—Colonial Courts of Admiralty Act 1890 (53 & 54 *Vict. c.* 27), *sec.* 2—*Judiciary Act* 1903-1934 (*No.* 6 *of* 1903—*No.* 45 *of* 1934), *sec* 30A.

Two ships collided in Hobson's Bay and both were damaged. The owner of one ship commenced an action for damages against the owner of the other in the Supreme Court of Victoria before a jury. Shortly afterwards, the owner of the latter ship commenced an action for damages against the former ship in the High Court in its admiralty jurisdiction. The defendant in the High Court sought to stay that action to enable the responsibility for the damage caused by the collision to be decided in the Supreme Court.

Held that the plaintiff in the High Court was entitled to proceed *in rem* and was not obliged to assert its claim by counterclaim in the action in the Supreme Court, and that the application should be refused.

The right of the Supreme Court to exercise admiralty jurisdiction considered.

Application to stay action.

This was an application made on behalf of the owners of the ship *Caradale* to stay an action *in rem* in the admiralty jurisdiction of the High Court brought by the Union Steamship Co. of New Zealand Ltd., which was the owner of the ship *Kakariki*. The dispute arose out of a collision between the *Kakariki* and the *Caradale* which occurred in Hobson's Bay on 29th January 1937, when the *Kakariki* was sunk and the *Caradale* was seriously damaged.

H. C. OF A. 1937.

UNION STEAMSHIP CO. OF NEW ZEALAND LTD. v. THE CARADALE.

Upon the conclusion of a marine inquiry into the cause of the collision each party sued the other for the loss which each respectively suffered as a result of the collision.

On 12th February 1937 the owners of the *Caradale*, James Patrick & Co. Ltd., issued a writ in the Supreme Court of Victoria against the Union Steamship Co. of New Zealand Ltd., the owners of the *Kakariki*, claiming £15,000 and requiring the action to be tried by a judge and a jury of six. On 15th February 1937 the Union Steamship Co. of New Zealand Ltd. issued a writ in the High Court in its admiralty jurisdiction against the *Caradale*, her cargo and freight, requiring such action to be heard by a judge without a jury.

The application to stay the action in the High Court was made in order that the responsibility for the damage caused by the collision might be decided in the proceedings in the Supreme Court.

Further facts appear in the judgment hereunder.

Reynolds, for the applicant, referred to "*The London*" (1); "*The Never Despair*" (2); *Union Steamship Co. of New Zealand Ltd.* v. *Melbourne Harbour Trust Commissioners* (3); *Metropolitan Asylums Board* v. *Sparrow* (4); *Ocean Steamship Co.* v. *Anderson, Tritton & Co.* (5); *Gronow* v. *Thomson* (6).

Wilbur Ham K.C. and *Evans*, for the respondent, referred to "*The London*" (1); "*The City of Mecca*" (7); "*The Janera*" (8); *Cohen* v. *Rothfield* (9); *Hyman* v. *Helm* (10); *Harmer* v. *Bell*; "*The Bold Buccleugh*" (11); *Maritime Insurance Co. Ltd.* v. *Geelong Harbor Trust Commissioners* (12); "*The Christiansborg*" (13); *Marsden's Collisions at Sea*, 9th ed. (1934), pp. 222, 223.

Reynolds, in reply referred to *Roche* v. *London and South Western Railway Co.* (14) and *Halsbury, Laws of England*, 2nd ed., vol. 1, pp. 142, 143.

Cur. adv. vult.

(1) (1931) P. 14.
(2) (1884) 9 P.D. 34.
(3) (1907) V.L.R. 204; 29 A.L.T. 63.
(4) (1913) 29 T.L.R. 450.
(5) (1885) 33 W.R. 536.
(6) Unreported. [*Starke* J., 25th May 1933.]
(7) (1881) 6 P.D. 106.
(8) (1928) P. 55.
(9) (1919) 1 K.B. 410.
(10) (1883) 24 Ch. D. 531.
(11) (1851) 7 Moo. P.C.C. 267; 13 E.R. 884.
(12) (1908) 6 C.L.R. 194.
(13) (1885) 10 P.D. 141.
(14) (1899) 2 Q.B. 502.

DIXON J. delivered the following written judgment :—

This application is made on the part of the defendant for a stay of an action *in rem* brought in the admiralty jurisdiction of the court. The defendant's ship was arrested but the parties agreed upon security and the ship was released by consent. She and a ship owned by the plaintiff had collided. The plaintiff's ship was sunk and the defendant's was seriously damaged. The collision took place near the Gellibrand Light in Hobson's Bay on 29th January 1937. An inquiry was held and immediately upon its conclusion each party proceeded to sue the other for the loss which each respectively suffered as a result of the casualty. The defendant's action was brought in the Supreme Court of Victoria as at common law. The writ was issued on Friday, 12th February. On the same day the plaintiff made an attempt to issue its writ out of this court, but it was not in fact issued until 15th February. The plaintiff's claim is for £50,000, the defendant's for £15,000.

The application for a stay of the action in this court is made in order that the responsibility for the damage caused by the collision may be decided in the proceedings in the Supreme Court. The defendant says that the plaintiff may assert its claim in those proceedings by counterclaim and that it ought not to be allowed to maintain or at any rate actively to pursue an independent action in this court. The plaintiff, on the other hand, says that it wished to proceed *in rem* and to have the matter determined in admiralty and that it was and is entitled to enforce its claim in the admiralty jurisdiction. Whether the Supreme Court possesses such a jurisdiction is a question of much uncertainty and therefore, it says, it was practically bound to proceed in this court, unless it was prepared not only to forgo its remedy against the ship itself but also to allow the whole matter to be decided in a common law jurisdiction in which its opponent claims a right to trial by jury.

It unfortunately remains true that the existence of an admiralty jurisdiction of the Supreme Court is a matter of doubt. It depends on the validity of sec. 30A of the Commonwealth *Judiciary Act* 1903-1934, which declares this court to be a colonial court of admiralty. If no such declaration were in force, then both this court and the Supreme Courts would be colonial courts of admiralty

H. C. OF A. 1937.

UNION STEAMSHIP CO. OF NEW ZEALAND LTD. v. THE CARADALE.

Dixon J.

under sec. 2 of the *Colonial Courts of Admiralty Act* 1890. But a declaration specifying one court has the effect of confining the jurisdiction to that court. In *John Sharp & Sons Ltd.* v. *The Katherine Mackall* (1), *Isaacs* J. held that sec. 30A was void, but *Starke* J. expressed the contrary view. Unless the opinion of *Isaacs* J. is right the Supreme Court appears to be no longer a colonial court of admiralty. The jurisdiction would be revived by the repeal of sec. 30A. The matter is fully discussed in *McArthur* v. *Williams* (2). There (3) *Latham* C.J. drew the attention of the legislature to the difficulty.

The present defendant, however, is content with the common law jurisdiction of the Supreme Court. Even if it does possess an admiralty jurisdiction, it prefers to sue at common law and thus obtain a jury. Unless the case is brought within Order XXXVI., rule 5, of c. I. of the *Rules of the Supreme Court* (Vict.), either party to an action in that court for damage by collision between two vessels is, it seems, entitled to have it tried before a jury unless the action is " instituted in the . . . Court in the exercise of the jurisdiction conferred on it by the *Colonial Courts of Admiralty Act* 1890." See *Rules of the Supreme Court*, c. IX (*Admiralty Rules*), rule 2, definition of " action," and rule 95 ; *Union Steamship Co. of New Zealand Ltd.* v. *Melbourne Harbour Trust Commissioners* (4) ; and cp. *Rules of the Supreme Court*, c. I., Order XIX., rule 28. There is a provision in the *Colonial Courts of Admiralty Act* 1890 (sec. 2 (4)) as a result of which a court possessing jurisdiction under that Act must be treated as acting in the exercise of that jurisdiction and not otherwise whenever it deals with matters falling within that jurisdiction if they arise outside the body of a country or other like part of the British possession. If the collision had occurred " outside the body of a country or other like part " of Australia, the present defendant's right to a jury in the Supreme Court would depend upon the question whether that court retains its jurisdiction as a colonial court of admiralty. For if it does so, an action in respect of a collision between ships occurring outside the body of a country or other like part could not be entertained except as a proceeding in admiralty.

(1) (1924) 34 C.L.R. 420.
(2) (1936) 55 C.L.R. 324, at pp. 340, 341 and 358-360.
(3) (1936) 55 C.L.R., at p. 340.
(4) (1907) V.L.R. 204 ; 29 A.L.T. 63.

But it is plain that the place of collision, namely near the Gellibrand Light, could not be regarded as outside the body of all parts of Victoria. See *R.* v. *Keyn* (1); "*The Public Opinion*" (2); *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.* (3); "*The Fagernes*" (4); *Supreme Court Act* 1928, secs. 56 and 57. The case is, therefore, one with which the Supreme Court at least may deal as a common law action and with which it cannot otherwise deal unless sec. 30A of the *Judiciary Act* is void. I do not think that the principles of law upon which liability depends differ in the two jurisdictions. The ships were engaged in inter-State trade and if it were found that both were in fault sec. 259 of the *Navigation Act* 1912-1934 would apply in both jurisdictions so as to make the liability of each proportionate to the degree of fault (Cf. sec. 64 of the *Supreme Court Act* 1928).

The inconvenience and embarrassment of allowing two independent actions involving the same question of liability to proceed contemporaneously in different courts needs no elaboration. But the question is: Ought the action in the admiralty jurisdiction of this court to be stayed? In my opinion it ought not. The jurisdiction was established for the hearing and determination of kinds of causes of which this case presents an ordinary example. The plaintiff was entitled to proceed *in rem* and it may be that the assertion of its claim to a maritime lien appeared to it to be essential if it was to be sure of recovering its loss. The plaintiff was entitled also to seek a determination of its claim by the tribunal and according to the procedure obtaining in admiralty. Prima facie, therefore, the institution of the action was quite proper. The two actions were begun almost at the same time and I think the circumstance that the defendant was a little quicker in the actual issue of its writ is not a very substantial consideration. The desire of the defendant to litigate the question of liability where a jury would decide it is a matter of weight. But it appears to me to be quite counterbalanced by the desire of the plaintiff to litigate it where a jury will not decide it. Federal law treats a case of this kind as prima facie unsuited

(1) (1876) 2 Ex. D. 63, at pp. 162, 168.
(2) (1832) 2 Hag. Adm. 398; 166 E.R. 288.
(3) (1877) 2 App. Cas. 394, at pp. 416-419.
(4) (1927) P. 311, at pp. 313, 315-318.

H. C. OF A. 1937.

UNION STEAMSHIP CO. OF NEW ZEALAND LTD. v. THE CARADALE.

Dixon J.

for trial by jury. It does so consistently with the traditional procedure in admiralty. But now that damages are apportionable according to the degrees of fault, there is an added reason why liability for marine collisions should be decided by the court. The defendant has offered to submit to terms by which the security it has given in this action may be kept on foot until the final determination of the action in the Supreme Court. If a stay meant that the plaintiff would lose its remedy against the *res* or the security which represents it, the defendant's application would scarcely deserve consideration. But I do not think that the defendant's readiness to submit to terms warrants an exercise of the discretion against the continuance of the plaintiff's action. The plaintiff brings in an appropriate jurisdiction an action for a very large claim. There are no questions as to the existence or sufficiency of the jurisdiction or as to the mode of trial. The action was instituted for a proper purpose which might not otherwise be achieved. I do not think that the defendant can show any sufficient reason for this court's refusing to try the plaintiff's claim and turning it into the Supreme Court, where the admiralty jurisdiction is in doubt and the mode of trial may prove unsuitable and perhaps other difficulties may be raised. It is not a sufficient reason that the defendant's writ was issued three days earlier and the defendants are now ready to allow the security that they were forced to give by the process of this court to stand until the conclusion of the proceedings in the Supreme Court.

The summons will be dismissed. Costs to be plaintiff's costs in the cause. Certify.

Summons dismissed.

Solicitors for the applicant, *Moule, Hamilton & Derham.*

Solicitors for the respondent, *Malleson, Stewart, Stawell & Nankivell.*

H. D. W.