[HIGH COURT OF AUSTRALIA.]

NAGRINT . . . . . PLAINTIFF;

AGAINST

THE SHIP *REGIS*, FORMERLY THE SHIP *RODNEY* . . . . . } DEFENDANT.

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SYDNEY, 1938, *Dec.* 7.

1939, *Mar.* 28.

DIXON J.

High Court—Admiralty jurisdiction—Action in rem *against ship—Personal injury to passenger—Improper navigation—Injury caused by ship—Admiralty Court Act* 1861 (24 & 25 *Vict. c.* 10), *sec.* 7—*Colonial Courts of Admiralty Act* 1890 (53 & 54 *Vict. c.* 27), *sec.* 2 (2)—*Maritime Conventions Act* 1911 (1 & 2 *Geo. V. c.* 57), *sec.* 5—*Navigation Act* 1912-1935 (*No.* 4 *of* 1913—*No.* 30 *of* 1935), *sec.* 262.

The High Court of Australia in its admiralty jurisdiction has jurisdiction to adjudicate on a claim by a passenger against the vessel carrying him for negligent navigation resulting in personal injury to him caused by the capsizing of the vessel, and this is so notwithstanding that the casualty was not an incident of inter-State trade.

SUIT.

In an action brought in the admiralty jurisdiction of the High Court the plaintiff, Lorna Ellen Irene Nagrint, claimed to recover the sum of £400 against the ship *Regis*, formerly known as the ship *Rodney*, "for damage done by the said ship which by reason of the negligence of the master and owner thereof in Port Jackson on 13th February 1938 occasioned personal injuries to and otherwise damnified the plaintiff."

An appearance to the action was entered by Charles Henry Rosman, who, in an affidavit, swore that he was the owner of the defendant ship.

The statement of claim filed on behalf of the plaintiff was substantially as follows :—

1. The plaintiff is an infant within the age of 21 years and sues herein by her duly appointed next friend Cordy Nagrint of Rockdale, near Sydney, New South Wales.

2. On 13th February 1938, the ship *Regis,* then known as the ship *Rodney,* was a ship owned and controlled and in the care and management of one Charles Henry Rosman.

3. Rosman then was and still remained a British subject.

4. The said ship was at the date of the commencement of the action known as the ship *Regis* and was still owned by Rosman.

5. On 13th February 1938 the plaintiff promised to pay to Rosman a certain sum in consideration that he would carry her on the said ship on the waters of Port Jackson in order that she might view the United States of America cruiser *Louisville* proceed outward from the port of Sydney to sea.

6. In pursuance of that agreement the plaintiff embarked on the *Rodney* on 13th February 1938.

7. Rosman then and at all material times was the master of the *Rodney.*

8. The ship thereupon proceeded to follow the cruiser referred to above and at all material times both vessels were being navigated in waters of Port Jackson ordinarily used by ships engaged in trade and commerce with other countries.

9. At a certain time the *Rodney* negligently and improperly approached so close to the cruiser that it became necessary in order to avoid a collision between the *Rodney* and the cruiser for the *Rodney* to alter her course and in so doing to avoid the collision the *Rodney* capsized and struck and injured the plaintiff causing personal injuries to her and also precipitated her into the water whereby she became and was for a long time sick and wounded and her apparel was ruined and her health permanently impaired.

The plaintiff claimed, *inter alia,* a declaration that she was entitled to the damages proceeded for and condemnation of the ship in such damages and in costs.

All the allegations in the statement of claim, other than those contained in pars. 1 and 3 thereof, were denied by the defendant

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which, by way of further defence to the statement of claim, said that the allegations contained therein did not entitle the plaintiff to the damages as therein claimed or any damages and that the allegations therein contained did not render the ship liable to "condemnation" as therein claimed. The defendant asked that the suit be dismissed with costs.

The matter came on for hearing on 7th December 1938 before *Dixon* J., and, upon it appearing to his Honour that the question of law hereinafter stated arose and that it would be convenient to have it decided before any evidence was given or any question or issue of fact was tried, his Honour ordered that the question be raised as to the sufficiency of the statement of claim to support a proceeding *in rem*.

The question of law was whether upon the facts alleged in the statement of claim proceedings *in rem* lay against the ship *Regis*, formerly the ship *Rodney*.

F. P. Evans and *May*, for the plaintiff.

C. D. Monahan and *R. Le G. Brereton*, for the defendant.

Cur. adv. vult.

1939, Mar. 28.

DIXON J. delivered the following written judgment:—

The suit is brought in the admiralty jurisdiction of this court with a view to proceeding *in rem* against the ship *Rodney*, which has been renamed the *Regis*. According to the allegations in the statement of claim, on 13th February 1938 the plaintiff was a passenger upon the *Rodney* when that vessel took sightseers down Port Jackson to watch the departure of an American cruiser. The *Rodney* with its passengers followed the cruiser down the harbour, through the waters ordinarily used by ships engaged in trade and commerce with other countries. It is alleged that the *Rodney*, owing to improper navigation, approached close to the cruiser and, in changing her course in order to avoid a collision, capsized " and struck and injured the plaintiff, causing personal injuries to her, and also precipitated her into the water." She complains of the

consequences of the immersion both to her health and to her wearing apparel. It is not clear how the *Rodney* "struck" the plaintiff but, as I understand what was stated at the bar, the allegation is intended to cover proof that as or after the plaintiff was precipitated into the water some part of the vessel struck her.

The existence of a remedy *in rem* against the vessel, as distinguished from a remedy *in personam* against the owner of the *Rodney*, is said to be of practical importance in the particular circumstances obtaining, and for this reason the plaintiff has sued in admiralty.

An appearance to the writ was entered on behalf of the owner, who at once raised the objection that the cause of action set up was not a matter of admiralty jurisdiction. As it appeared that a question of law was involved which it would be convenient to have decided before any evidence was taken or any question of fact was tried, I ordered that the question be raised as an objection to the sufficiency of the statement of claim to support a proceeding *in rem* (Order XXXII., rule 2, Rules of the High Court). The question of law stated is whether upon the facts alleged in the statement of claim proceedings *in rem* lie against the ship *Rodney*, now called *Regis*. In effect the question is whether the plaintiff's claim falls within the admiralty jurisdiction. The conclusion I have reached is that the claim may be enforced in admiralty because it is a claim for damage done by the ship within the meaning of sec. 7 of the *Admiralty Court Act* 1861. But, to explain what is involved in the question and in the conclusion, some account is necessary of the not very simple course which has been taken by statute and judicial decision in extending the jurisdiction of the High Court of Admiralty. For under that provision the jurisdiction of this court comes to be measured by the jurisdiction of the High Court of Admiralty. Moreover, some discussion is necessary of the interpretation or interpretations which the provision has received.

Under sub-sec. 2 of sec. 2 of the Imperial *Colonial Courts of Admiralty Act* 1890 a jurisdiction is given to a Colonial Court of Admiralty 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. The High Court of Australia is a Colonial Court of Admiralty. If sec. 30A of the *Judiciary Act*

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1903-1937 was validly enacted by Act No. 11 of 1914, it is a Colonial Court of Admiralty because that section contains a declaration to that effect pursuant to sec. 3 (*a*) of the Imperial Act. If sec. 30A was not validly enacted, it is a Colonial Court of Admiralty because it is a court of law in Australia of original civil jurisdiction, unlimited as to the value of the subject matter, within the meaning of secs. 2 (1) and 15 of the Imperial Act: See *John Sharp & Sons Ltd.* v. *The Katherine Mackall* (1); *McArthur* v. *Williams* (2); *Union Steamship Co. of New Zealand Ltd.* v. *The Caradale* (3).

The jurisdiction which this court derives from the Imperial Act as a Colonial Court of Admiralty is the admiralty jurisdiction of the English High Court as it existed when the Imperial Act was passed, that is, in 1890: See *The Yuri Maru* and *The Woron* (4).

The admiralty jurisdiction of the English High Court in 1890 depended primarily upon sec. 16 (5) of the *Judicature Act* 1873, which transferred and vested in the High Court the jurisdiction which at the commencement of that Act was vested in or capable of being exercised by the High Court of Admiralty.

The jurisdiction of the High Court of Admiralty had been confirmed and extended by the *Admiralty Court Act* 1840 (3 & 4 Vict. c. 65) and the *Admiralty Court Act* 1861 (24 & 25 Vict. c. 10). Before those Acts the jurisdiction over causes of action arising within the body of a county was, speaking generally, denied by the common-law courts (*Holdsworth's History of the Law of England*, vol. I. (1938), pp. 552-559). Even if the matter complained of had occurred on the high seas, it is not clear that the High Court of Admiralty would have been permitted to entertain a claim by a passenger carried upon a ship against the owner for personal injury caused by the negligent navigation of the ship, though there are many instances where suits for remedies *in personam* for tort committed on the high seas, such as assault, were maintained in admiralty without interference by prohibition: *The Ruckers* (5); *The Agincourt* (6); *The Lowther Castle* (7); *The Sarah* (8); and *The Petronella* (9), the notes to which give a number of early

(1) (1924) 34 C.L.R. 420.
(2) (1936) 55 C.L.R. 324, at pp. 340, 341, 358-360.
(3) (1937) 56 C.L.R. 277.
(4) (1927) A.C. 906, at p. 915.
(5) (1801) 4 C. Rob. 73; 165 E.R. 539.
(6) (1824) 1 Hag. Adm. 271; 166 E.R. 96.
(7) (1825) 1 Hag. Adm. 384; 166 E.R. 137.
(8) (1862) Lush. 549; 167 E.R. 248.
(9) (1730) Burrell 311; 167 E.R. 587.

unreported claims *in personam* brought in the Court of Admiralty for damages for injury to person or property; cf. *Holdsworth's History of the Law of England*, vol. XII. (1938), at p. 692.

Sec. 7 of the *Admiralty Court Act* 1861 provided that the High Court of Admiralty should have jurisdiction over any claim for damage done by any ship. The very generality of this provision has provoked attempts to limit its operation to particular kinds of claims. One view suggested was that it did not extend the kind of subject matter or cause of action over which the Court of Admiralty should have jurisdiction but meant only that there should be no exclusion of any claim on the ground that the waters where it arose were within the body of a county and it had not arisen on the high seas. Sec. 6 of the *Admiralty Court Act* 1840 had enacted, among other things, that the Court of Admiralty should have jurisdiction to decide all claims for damage received by any ship or sea-going vessel whether such ship or vessel may have been within the body of a county or upon the high seas. It was suggested that the later provision was intended only as the counterpart of the earlier and to produce the same effect where the damage was done, not received, by the ship.

Another suggestion was that the words "claim for damage done by any ship" applied only to damage to ships or other property and not other forms of injury or loss, as, for instance, personal injury.

These limitations, after some fluctuation of decision, have, I think, finally been rejected authoritatively. The effect of decisions to which I shall refer is that the jurisdiction includes claims for personal injuries and that the criterion is not whether according to the decisions of the courts of common law the claim is of a kind which if arising on the high seas the Court of Admiralty might entertain. The word "done," however, imposes a limit upon the operation of the section and makes it necessary to distinguish between damage simply sustained on or in connection with a ship and damage inflicted by the ship as a thing, so to speak, capable of causing harm.

At one stage in the course of decision a difference of opinion arose between the Court of Admiralty and the courts of common law upon the question whether proceedings under Lord Campbell's Act might be brought in the former court. The Court of Admiralty

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decided that it had jurisdiction over such proceedings (*The Guldfaxe* (1); *The Explorer* (2)). The Court of Queen's Bench decided that it had not (*Smith* v. *Brown* (3)). To claimants under Lord Campbell's Act the importance of the question lay in the remedy *in rem* which proceedings in admiralty gave them. For, by sec. 35 of the *Admiralty Court Act* 1861 it was provided that the jurisdiction conferred by that Act might be exercised either by proceedings *in rem* or by proceedings *in personam*.

The question therefore survived the fusion of jurisdictions effected by the *Judicature Act*. At first the Court of Appeal was equally divided upon the question, the opinion of two Lords Justices from the common law side being against the jurisdiction *in rem* and that of two from the chancery side being in its favour (*The Franconia* (4)). But later the Court of Appeal unanimously held that claimants under Lord Campbell's Act must proceed *in personam* before a jury, because that statute gave a special remedy and procedure and it was exclusive (*The Vera Cruz* [*No.* 2] (5)). This decision was affirmed by the House of Lords (*Seward* v. *Vera Cruz* (6)). In the early stages of the controversy the reasons given for denying that claims for loss of life could be the subject of admiralty proceedings *in rem* were much wider than those finally adopted. Sec. 7 of the *Admiralty Court Act* 1861 was construed as relating only to damage done to property and therefore as incapable of extending to personal injury or loss of life (7). But in the end the decision that claims under Lord Campbell's Act fell outside sec. 7 was placed entirely on the nature of the claim by relatives for the loss of actual or prospective support by the deceased, on the special remedies given by Lord Campbell's Act, and on the implications found in its provisions. It was conceded that proceedings *in rem* lay for personal injuries as well as damage to property, a proposition which had been decided by the Privy Council in *The Beta* (8) but overruled by the Queen's Bench on prohibition in *Smith* v. *Brown* (9).

In *The Franconia* (10) *Bramwell* and *Brett* L.JJ. had expressly refrained from offering any opinion upon the question whether the

(1) (1868) L.R. 2 Ad. & Ecc. 325; 19 L.T. 748.
(2) (1870) L.R. 3 Ad. & Ecc. 289.
(3) (1871) L.R. 6 Q.B. 729.
(4) (1877) 2 P.D. 163.
(5) (1884) 9 P.D. 96.
(6) (1884) 10 App. Cas. 59.
(7) (1871) L.R. 6 Q.B., at pp. 734-736.
(8) (1869) L.R. 2 P.C. 447.
(9) (1871) L.R. 6 Q.B. 729.
(10) (1877) 2 P.D., at p. 170.

Court of Admiralty would have jurisdiction in a case of personal hurt where there was no death and the person hurt was the plaintiff. But in *The Vera Cruz* [*No.* 2] (1) *Brett* M.R. said :—" The section indeed seems to me to intend by the words ' jurisdiction over any claim,' to give a jurisdiction over any claim in the nature of an action on the case for damage done by any ship, or in other words, over a case in which a ship was the active cause, the damage being physically caused by the ship. I do not say that damage need be confined to damage to property, it may be damage to person, as if a man were injured by the bowsprit of a ship. But the section does not apply to a case when physical injury is not done by a ship." *Fry* L.J. said :—" First, then, does damage include injury to the person ? I consider that it does, for the reasons given in the judgment which *Baggallay* L.J. delivered in *The Franconia* (2) on behalf of himself and *James* L.J. The preamble of the Act leads me to the same conclusion " (3). *Bowen* L.J. did not mention personal injury but he said :—" The Act gives a claim for compensation for damage done by the ship—this, and this only, is the cause of action. ' Done by a ship ' means done by those in charge of a ship, with the ship as the noxious instrument " (3).

In the House of Lords the question whether personal injury fell within the jurisdiction *in rem* was mentioned by Lord *Blackburn* only, who treated it as irrelevant but not closed (4). The Admiralty Division adhered to the interpretation by which claims for personal injuries were included in its jurisdiction *in rem* (*The Theta* (5)). But when the British legislature decided to extend the remedy *in rem* to claims for loss of life, apparently it was thought better to put the jurisdiction *in rem* in cases of personal injury beyond doubt. By sec. 5 of the *Maritime Conventions Act* 1911, which does not extend to Australia (sec. 9 (2)), it was provided that any enactment which confers on any court admiralty jurisdiction in respect of damage shall have effect as though references to such damage included references to damages for loss of life or personal injury, and accordingly proceedings in respect of such damages may be brought *in rem* or *in personam*. This provision was transcribed by

(1) (1884) 9 P.D., at p. 99.
(2) (1877) 2 P.D., at pp. 172 et seq.
(3) (1884) 9 P.D., at p. 101.
(4) (1884) 10 App. Cas., at p. 72.
(5) (1894) P. 280.

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sec. 262 of the Commonwealth *Navigation Act* 1912-1935. If this section operates, through the *Colonial Courts of Admiralty Act* 1890, upon sec. 7 of the *Admiralty Court Act* 1861 in its indirect application to the High Court of Australia, and if it applies to the case of a passenger claiming against a vessel engaged in intra-State trade but sailing in waters used by oversea ships, it would exclude all possibility of questioning the jurisdiction to entertain proceedings *in rem* for claims for personal injury, provided that the injury was "done by the ship." But assuming that sec. 262 of the *Navigation Act* is justified by sec. 98 of the Constitution it is not clear how far it can stand with the proviso to sec. 3 of the *Colonial Courts of Admiralty Act* 1890; and the decision in *R.* v. *Turner*; *Ex parte Marine Board of Hobart* (1) tends against the view that there is a sufficient relation between the casualty in the present case and foreign or inter-State trade or commerce to bring the rights or remedies of those injured under the operation of Commonwealth law. Reliance may be placed upon sec. 51 (xxxix.) and sec. 76 (iii.) of the Constitution to support sec. 262, but the decision of the court in *John Sharp & Sons Ltd.* v. *The Katherine Mackall* (2) places the jurisdiction of the High Court of Australia upon the authority of the *Colonial Courts of Admiralty Act* 1890 and not upon sec. 30 (*b*) of the *Judiciary Act* 1903-1937. With such a foundation for the jurisdiction, it would seem that effect should be given to the proviso to sec. 3 of the *Colonial Courts of Admiralty Act* 1890 as against sec. 262. But in any case it appears to me to be established by authority that, independently of the provisions contained in sec. 5 of the British *Maritime Conventions Act* 1911 and in sec. 262 of the Commonwealth *Navigation Act*, sec. 7 of the *Admiralty Court Act* 1861 gives jurisdiction where damage is done by a ship to a person or to a thing, including, of course, another ship. The chief authorities are *The Sylph* (3); *The Beta* (4); *The Vera Cruz* [*No.* 2] (5); *The Zeta* (6), per Lord *Herschell*; *The Theta* (7). The fullest statement of the grounds for the conclusion is to be found in the judgment of *Baggallay* L.J. in *The Franconia* (8).

(1) (1927) 39 C.L.R. 411.
(2) (1924) 34 C.L.R. 420.
(3) (1867) L.R. 2 Ad. & Ecc. 24.
(4) (1869) L.R. 2 P.C. 447.
(5) (1884) 9 P.D., at pp. 99, 101.
(6) (1893) A.C. 468, at p. 478.
(7) (1894) P. 280.
(8) (1877) 2 P.D., at pp. 173-176.

The conclusion that a claim for damages for personal injuries falls within the jurisdiction *in rem* does not answer the objection to the jurisdiction. For there remains the contention that sec. 7 of the *Admiralty Court Act* 1861 does not cover a claim by a passenger against the ship carrying him for negligent navigation causing such an accident as that described. The contention, perhaps, does not really depend on separate or alternative grounds. But for clearness or convenience I think it may be treated as based on two grounds, viz., first on the view that claims by a passenger for injury caused by negligence in carrying him are completely outside sec. 7, and, secondly, on the view that the injury was not "done" by the vessel.

In a very summary manner *Butt* J. rejected an argument that sec. 7 covered a claim by a cargo owner for damage to his goods caused by a collision of the carrying vessel with another, owing to the improper navigation of the former (*The Victoria* (1)). The ground of the decision appears to have been that sec. 7 applied only to damage done by a vessel to something external to it with which it can come into contact and not to things like cargo on board. In *The Franconia* (2) *Bramwell* and *Brett* L.JJ. say: "It is remarkable that no jurisdiction is given in a case of bodily hurt to a passenger, nor to his goods for injury done in the ship." In *The Bernina* [*No.* 2] (3) *Lopes* L.J., speaking of the admiralty rule for the division of the loss where both vessels are to blame for a collision between them, said:—"This rule before the *Judicature Acts* clearly did not apply to claims brought by passengers or by representatives of deceased passengers under Lord Campbell's Act. Such claims were not brought in the Admiralty Court at all, because there was no question of maritime lien; but were brought in a court of common law, in which the ordinary rule as to contributory negligence was in force." It is doubtful, perhaps, whether *Lopes* L.J. had sec. 7 in mind.

From these citations it does appear to have been assumed as a general proposition that proceedings *in rem* would not lie where the real ground of complaint was a failure in the duty to carry goods or passengers safely. The existence or prevalence of such a view is

(1) (1887) 12 P.D. 105. (2) (1877) 2 P.D., at p. 171.
(3) (1887) 12 P.D. 58, at p. 95.

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readily to be accounted for by three considerations, viz., that the jurisdiction of the High Court of Admiralty did not cover the enforcement of liabilities under contracts of affreightment, that sec. 6 of the *Admiralty Court Act* 1861 made an express and guarded provision in reference to claims for loss of and damage to cargo, and that the interpretation of sec. 7 was arrived at by a slow and uncertain course of development. But once sec. 7 received a meaning which made its application depend not on any prior conception of the ambit of admiralty jurisdiction, not on any limited construction of the word "damage," and not on any restricted denotation of the word "claim," but simply on the question whether the damage could properly be said to have been "done by the ship," no reason existed for differentiating between passengers or members of the ship's company on the one hand and strangers to the ship on the other.

It is true that where passengers or crew suffer injury it will less often be possible to say that the ship did the damage. In most cases if an injury is sustained by a passenger or one of the ship's company it will be found to have occurred in or on the ship and not to have been "done by" the ship. But cases may arise and have arisen where the ship is the instrument of damage. The distinction between loss or injury inflicted by the ship regarded as an active agent and loss or injury which, though occurring on or in connection with the ship and attributable to the negligence of the master or crew, is not "done by the ship" may appear artificial and unreal. For, after all, whether, for example, a plaintiff's complaint is that he fell down an uncovered hatchway on the vessel or suffered immersion because his dinghy was overturned or swamped by the movement of the ship, negligence in or about the management of the ship by her master, officers or crew or one or some of them is the foundation of his cause of action, if any. Yet the distinction is the turning point of a number of decisions both in England and the dominions.

The criterion is usually expressed by a citation of the words of *Brett* M.R. (1), "a case in which a ship was the active cause, the damage being physically caused by the ship," or of those of *Bowen*

(1) (1884) 9 P.D., at p. 99.

L.J. (1), "damage done . . . by those in charge of a ship, with the ship as the noxious instrument." In *The Theta* (2) *Bruce* J. applied these expressions to the case of an officer injured by falling into the hold of a ship lying between his own ship and the wharf while attempting to gain his own ship. The learned judge held that the damage was done on board the ship but not by the ship.

In *The Minerva* (3) the ship proceeded against had, after completing the loading of grain by means of an elevator-barge, taken aboard part of the elevator during the storing of gear by the barge. While the ship's derrick was returning the part taken aboard, the rope of the derrick broke and the part fell on the deck of the barge, doing damage both to itself and to the barge. *Bateson* J. applied the same criterion and held that, by the failure of the ship's derrick to act properly in the hands of the owner's servants, the ship was the active cause of the damage.

In *The Queen Eleanor* (4) a stevedore's labourer fell into the hold through some fault in a hatch or in the hatchway. *Stout* C.J. referred to *The Vera Cruz* [*No.* 2] (5) and *The Theta* (6), and said: —"But for the decisions I have referred to I should have thought that the words of the section were wide enough to cover such a class of case, but in interpreting the English Act I feel I am bound by English decisions. It was, in my view, the ship that did the damage, by her faulty construction; but that is not the meaning of 'done by the ship' which the English courts have held to be within the jurisdiction of the Admiralty Court. I came to this conclusion not without some doubt, and with regret" (7).

In *Wyman* v. *The Duart Castle* (8) an engineer was scalded through the breaking of a stop valve on a steamer, and *McLeod* J. held that this was damage done by the ship. In *Barber* v. *The Nederland* (9) and *Mulvey* v. *The Neosho* (10) on facts like or analogous to those of *The Queen Eleanor* (4) the same conclusion was reached by the Canadian Exchequer Court. In *Outhouse* v. *The Thorshavn* (11) the remoter consequences of jettisoning oil were held to be damage done by the

(1) (1884) 9 P.D., at p. 101.
(2) (1894) P., at p. 284.
(3) (1933) P. 224.
(4) (1899) 18 N.Z.L.R. 78.
(5) (1884) 9 P.D. 96.
(6) (1894) P. 280.
(7) (1899) 18 N.Z.L.R., at p. 84.
(8) (1899) 6 Can. Ex. C.R. 387.
(9) (1909) 12 Can. Ex. C.R. 252.
(10) (1919) 19 Can. Ex. C.R. 1.
(11) (1935) Ex. C.R. (Can.) 120.

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ship, and in *Lincoln Pulpwood Co. Ltd.* v. *The Rio Casma* (1) damage suffered by a barge through being placed in an improper berth by the crew of the defendant ship in order to make room for the latter ship was held to be damage by that ship. It is true that these cases are no more than illustrations of the manner in which the test has been applied. But they show that when the injury arises from some defect in the condition of the ship considered as premises or as a structure upon which the person injured is standing, walking or moving, the ship is treated as no more than a potential danger of a passive kind, a danger to the user, whose use is the active cause of the injury. But where the injury is the result of the management or navigation of the ship as a moving object or of the working of the gear or of some other operation, then the damage is to be regarded as done by the ship as an active agent or as the "noxious instrument."

In the present case, according to the allegations, the improper navigation of the ship caused her so to behave that she capsized. Her behaviour as an active agent was the direct cause of the harm, and in that sense she was the noxious instrument.

In my opinion, proceedings *in rem* lie and this court has jurisdiction.

Order that upon the facts alleged in the statement of claim proceedings in rem lie against the ship Regis formerly Rodney. Costs, plaintiff's costs in the cause including costs of order 7th December 1938.

Solicitors for the plaintiff, *Carruthers, Hunter & Co.*

Solicitors for the defendant, *Dawson, Waldron, Edwards & Nicholls.*

J. B.

(1) (1935) Ex. C.R. (Can.) 123.