1902
MAY 1.

APPELLATE CIVIL.

29 C. 400.

29 C. 400.

APPELLATE CIVIL.

Before Mr. Justice Pratt and Mr. Justice Geidt.

RATAN MAHANTI *v.* KHATOO SAHOO.* [1st May, 1902.]

Jurisdiction—Foreign Court—Decree, execution of—Civil Procedure Code (Act XIV of 1882), ss. 223, 224, 229 (A) and 229 (B)—British Courts in India, power of, to send their decrees for execution to Foreign Courts.

The Tributary Mahals of Orissa do not form part of British India; therefore, in the absence of a prior notification in the *India Gazette* as specified in ss. 229 (A) and 229 (B) of the Civil Procedure Code, no decree [401] by a Court in British India can be sent for execution into a territory such as Mayoorbhunj, which is a Tributary Mahal.

***Kastur Chand Gujar* v. *Parsha Mahar* (1) referred to.**

THE judgment-debtor Khatoo Sahoo obtained from the High Court this Rule.

The plaintiffs Ratan Mahanti and others obtained a decree for a sum of Rs. 69-9 against the petitioner in the Court of Small Causes at Balasore on the 16th January 1901. The decree-holders, on the 27th September 1901, applied in the said Court for a certificate to be sent to the Court of the Raja at Killa Mayoorbhunj for the execution of the decree, alleging that the petitioner resided or had property within the local limits of the jurisdiction of the last-mentioned Court. The Court below granted the application of the decree-holder and issued a certificate under ss. 223 and 224 of the Civil Procedure Code on the 27th September 1901, and ordered that the suit be struck off the file and that a copy of the *robocari* be sent to the Raja of Killa Mayoorbhunj through the Assistant Superintendent of the Tributary Mahals at Balasore.

Mr. *J. T. Woodroffe* (the *Advocate-General*) and Babu *Harendra Nath Mookerjee* for the petitioner.

No one appeared for the opposite party.

PRATT and GEIDT, JJ. Ratan Mahanti and others, holders of a decree in the Court of Small Causes at Balasore, obtained an order, dated the 27th September 1901, directing that a *robocari* be sent to the Raja of Killa Mayoorbhunj through the Assistant Superintendent of the Tributary Mahals, Balasore, with a copy of the decree and of any order which may have been passed in execution of the same and a certificate of non-satisfaction. This order purports to have been passed under ss. 223 and 224 of the Code of Civil Procedure.

The judgment-debtor has obtained this Rule calling upon the decree-holders to show cause why the order complained of should not be set aside. No cause has been shown. It appears that this Court has on more than one occasion decided that the Tributary Mahals of Orissa, of which Mayoorbhunj is one, do not form part of **[402]** British India; and this ruling has been accepted by the Secretary of State for India in Council, as appears from p. 119 of Vol. I of Mr. Aitchison's work entitled "A Collection of Treaties, Engagements and Sanads." Under ss. 229 (A) and 229 (B) of the Code, no decree by a Court in British India can be sent for execution into a territory such as Mayoorbhunj without prior notification in the *India Gazette* as specified in these sections. No such notification appears to have been issued. The Judge of the Small Cause Court at

* Civil Rule No. 500 of 1902.

(1) (1887) I. L. R. 12 Bom. 230.

Balasore had therefore no jurisdiction to make the orders, which he did in this case. The view we take is in accordance with that expressed in the case of *Kastur Chand Gujar* v. *Parsha Mahar* (1).

The Rule is accordingly made absolute, and the order complained of is set aside with costs.

Rule made absolute.

1902 MAY 1.

APPELLATE CIVIL.

29 C. 400.

29 C. 402.

ADMIRALTY JURISDICTION.

Before Mr. Justice Harington.

THE " TELENA." [24th, 25th Sept., 1901.]

Admiralty Jurisdiction—Arrest of a steam-ship, application for—Damage done " by a ship "—Maritime lien for damage—Injury caused to one ship by wrongful act of another—Ship as " Instrument of Mischief "—Action in rem—53 & 54 *Vict., Ch.* 27.

To establish a maritime lien for damage against a ship, the damage must be the direct result of some unskilful or negligent conduct of those in charge of the ship which does the mischief, the ship herself being the " instrument of mischief."

The steam-ship *T.* while lying in dock discharged a large quantity of oil which, floating on the dock-water and becoming ignited, caused considerable damage to another steam-ship, *C.*, lying in the same dock. The charterers of the latter applied for the arrest of the former, alleging that they were entitled to bring an action *in rem* against the owners of the ship *T.*

The application for arrest of the ship *T.* was refused, she not being the direct cause of the damage, and the applicants not having an action *in rem* in the Admiralty Court against the owners of that ship.

[403] *The Vera Cruz, No.* 2 (2), *Currie* v. *M'Knight* (3) referred to.

The Industrie (4), *The Batavier* (5) *The Clara Killam* (6), *The Energy* (7) distinguished.

APPLICATION before the Judge at Chambers by Mr. Edwards, of Messrs. Orr, Robertson and Burton, Solicitors, on behalf of the British India Steam Navigation Company, Limited, for a warrant of arrest of the steam-ship *Telena*.

The following are the material allegations contained in the affidavit filed in this matter :—

That on November 23,1900, the steam-ship *Croydon*, which was chartered by the British India Steam Navigation Company, Limited, was lying in the Kidderpore Docks within the port of Calcutta.

That on the same date another steam-vessel, *Telena*, was also lying in the said dock, and on the morning of the same day a large quantity of refuse oil was discharged from the *Telena*. The oil floating on the dock-water and becoming ignited set fire to the *Croydon*, and thereby caused considerable damage to that ship, her furniture, apparel, stores, &c., and in consequence thereof great loss and damage were occasioned to the applicants, for which they demanded from the owners of the *Telena* compensation, which was refused.

That after the said fire the *Telena* left Calcutta and went to foreign ports ; and did not return to Calcutta until September 20, 1901, and had

(1) (1887) I. L. R. 12 Bom. 230.
(2) (1884) L. R. 9 P. D 96.
(3) (1897) 1897 A. C. 97.
(4) (1871) L. R. 3 Ad. & Eccl. 303.
(5) (1889) L. R. 15 P. D. 37.
(6) (1870) L. R. 3 Ad. & Eccl. 161.
(7) (1870) L. R. 3 Ad. & Eccl. 48.

1901
SEP. 24, 25.

ADMIRALTY JURISDICTION.

29 C. 402.

since been lying at Budge-Budge within the port of Calcutta. And that as she was about to leave this port again, this application was made on September 24, 1901, before the vacation Judge at chambers, alleging that the British India Steam Navigation Company were entitled under the circumstances to bring an action *in rem* against the owners of the *Telena* and to have a warrant for her immediate arrest.

Mr. *Edwards* for the applicants. The crew of the *Telena* negligently discharged the oil which ignited, and thereby caused **[404]** considerable damage to the *Croydon;* for this wrongful act the British India Steam Navigation Company are entitled to bring an action *in rem* against the owners of the *Telena* and to a warrant for her arrest.

[HARINGTON, J. You must show that the ship has, in maritime language, done the damage. And some authority must be shown that the damage as caused in the present case entitled the parties to proceed *in rem.*]

I submit that the words "damage done by a ship" mean the damage done by any negligent act or behaviour of those in charge of the ship; and, inasmuch as the damage in the present case has been occasioned by a negligent act on the part of the crew of the *Telena*, namely, the discharge of a large quantity of oil in the dock, I am entitled to a warrant for her arrest.

[HARINGTON, J. Can you cite any case where a warrant of arrest has issued when the injury was not directly caused by the ship or her crew?]

In the present instance there was a direct wrongful act on the part of the crew of the *Telena*; and the injury was caused by the dangerous position in which the *Croydon* was placed: see *The Industrie* (1), *The Batavier* (2), *The Clara Killam* (3), and *The Energy* (4). These cases show that it is not essential that the vessel itself should be the immediate instrument or cause of the damage.

HARINGTON, J. This is an application made on behalf of the British India Steam Navigation Company for a warrant for the arrest of the steam-ship *Telena*. The circumstances giving rise to this application are to be found in the affidavit which has been filed. From that it appears that the *Telena* was lying in the Kidderpore Docks on the 23rd of November in the year 1900, and that on that day a large quantity of oil was negligently discharged from her into the dock: this floated on the water and became ignited, and did considerable damage to the steam-ship *Croydon*, of which the British India Steam Navigation Company were the charterers. Under these circumstances the British India Steam Navigation Company say that they are entitled to **[405]** bring an action *in rem* against the owners of the *Telena* and to have the *Telena* arrested.

Now the Admiralty Jurisdiction which is conferred on this Court by 53 and 54 Vict., Chap. 27, is expressed to be precisely similar to that exercised by the High Court in England in Admiralty, and that Court has jurisdiction over any claim for damage done "by any ship."

The question which I have to consider is whether this is damage done "by a ship," so as to give the Admiralty Court here jurisdiction.

The question whether the applicants are entitled to recover damages for negligence against the employers of the persons who negligently placed this oil in the dock is not a question which I have to consider.

(1) (1871) L. R. 3 Ad. & Eccl. 308.
(2) (1889) L. R. 15 P. D. 37.
(3) (1870) L. R. 3 Ad. & Eccl. 161.
(4) (1870) L. R. 3 Ad. & Eccl. 48.

1901 SEP. 24, 25.

ADMIRALTY JURISDICTION.

29 C. 402.

The only question before me is—Was this damage done " by the ship? " If it was done by the ship, a maritime lien arises, and on that lien being created, the right to have the ship arrested arises. Mr. *Edwards* on behalf of the applicants has founded his argument on cases in which it has been held that a maritime lien arises where one ship puts another in danger, and where the ship put in danger is injured in consequence of the dangerous position in which she has been placed. The cases which have been cited in support of this are the cases of *The Industrie* (1), *The Batavier* (2), *The Clara Killam* (3), and *The Energy* (4).

In these cases the injury was directly caused by the wrongful act of the ship against which the action *in rem* was brought. In the case of *The Batavier* (2), it was the disturbance made by the ship passing close to the boat that upset the boat. In the case of *The Clara Killam* (3) it was the fact that the ship entangled herself with a submarine cable, and that the cable was cut in clearing her, which was the direct cause of injury to the cable ; and in the case of *The Industrie* (1) the act of negligently placing the ship across the channel was the direct cause of the injured ship being forced out of the channel fairway and damaged ; and in the case of *The Energy* (4), the injury was directly due to the misconduct of the tug, which was towing the vessel that caused the collision.

[406] I do not think that these cases go far enough to enable me to say that a maritime lien is created where a dangerous substance is placed in a dock, and the injury is caused not by the dangerous substance directly, but by the interposition of another agent, namely, fire which caused the dangerous substance to damage the ship of the plaintiffs. The question as to what is damage done by a ship has been considered in the English Courts in a number of cases, and, inasmuch as the jurisdiction is the same here as in England, these cases must be referred to as a guide.

In the case of *The Vera Cruz* (5), decided in 1884, the question arose, and Lord Justice Bowen, in interpreting the meaning of the expression " damage done by a ship," says that it means " damage done by those in charge of a ship, with the ship as a noxious instrument ;" and the Master of the Rolls, in interpreting the same words, says :—

" 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 the ship was the active cause, the damage being physically caused by the ship."

The question was also considered in the House of Lords in the case of *Currie* v. *M'Knight* (6), decided in the year 1896.

That was a case in which the Master of a ship desiring to proceed to sea cut away the moorings of another ship to enable his ship to get clear and to go on her voyage, and the question before the House of Lords was whether a maritime lien was created against the ship whose Master did this injury.

It was held that no such lien was created. It was said that the ship had done nothing, and the Lord Chancellor, in explaining the meaning of damage done by a ship, says that " the phrase that it must be the fault of the ship itself is not a mere figurative expression, but it imports, in my opinion, that the ship against which a maritime lien for damages

(1) (1871) L. R. 3 Ad. & Eccl. 303.
(2) (1889) L. R. 15 P. D. 37.
(3) (1870) L. R. 3 Ad. & Eccl. 161.
(4) (1870) L. R. 3 Adm. Eccl. 48.
(5) (1884) L. R. 9 P. D. 96.
(6) (1897) A. C. 97.

1901 SEP. 24, 25.

ADMIRALTY JURISDICTION.

29 C. 402.

is claimed is the instrument of mischief, and that, in order to establish the liability of the ship itself to the maritime lien claimed, some act of navigation of the ship itself should either mediately or immediately be the cause of the [407] damage;" and Lord Watson, in interpreting the same section, says:—

"I think it is of the essence of the rule that the damage in respect of which a maritime lien is admitted must be either the direct result or the natural consequence of a wrongful act or manœuvre of the ship to which it attaches. Such an act or manœuvre is necessarily due to the want of skill or negligence of the persons by whom the vessel is navigated; but it is, in the language of maritime law, attributed to the ship, because the ship in their negligent or unskilful hands is the instrument which causes the damage:"

In that case to which I have just referred and quoted passages, Lord Herschell sums up all the cases in which it has been held that maritime lien is created where damage is done by a ship, and I cannot do better than quote his word. He says:—

"In all the cases referred to, the damage had been caused either by a collision with the vessel which was to blame, or by that vessel having driven the other into collision with some third vessel or other object. The doctrine was originally asserted in cases of damage by collision with the vessel which were declared subject to the lien. It has since been applied in cases in which the damage did not result from a collision with the vessel in fault, but in which, owing to the negligent navigation of that vessel, the injured ship was driven into collision with some other vessel or object. Whether the circumstances have always warranted the conclusions arived at, it is not necessary to inquire. I express no opinion upon it; but the ground of the decision was in all cases this, that the vessel on which the lien was enforced had, in maritime language, done the damage."

There are other cases to which it is unnecessary to refer, but the conclusion to be drawn from them all is that to establish a maritime lien, the damage must be due to the negligence or unskilful conduct of those in charge of the ship, which does the mischief, the ship herself being, as is described in the House of Lords, the 'instrument of mischief.' Now, in the present case, can it be accurately said that the *Telena* was the "instrument of mischief." I do not think it can. She no doubt [408] brought the dangerous substance into a place where it was the cause of danger to the plaintiffs' ship, but the direct cause of injury to the plaintiffs' ship was the fire which took place when this dangerous substance was ignited.

I do not see how it can be said that the fire was the direct act of the ship.

The cases in which ships have been held responsible for placing other vessels in positions in which they are damaged or confined to cases where the damage has been the direct result of some improper or negligent manœuvre by the wrong-doing ship: to apply this to a case in which the injury is indirectly caused by the negligent discharge from the ship of a dangerous substance into a place where it may become capable of doing injury would be to extend the principle to a degree which is not warranted either by the words of the statute or by any of the cases which have been decided of recent years in Admiralty Courts.

1901
SEP. 24, 25.

ADMIRALTY JURISDICTION.

29 C. 402.

For these reasons this application must be refused, but it must be understood that it does not follow because the owners of the injured ship have not an action *in rem* in the Admiralty Court that they may not have their remedy against the persons who may be responsible for the injury caused by the fire in an ordinary action founded on negligence.

[Mr. *Edwards*. Your Lordship has dealt with this matter as an admiralty action.]

HARINGTON, J. Yes.

[Mr. *Edwards*. It may be that I will have to apply for the admission of a plaint and for an order to arrest the vessel.]

HARINGTON, J. As to that I do not express any opinion.

Application refused.

Attorneys for the applicants: Messrs. *Orr*, *Robertson* and *Burton*.

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29 C. 409.

CRIMINAL REVISION.

[409] *Before Mr. Justice Prinsep and Mr. Justice Stephen.*

BISHU SHAIK *v.* SABER MOLLAH.* [5th February, 1902.]

Summary trial—Complaint disclosing facts constituting offence of a graver nature—Process, issue of—Trial for minor offences—Magistrate, jurisdiction of—Illegality—Criminal Procedure Code (Act V of 1898) s. 260.

Where the complaint stated that the accused with a large number of other persons armed with swords and other deadly weapons came upon the complainant's land, threatened him, and, in spite of his remonstrances, cut his paddy, and the Magistrate in examining the complainant recorded merely the fact the complainant stated that his paddy had been cut by the accused, and thereupon tried the accused summarily and convicted them under ss. 143 and 379 of the Penal Code. *Held*, that as the petition of complaint disclosed the commission of a much more serious offence than the offences for which the Magistrate had held a summary trial, and the examination of the complainant, which had not been properly recorded, did not show that such offence had not been committed, the Magistrate had acted without jurisdiction, and it was ordered that he should hold a regular trial.

THE accused Bishu Shaik obtained a Rule calling upon the District Magistrate to show cause why his conviction and sentence should not be set aside and a regular trial ordered on the ground that the offence disclosed in the petition of complaint was not triable summarily.

In this case the petition of complaint of the complainant Saber Mollah stated that the accused persons, Bishu Shaik and another, with some ninety or a hundred men armed with swords and other deadly weapons came upon his land, threatened him, and, in spite of his remonstrances, cut his paddy. In examining the complainant the Deputy Magistrate of Magurah recorded merely the fact that the complainant had stated that his paddy had been cut by the accused persons. He then issued processes for the attendance of the accused to answer charges of offences under ss. 143 and 379 of the Penal Code. A summary trial was thereupon held and the accused were convicted.

Mr. *P. M. Guha* for the petitioner.

PRINSEP and STEPHEN, JJ. The Rule must be made absolute. In this case the petition of complaint stated that the accused with **[410]**

* Criminal Revision No. 904 of 1901, made against the order passed by R. Banerjee, Esq., Deputy Magistrate of Magurah, dated the 20th of September 1901.