

## JURISDICTION IN ACTIONS BY MORTGAGEES

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IN the May 1975 issue of 'Id-Dritt', there was an article on 'Actions in Rem and Exclusive Jurisdiction Clauses'.<sup>1</sup> The article was inspired by the case 'Dr. Edward Fenech Adami noe. vs. Arsemis Christos noe.'<sup>2</sup> There was subsequently another case raising similar issues of Maritime Law: 'Dr. Hugh Peralta noe. vs. Stefanos Chatzakis noe.'<sup>3</sup> There were various points discussed in this second case that deserve particular attention.

The plaintiff company had made a loan to a Liberian registered company for the purpose of the purchase of a ship by the latter Company. The lenders were granted a first preferred mortgage over the vessel. According to the Mortgage Agreement, the plaintiff company had the right to take possession of the vessel in various eventualities envisaged in the Agreement.

The ship, which had a Liberian registration, had been for some time undergoing repairs at the Malta Drydocks. The plaintiff company claimed that the loan was repayable under the terms of the Agreement and requested the borrowers to repay the loan and to hand over possession of the ship. The borrowers failed to pay and hand over possession to the Mortgagees and the plaintiff company by summons filed before the Commercial Court requested that the defendants, (i.e. the Master on behalf of the said ship and on behalf of the owners and charterers of the ship) be condemned to pay the amounts due under the Loan Agreement and hand over possession of the ship to the plaintiffs with such modalities as shall be ordered by the Court. Prior to the said action being instituted a warrant of impediment of departure of the said vessel was obtained from the Commercial Court and subsequently also a precautionary warrant of seizure of the ship.

The defendant pleaded that the Commercial Court did not have

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<sup>1</sup> 'Id-Dritt', Vol. V, pages 48-54.

<sup>2</sup> Withdrawn before the Court of Appeal on the 9th June, 1972.

<sup>3</sup> Withdrawn before the Court of Appeal on the 13th February, 1976 and subsequently decided by the Commercial Court on the 17th February, 1976.

jurisdiction to hear the case. Other pleas were raised in regard to the merits of the case, but we are here concerned only with the question of jurisdiction.

The Commercial Court dismissed the said plea and upheld its jurisdiction.<sup>4</sup> The reasons followed in the judgment call for some analysis. The Court stated that, were it not for the claim for possession of the ship, it would have unhesitatingly declined jurisdiction on the basis of s.743 of the Code of Civil Procedure. Both parties were non-Maltese and the loan transaction did not have any Maltese connection. The Maltese Merchant Shipping Act (Act XI/1973 s. 370) provided that the Commercial Court continued to exercise, as part of its ordinary jurisdiction, the jurisdiction which it previously had as a Vice-Admiralty Court. The Court explained that the crucial point related to the nature of the action i.e. if the action was an action *in rem*, the Court had jurisdiction; on the contrary, if it was an action *in personam*, the Court did not have jurisdiction to hear the case.

The Court explained that the action *in rem* was known in the Admiralty Division of the High Court in England as an action against a ship or other things (such as cargo) connected with a ship and its primary purpose was for the claim to be satisfied from the *res* itself. The Court's jurisdiction in actions *in rem* rested on the sole basis that the *res* was in the territorial waters of the country and the *res* was held so that execution could proceed on it.

The Court held that the action in this case was an action *in rem* as it was directed against the vessel represented by her Master and the objective was for the plaintiff to take possession of the ship.

The defendant, while admitting that the Court had jurisdiction to entertain the claim for possession, contended that jurisdiction to entertain one claim did not in any way imply jurisdiction to entertain the other demand. He contended that the claim for the payment of the debt was not an action *in rem* but a purely personal action. The Court itself had stated that, were it not for the claim for possession, it would have declined jurisdiction. Therefore, defendant contended that, as the Court was satisfied that it did not have jurisdiction to entertain the action for the debt, it should have declined its jurisdiction to take cognisance of that particular claim. The defendant quoted from Aspinall's Reports (page 608) which defined the action *in rem* as:

'A proceeding directed *against a ship* or other chattel in which the plaintiff seeks *either* to have the *res* adjudged to him in

<sup>4</sup> Judgment delivered on the 5th December, 1975 per Mr. Justice G.O. Refalo.

property or possession, or to have it sold under the authority of the Court'.

He submitted that the action for the payment of the debt was not an action for the sale of the ship, as there was no specific claim for a sale and the judgment condemning the defendant to pay the debt did not *necessarily* lead to the sale of the ship. It was true that plaintiffs had declared during the hearing that their intention was to sell the ship under the authority of the Court in Malta, but objectively the condemnation for the payment of the debt had as its legal consequence also the possibility of execution on other assets of the defendant company, apart from the ship, and the mere intention of subsequent action could not change or restrict the nature and effects of the claims contained in the Writ.

One must grant the defendant's argument that jurisdiction to entertain one claim did not imply in any way jurisdiction to entertain the other, in view of the fact that they were two distinct claims which had to be considered separately. There was no question as to the *in rem* nature of the claim for possession. On the contrary, the claim for the debt caused a great deal of controversy.

The first point to be examined is whether a claim of the mortgagee for the condemnation of the Master on behalf of the ship and on behalf of the ship owners (who were the borrowers) for the repayment of the loan and interest can be exercised as an action *in rem* or not. It must be emphasised that the notion of an action *in rem* in maritime cases bears no relationship whatsoever to the traditional continental distinction between real and personal actions. This point was clearly made out also in the judgment of the Commercial Court. It may easily happen that a personal action (e.g. for the payment of a debt) qualifies under the heading of an action *in rem* for the purposes of Maritime Law. In fact, as will be seen, the majority of actions *in rem* are meant for the enforcement of obligations and are personal actions, according to the traditional classification of actions. Failure to appreciate this point has given rise to unnecessary doubts on the jurisdiction of the Courts in maritime issues, and it would be useful if one were to try to eliminate such doubts.

The Admiralty Courts possessed jurisdiction both *in rem* and *in personam*, as is clearly stated in the 1861 Act:<sup>5</sup>

'The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings *in rem* or by proceedings *in personam*'. (s. 35)

<sup>5</sup> Admiralty Court Jurisdiction Act, 1861 – 24 Vict. 1861.

As is stated in Williams and Bruce,

'It is provided by the Admiralty Courts Act 1854 that in all cases in which a party has a cause or right of action in the Court of Admiralty against any ship, or freight, goods or other effects whatever, it shall not be necessary to the institution of the suit for such person to sue out a warrant for the arrest thereof, but it shall be competent to him to proceed by way of personal action, citing the owner or owners of such ship, freight, goods or other effects to appear and defend the suit'.<sup>6</sup>

The whole jurisdiction, be it *in rem* or *in personam*, was vested in the Commercial Court in 1892. Therefore, in a case in which a foreign creditor sues in Admiralty his debtor, who happens to be even by sheer accident in Malta, it is arguable that the Commercial Court has jurisdiction to entertain the action, (although it may be beyond the limits traced by s.743 of the Code of Civil Procedure) on condition that the case fell within the Vice-Admiralty Court's jurisdiction in 1892.<sup>7</sup>

The Merchant Shipping Act 1973 refers to the position obtaining under the earlier law in Malta. The jurisdiction of the Commercial Court remained as it was in 1892, when the jurisdiction hitherto enjoyed by the Vice-Admiralty Court was vested in it by Ord. III of 1892.<sup>8</sup> In 1892 the relevant Act was the Colonial Courts of Admiralty Act 1890.<sup>9</sup> This Act had been preceded by the 1863 Act<sup>10</sup> which had regulated the Court's jurisdiction and which was abrogated by the 1890 Act. By this latter Act of 1890, jurisdiction became based on the position applicable in England at that time:

'The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons,

<sup>6</sup> Admiralty Practice, Part II, page 186 et seq.

<sup>7</sup> This principle has not as yet been clearly accepted by the Courts. *Vide Strano vs. Zahra* decided by the Court of Appeal on the 30th June, 1975. The Court declined jurisdiction, because it came to the conclusion that the action was not an action *in rem*. The action was not made against the ship but a request for the appointment of a curator to represent the debtor who was absent from Malta was made by plaintiff. Had the defendant been present in Malta and served with the writ there would have been Admiralty jurisdiction *in personam*. It would have been interesting to see if the Court would have upheld its jurisdiction in such a case.

<sup>8</sup> Chap. 41 of the Laws of Malta. Subsequent enactments made in the United Kingdom, viz. the Administration of Justice Act, 1920 and the Supreme Court of Judicature Consolidation Act, 1925 were not applicable to the Colonial Courts of Admiralty (*Vide Halsbury, Statutes, Vol. I, p. 15*).

<sup>9</sup> 53 and 54 Vict. c. 27.

<sup>10</sup> 26 Vict. 1863 c. 24 – concerning Vice-Admiralty Courts in Her Majesty's Possessions abroad.

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'. (s. 2(2))

In so far as jurisdiction in regard to actions by mortgagees was concerned, the Admiralty Court Act of 1840<sup>11</sup> had made the position clear:

'And be it enacted, that after the passing of this Act, whenever any ship or vessel shall be under arrest by process issuing from the said High Court of Admiralty or the proceeds of any ship or vessel having been so arrested shall have been brought into and be in the Registry of the said Court, in either case the said Court shall have full jurisdiction to take cognisance of all claims and causes of Action of any person in respect of any mortgage of such ship or vessel and to decide any suit instituted by any such person in respect of any such claims or causes of action respectively'. (s.III)

A somewhat ambiguous provision in the 1863 Act (s. 10(8)) is of no relevance, as it was repealed by the 1890 Act, as already stated. That section included among the cases falling within the Court's jurisdiction:

'claims in respect of any mortgage where the ship has been sold by a decree of the Vice-Admiralty Court and the proceeds are under its control'.

It is possible that that provision was only meant to extend the Court's jurisdiction over the proceeds obtained from the judicial sale of the ship and was not meant to put in doubt the Court's jurisdiction *in rem* when the *res* herself had been arrested. However, s. 10 seems intended to set out an exhaustive list of cases, and by contrast with the much wider wording of the 1840 Act, posed difficulties of interpretation.

In the case of a Mortgage registered under the Merchant Shipping Act, the High Court of Admiralty was given jurisdiction to take cognisance of a claim 'whether the ship or the proceeds thereof be under Arrest of the said Court or not'.<sup>12</sup> This provision came within the all-embracing effect of the 1890 Act abovementioned, and must be regarded as applicable to the Commercial Court.

<sup>11</sup> An Act to improve the practice and extend the jurisdiction of the High Court of Admiralty of England (3 and 4 Vict. c. 65.)

<sup>12</sup> S. 11 of the Admiralty Court Jurisdiction Act, 1861 (24 Vict. 1861 c. 10). Vide also Maude & Pollock, Law of Merchant Shipping (4th Edit.) Vol. I, p. 60.

the territorial waters over which the authority of the Court extended. Reference may be made to judgments in the following cases:

(a) 'Nikolaki vs. Dr. Agius noe'<sup>16</sup>

'In virtù della giurisdizione alla Corte di Commercio trasferita come Corte di Vice Ammiragliato la detta Corte di Commercio è competente a conoscere *di qualunque credito dedotto contro una nave*, sia essa nazionale o estera, e chiunque sia il proprietario della nave quando la stessa trovasi nella giurisdizione di queste isole e molto più quando la stessa è elevata sotto la autorità di questa Corte'.

(b) 'Vadalà vs. Zammit Cutajar'<sup>17</sup>

'La giurisdizione è duplice. È nella giurisdizione della nostra Corte di Commercio come Corte di Vice Ammiragliato di ordinare l'elevazione di nave a domanda di creditori, qualunque sia la loro nazionalità, quando trattasi *di obbligazione comunque nascente contro l'identica nave*'.

(c) 'Mifsud vs. Capitano Leonardo Miglioni'<sup>18</sup>

'Come Corte di Vice Ammiragliato la nostra Corte di Commercio prende cognizione delle domande relative a provviste fatte ad una nave anche fuori la giurisdizione di queste isole quando tale nave si trovi nelle acque territoriali di queste isole ...'

A joint demand is a feature in a number of English cases, e.g. the Lord Stratchona<sup>19</sup> in which in the same action there was a request for a declaration of the validity of the mortgage and for the sale of the ship. Also in another case<sup>20</sup> there was a claim both for the recovery of possession of the ship and for the sale of the ship.

An examination of the questions discussed in the 'Peralta vs. Chatzakis' case does reveal a marked difference between the procedure followed by the Maltese Courts and the procedure of the Courts of Admiralty in the United Kingdom and it is imperative to bear these differences in mind in applying the relative Acts.

However, one can safely say that, when an action is made by a mortgagee to obtain possession of the ship and/or to enforce payment of the debt when the *res* is within the territorial limits of the Island and is subject to a Court warrant, such an action, as an action *in rem*, clearly comes within the jurisdiction of the Commercial Court.

<sup>16</sup> Vol. XX.III.60

<sup>17</sup> Vol. XXV.III.667

<sup>18</sup> Vol. XXV.III.762

<sup>19</sup> Aspinall's Maritime Cases, Vol. 16, p. 536.

<sup>20</sup> Aspinall's Maritime Cases, Vol. 11, p. 93.

The characteristic of actions *in rem* is that they are actions against the *res* and are meant to enforce a claim through the sale of the *res*. Therefore, any judgment thereby obtained can be enforced only on the *res* itself and not on other property, saving any extension which may be made by legislation. Such a limitation will naturally apply *expressis verbis* if the action were made only against, say, the ship; but it must be appreciated that the traditional formula used is for the action to be made against the Master 'on behalf of the ship *and of her owners and charterers*'. Should the inclusion of the words in italics, with or without the indication of the Shipowners' name, make any substantial difference to the nature of the action?

Admittedly, when a judgment is obtained against a person, the judgment is enforceable against all the assets of that person and, therefore, it should be made clear at least in the judgment itself that execution is limited to the particular ship. Should one require that this limitation appears in the summons itself? Such a requirement would certainly not be in accordance with established practice and procedure and it does not seem that any explicit limitation is necessary, when an action is made against the Master on behalf of the ship and her owners and charterers. The ambit of the Master's representation is necessarily limited to the ship and does not extend to other assets.<sup>13</sup>

It seems that the procedure before the English Courts is not identical to the procedure followed in our Courts. In actions *in rem* in England a Writ of Summons is first filed and an Application for the arrest of the ship is subsequently filed.<sup>14</sup> In our case, the normal procedure is to obtain an impediment of departure against the ship either before or after the filing of the Writ and possibly also the issue of a precautionary warrant of seizure of the ship. Subsequently an application for the judicial sale of the ship is made. It is open to the plaintiff to ask for such an order also in the original writ itself.<sup>15</sup> Such a procedure is, however, not normally followed.

It has repeatedly been held by our Courts that the jurisdiction of the Court was established by the mere fact of the ship being within

<sup>13</sup>Vide Marsden, *The Law of Collisions at Sea*, (1880) p. 32: 'The main object of arresting a vessel ... is to cause an appearance on the part of her owners ... and that the process of the Court can be enforced against a ship, without reference to the question whether her owners at the time of her arrest were or were not her owners when the collision occurred.'

<sup>14</sup>'The Maxima', 18th June, 1878 (Aspinall's, *Maritime Cases*, Vol. 4, p. 21). The action was commenced on the 7th June, 1878 and the vessel was immediately afterwards put under arrest.

<sup>15</sup>S. 306(1) of the Code of Civil Procedure.