

BRITISH COLUMBIA ADMIRALTY DISTRICT.

MOMSEN

PLAINTIFF;

1913  
August 19.

AGAINST

THE SHIP *AURORA*, (No. 3).

*Shipping—Ship under arrest in prior action in rem—Subsequent action for equipping the ship—Section 4 of The Admiralty Court Act (U. K.) 1861—Jurisdiction.*

*Held*, that the clear intention of section 4 of *The Admiralty Court Act (U. K.) 1861* is that as soon as a creditor finds that a "ship or the proceeds thereof are under arrest of the Court" in pursuance of its valid process issued in that behalf, then he may bring his action, and the Court acquires immediate and irrevocable jurisdiction over any claim for building, equipping or repairing the ship. The burden is not cast upon the creditor who proceeds against a ship under arrest in a prior action to show that such action must eventually succeed.

**T**HIS was an action for the equipping of defendant ship with a standard engine.

The facts of the case are stated in the reasons for judgment.

Trial commenced before Mr. Justice Martin, Local Judge, at Vancouver, B.C., on 22nd May, 1913, and was continued at Victoria, B.C., on 28th June and 4th July, 1913.

*J. M. Price* for ship: No jurisdiction to entertain action. Jurisdiction limited by section 4 of the *Admiralty Courts Act, 1861*. Arrest must be legal. Section 165 of *Merchants Shipping Act, 1894*, applies.

*E. A. Lucas* for plaintiffs: Not now open to defence to take objection to want of jurisdiction. Should have appeared under protest. *Halsbury's Laws of England* (1). *Hall v. Seward* (2) *The Vivar* (3).

At time of our action ship was under arrest.

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Nothing to show that Oliver action not within section 191, of the *Canada Shipping Act*.

*Mr. Price:* Want of jurisdiction can be raised in defence : it is a matter of substantive jurisdiction, not procedure, and may be taken notice of by Court at any time.

MARTIN, LO. J., now (August 19, 1913) delivered judgment.

This is an action for the equipping of the *Aurora* with a 20 h.p. "Frisco" standard engine, for the price of \$1,625. At the end of the trial judgment was given in favour of the plaintiffs on the facts, reserving for further consideration the point of law raised as to the jurisdiction of this Court to entertain the action; which point is based on section 4 of the *Admiralty Courts Act* 1861 (24 Vic. c. 10) as follows:—

4. "The High Court of Admiralty shall have jurisdiction over any claim for the building, equipping, or repairing of any ship, if at the time of the institution of the cause the ship or the proceeds thereof are under arrest of the Court."

It is admitted that at the time this cause was instituted the *Aurora* was under arrest of this Court in an action by one Oliver for seaman's wages, yet because Oliver's claim was for less than fifty pounds it is submitted that his action should never have been brought, and therefore the ship cannot be deemed to have been legally under arrest at the time this present action was begun, since section 165 of the *Merchant's Shipping Act* of 1894 provides that:

"A proceeding for the recovery of wages not exceeding fifty pounds shall not be instituted by or on behalf of any seaman or apprentice to the sea's service in any superior court of record in her Majesty's dominions, nor as an admiralty proceeding

in any court having admiralty jurisdiction in those dominions, except—

- (i) where the owner of the ship is adjudged bankrupt; or
- (ii) where the ship is under arrest or is sold by the authority of any such court as aforesaid; or
- (iii) where a court of summary jurisdiction acting under the authority of this Act, refers the claim to any such court; or
- (iv) where neither the owner nor the master of the ship is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore."

In answer to this contention it is first submitted (apart from other objections as to waiver, and the application of the said *Merchants Shipping Act*) that once the fact of the arrest by this Court is established that of itself confers jurisdiction; and, furthermore as Oliver's action is coming on for trial it is open to him to prove any one of the four exceptions to section 165 which would entitle him to maintain his action even though his claim is under £50. In my opinion, after a careful consideration of the matter, this submission should prevail. I think the clear intention of the statute, section 4, is that as soon as a creditor finds that a "ship or the proceeds thereof are under arrest of the court" in pursuance of its valid process issued to the marshal in that behalf, then he may without further ado bring his action for, and the Court acquires immediate and irrevocable jurisdiction, over any claim for building, equipping, or repairing the ship. The burden is not cast upon the litigant to show to this Court now that the original action under which the ship was arrested must eventually succeed. It would indeed be an anomalous position to place this Court

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in to require it now to attempt to decide in this action the prophetic question of fact as to whether or not Oliver will be able, when his action comes to be tried, to adduce evidence that will bring him, say, within the fourth exception of section 165, and therefore be entitled to maintain his action, as another seaman was able to do before me in the case of *Cable v. The Socotra* (1). In short it is the present fact of the arrest and not the future result of the action that determines the question of jurisdiction.

It follows therefore that the question of law is also decided in favour of the plaintiffs and judgment will be entered for the full amount of their claim with costs.

*Judgment accordingly.*

(1) (1907) 11 Ex. C.R. 301.

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