

QUEBEC ADMIRALTY DISTRICT.

MICHAEL JOSEPH STACK, ET AL,

PLAINTIFFS;

v.

THE BARGE "LEOPOLD",

DEFENDANT.

THE PROVINCIAL BUILDING & ENGINEER-
ING CO., LTD.,

MIS EN CAUSE.

1918

July 11.

Admiralty—Jurisdiction—Necessaries and repairs—Towage—Maritime lien.

By virtue of secs. 4 and 5 of the *Admiralty Court Act*, 1861, where a ship is not under arrest and its owner is domiciled in Canada, the Exchequer Court of Canada has no jurisdiction over an action for repairs or necessaries supplied to the ship.

2. Towage performed in connection with the repairs, not at the owner's special request, is not within the purview of "claims and demands for services in the nature of towage," within the meaning of sec. 6 of the *Admiralty Court Act*, 1840, as would give the Court jurisdiction over the claim; neither claim for towage nor for necessaries is the subject of a maritime lien.

3. An objection to the jurisdiction will hold good even if made after the trial.

ACTION in rem and claim for \$959.92 for work done, materials furnished, towing and guarding barge "Leopold" from June, 1916, to the date of the institution of the action, and costs.

Tried before the Honourable Mr. Justice MacLennan, Deputy Local Judge of the Quebec Admiralty District, at Montreal, October 7, 1918.

Alphonse Décary, K.C., for plaintiff.

Lucien Beaugregard, for mis en cause.

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MACLENNAN, Dep. L. J. (July 11, 1918) delivered judgment.

The plaintiffs were contractors for the construction of a portion of the Montreal and Quebec highway, under contract from the government of the province of Quebec. The barge "Leopold" and certain other plant were leased by the Quebec government to the plaintiffs in connection with the said contract and were used by the plaintiffs during the seasons of 1915 and 1916, when plaintiffs' contract was completed. The plant belonged to another contractor, who had undertaken to construct a considerable portion of the highway, but failed to complete the whole of his work, whereupon the government took possession of the plant and gave the balance of the work to the plaintiffs, who paid a rental to the government for the plant. When the plaintiffs completed their contract they notified the government and offered to surrender the plant, including the barge "Leopold". The government declined to take the plant off the plaintiffs' hands, and the claim in this action is to recover the alleged costs of certain repairs to the barge, materials furnished, towing the barge to a dry dock in order to have the repairs made, towing the barge from the dry dock and the costs of a guardian looking after the barge for a considerable time.

After trial, and in a written argument submitted by the counsel for the defendant, the question of the jurisdiction of the court was raised. It is well settled law that the jurisdiction of this court to hear an action for necessaries supplied to a ship depends entirely upon statute. By the *Colonial Courts of Admiralty Act, 1890*, a Colonial Court of Admiralty

has, subject to the Act, jurisdiction over the like places, persons, matters and things as the High Court in England has, and any enactment in an Act of the Imperial Parliament referring to the Admiralty jurisdiction of the High Court in England, when applied to a Colonial Court of Admiralty, shall be read as if the name of that possession were substituted for England and Wales. By the *Admiralty Court Act*, 1861 (24 Vic., ch. 10, Imp.), sec. 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." And by sec. 5; "The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales." By the *Admiralty Court Act*, 1840 (3 and 4 Vic., ch. 65, sec. 6), the High Court of Admiralty was given jurisdiction to decide all claims and demands for services in the nature of towage and for the necessaries supplied to any foreign ship.

At the trial it was proved that the barge "Leopold" was registered at the port of Montreal on August 5, 1891, and that the registered owner since March 17, 1914, is Samuel Charland, of Montreal. The Provincial Building and Engineering Company, Limited, a body politic and corporate, having its principal place of business in the city of Montreal, claims that, at the date plaintiffs' services are alleged to have been rendered, it was and ever since has

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been the real owner of the barge. At the time of the institution of this action the barge was not under arrest of the court and the owner was either Charland or the said company. It, therefore, follows that under secs. 4 and 5 of the *Admiralty Court Act*, 1861, this court has no jurisdiction over the plaintiffs' claim for repairs or necessaries. *The Garden City*.¹ The plaintiffs' claim includes two items for towing, one for \$10 for bringing the barge to the dry dock at Sorel, in order to make some repairs considered necessary by plaintiffs, and an item of \$20, for towing the barge from Sorel to Berthier, where the plaintiffs retained the barge in their possession. This towing was not done at the request of the owners of the barge, but was for the convenience of the plaintiffs themselves, and was incidental to the repairs and retention of the barge by plaintiffs. In my opinion this was not the kind of towage which, under the *Admiralty Court Act* of 1840, sec. 6, would give the court jurisdiction. In my opinion the items for towage were incidental to plaintiffs' claim for necessaries and are to be treated in the same way; *The St. Lawrence*.² Neither claims for towage nor for necessaries are the subject of a maritime lien; *Westrup v. Great Yarmouth Steam Carrying Co.*;³ *The Henrich Björn*.⁴

The plaintiffs submit that the defendant's objection to the jurisdiction having been raised after the trial came too late. Dr. Lushington, in *The Mary Anne*,⁵ said: "If at any time the court discovers "and the facts show that the court has no jurisdic-

¹ (1901), 7 Can. Ex. 94.

² (1880), 5 P.D. 250.

³ (1889), 43 Ch. D. 241.

⁴ (1886), 11 App. Cas. 270.

⁵ 84 L. J. Adm. 74.

"tion, it cannot proceed further in the cause; the "delay of one or both parties cannot confer jurisdiction." The objection raised by defendant is not a mere technical objection which could be waived by appearance and proceeding to trial, as under the statute there is absolute absence of jurisdiction; *The Louisa*,¹ *The Eleonore*,² *The Barbara Boschwitz*.³

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The defendant could have raised the question of jurisdiction before trial, and if that had been done some expense for both parties would have been avoided. The defendant tendered and deposited with the Registrar the sum of \$250 with the defence. As at the time of the institution of this action the barge was not under arrest of the court, and its owner was domiciled in Canada, it is clear that the court has no jurisdiction. There will be judgment dismissing the action, each party paying their own costs, and the Registrar is directed to return the deposit of \$250 to the party from whom he received it.

Action dismissed.

Solicitor for plaintiff: *Alphonse Décary.*

Solicitors for mis en cause: *Beauregard & Labelle.*

¹ (1863), Br. and L. 59.

² (1863), Br. and L. 185.

³ (1894), 3 B. C. R. 445.