CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA.

QUEBEC ADMIRALTY DISTRICT.

1919
June 7.

PATRICK MULVEY,

PLAINTIFF;

v.

THE BARGE "NEOSHO,"

DEFENDANT.

Damages to seaman—"Damage done by any ship"—Admiralty Court Act, 1861, *sec. 7—Interpretation—Jurisdiction—Consent of parties—Acquiescence.*

The plaintiff, a seaman, brought an action *in rem* for damages against the barge "Neosho" for bodily injuries sustained by him in an accident alleged to have been occasioned by negligence for which the ship was liable.

Held, that the damage done was not *"by"* the barge, but *"on"* the barge, and is not such damage as gives plaintiff a remedy *in rem* within the meaning of sec. 7 of the *Admiralty Court Act,* 1861. The Court was therefore without jurisdiction in the matter.

2. In the absence of jurisdiction existing by law, the filing of an appearance and the giving of bail by defendant do not give jurisdiction to the Court in a proceeding *in rem.*

3. Jurisdiction is not a matter of procedure and cannot be derived from the consent of parties.

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Reasons for Judgment.

THIS is an action in damages brought by a seaman to recover $5,000 against the barge "Neosho" for bodily injuries sustained on May 2, 1919, owing to being tripped up on deck by reason of ropes negligently left thereon.

The case came before the Honourable Mr. Justice Maclennan on a motion to dismiss for want of jurisdiction.

The whole case turns upon the interpretation of the phrase giving jurisdiction to the Court, namely, "damages done by any ship".

The case was heard on June 7, 1919, and judgment was rendered on the same day, dismissing the action for want of jurisdiction.

R. S. Weir, K.C., for plaintiff.

W. B. Scott, K.C., and *Hon. Adrian K. Hugessen,* for defendant.

The facts are set forth in the judgment which follows:

MACLENNAN, J. (June 7, 1919) delivered judgment.

The plaintiff, a seaman, brings an action *in rem* for $5,000 damages against the barge "Neosho" for bodily injuries sustained by the fracture of his right forearm and bruises to his left knee and face, on May 2, 1919, owing to being tripped up in the middle deck by reason of ropes negligently left on the floor of the deck, which was dark; the barge was arrested and, upon bond given, was released.

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The defendant has moved for order that the writ of summons be set aside and plaintiff's action dismissed with costs for want of jurisdiction on the part of this Court, on the ground that the plaintiff's claim is not a "claim for damage done by any ship" within the meaning of sec. 7 of the *Admiralty Court Act,* 1861. It is well settled by the jurisprudence that the Court has jurisdiction over any claim for damages to property or person done by any ship.

The defendant submitted that the claim sued on, particulars of which are endorsed on the writ, is not damage done by any ship. The barge "Neosho" was in the harbour of Montreal and plaintiff's injuries were sustained on board. The question here is whether the words of sec. 7 of the Act of 1861 "damage done by any ship" are applicable to the present case.

In the *"Vera Cruz"*[1], Brett, M.R., said:

"The section indeed seems to me to intend by the "words 'jurisdiction over any claim', to give a juris-"diction 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 bow-"sprit of a ship. But the section does not apply to "a case when physical injury is not done by a "ship."

In the *"Theta"*[2], Mr. Justice Bruce said:

"Damage done by a ship is, I think, applicable "only to those cases where, in the words of the Mas-

[1] (1884), 9 P.D. 96 at 99.
[2] [1894] P. 280, at 284.

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"ter of the Rolls in *The Vera Cruz,* the ship is the "'active cause' of the damage. The same idea was "expressed by Bowen, L.J., who said the damage "'done by a ship means damage done by those in "charge of a ship, with the ship as the noxious in-"strument.' In this case, to put it at the highest, "those in charge of the ship so placed a tarpaulin "over the hatchway as to make a trap into which "the plaintiff fell, whilst lawfully crossing the deck "of the ship to reach his own vessel. The ship can-"not be said to have been the active cause of the "damage. The damage was done on board the ship, "but was not, I think, within the meaning of the Act, "done by the ship. Therefore, I must allow the "motion with costs."

In *Currie v. McKnight,*[1] Lord Halsbury, L.C., said:

"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 is claimed is "the instrument of mischief, and that in order to "establish the liability of the ship itself to the mari-"time lien claimed some act of navigation of the "ship itself should either mediately or immediately "be the cause of the damage."

In the *"Duart Castle"* case,[2] where an engineer, while working on a steamer, was injured by the breaking of a stop-valve and sued for damage, Mr. Justice McLeod held that the damage was done by the ship and that the Court had jurisdiction, but dismissed the action as the plaintiff did not produce reasonable evidence of negligence causing the acci-

[1] [1897] A.C. 97 at 101.
[2] (1899), 6 Can. Ex. 387.

dent. The learned judge clearly held that the Court had jurisdiction over the claim, as he came to the conclusion that the damage was done by the ship. In that case the stop-valve of the steam chest broke and plaintiff was scalded by the rush of steam.

In *Barber v. The "Nederland"*,[1] which was an action by plaintiff for damages for personal injuries sustained while working on a ship as a stevedore, such injuries being caused by the faulty construction of hatch coverings and beams supporting the same, Mr. Justice Martin allowed a motion made on behalf of the ship setting aside the proceedings for want of jurisdiction.

The nature of the claim forming the basis of plaintiff's action is substantially similar to the claims set up in the cases of the *"Theta," supra,* and the *"Nederland",* in both of which it was held the Court had no jurisdiction.

The plaintiff objects to the defendant's motion on the ground that it comes too late and that the defendant by having appeared and given bail submitted to the jurisdiction of the Court; the *Milwaukee* case.[2] The defendant appeared under protest and the application to give bail, in order to allow the barge to proceed on its voyage, was made under reserve and without prejudice to defendant's rights. The objections in the *Milwaukee* case were on mere matters of procedure. It was a case arising out of a collision in which the Court had inherent jurisdiction, and the objections were purely technical. In the present case the objection, if well founded, is absolute and goes to the jurisdiction of the Court; it is not a matter of procedure and cannot be affect-

[1] (1909), 12 Can. Ex. 252.
[2] (1907), 11 Can. Ex. 179.

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ed by any proceedings already taken by the defendant. The Court cannot get jurisdiction by consent of the parties, as jurisdiction must arise from the subject matter of the claim. Dr. Lushington, in the *"Mary Anne"*,[1] said p. 335: "If at any time the "Court discover it has no jurisdiction, and the "facts show that the Court has no jurisdiction, "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 giving bail, if under the statute there is absolute absence of jurisdiction; the *"Louisa"*,[2] the *"Eleonore"*,[3] *Richet v. The "Barbara Boscowitz"*.[4]

The application to dismiss by motion is in accordance with the practice in Admiralty matters. I am unable to distinguish this case from the *"Theta"* and the *"Nederland"*. The barge here was not the active cause or the noxious instrument of plaintiff's injuries. Damage done not "by" the barge, but "on" the barge is not such damage as gives plaintiff a remedy *in rem* such as he is seeking to exercise in this action. Plaintiff's action therefore fails for want of jurisdiction, and defendant's motion is granted, and the action is dismissed with costs.

Solicitor for plaintiff: *R. S. Weir*, K.C.

Solicitors for defendant: *Lafleur, MacDougall, Macfarlane & Barclay.*

[1] (1865), Br. and L. 334.
[2] (1863), Br. and L. 59.
[3] (1863), Br. and L. 185.
[4] (1894), 3 B.C.R. 445.