THE SHIP "D. C. WHITNEY" (DEFENDANT) ..... APPELLANT;

AND

THE ST. CLAIR NAVIGATION COMPANY AND THE SOUTHERN COAL AND TRANSPORTATION COMPANY (PLAINTIFFS) ..... RESPONDENTS.

1906
*Nov. 20, 21.
1907
*Feb. 19.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA TORONTO ADMIRALTY DISTRICT.

Admiralty law — Foreign bottoms — Collision in foreign waters — Jurisdiction of Canadian courts.

A foreign vessel passing through waters dividing Canada from the United States under a treaty allowing free passage to ships of both nations is not, even when on the Canadian side, within Canadian control so as to be subject to arrest on a warrant from the Admiralty Court.

A warrant to arrest a foreign ship cannot be issued until she is within the jurisdiction of the court.

Quœre. Have the Canadian Courts of Admiralty the same jurisdiction as those in England to try an action *in rem* by one foreign ship against another for damages caused by a collision in foreign waters?

Judgment of the Exchequer Court, Toronto Admiralty District (10 Ex. C.R. 1) reversed, Idington J. dissenting.

APPEAL from a judgment of the local judge for the Toronto Admiralty District of the Exchequer Court of Canada (1) in favour of the plaintiffs.

The action arose out of a collision between the ship "D. C. Whitney" and the ship "Monguagon,"

*PRESENT:—Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

(1) 10 Ex. C.R. 1.

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owned by the St. Clair Navigation Company, and upon which there was a cargo of coal owned by the Southern Coal and Transportation Company, on the night of the 28th of November, 1901, at the Baltimore & Ohio coal dock at Sandusky in the State of Ohio, one of the United States of America.

The following facts are admitted:

(*a*) The ship "Monguagon" was lying securely fastened at the Baltimore & Ohio dock with about three-quarters of a cargo of coal which she had taken on board awaiting to be supplied with the balance of the cargo on the following morning.

(*b*) The "D. C. Whitney" was coming into the Port of Sandusky light claiming to be making for the same dock.

(*c*) The steamer "D. C. Whitney" came into collision with the "Monguagon," her bow striking the stern of the "Monguagon" with sufficient force to part her line and drive her some three hundred feet forward where her bow went ashore and she shortly afterwards sank.

(*d*) The owners of the "Monguagon," the St. Clair Navigation Company, are an incorporated company, incorporated under the laws of the State of Michigan. The ship "Monguagon" is an American bottom; the other plaintiff, the Southern Coal and Transportation Company, is an incorporated company, incorporated under the laws of West Virginia, and the Inland Star Transit Company is a company incorporated under the laws of the State of Ohio and the ship "D. C. Whitney" is an American bottom.

The plaintiffs in their claim allege that the collision occurred through the negligent navigation of the "D. C. Whitney;" the "Monguagon" was lying along-

side the dock and having all necessary lights required in that condition displayed.

The "D. C. Whitney" for a defence claim that the trial court had no jurisdiction to try the case for the reasons before set forth that the ship and parties to the action were all Americans and the collision occurred in American waters; that the damages were due to inevitable accident; that the "Monguagon" did not exhibit proper and sufficient lights and did not have a proper and sufficient watch on deck making an effort to avoid the collision or to lessen the consequences thereof; and that the "Monguagon" had no business at the said dock and should not have been there.

The ship "D. C. Whitney" was found in Canadian waters and she was seized on a process issued out of the Toronto Admiralty District of this court, by a marshall of this court or by a deputy marshall of this court at or near Amherstburg, Ontario, and in Canadian waters.

The defendants, the owners of the "D. C. Whitney," consequently provided a bond in which the bondsmen submitted to the jurisdiction of this court and agreed to abide by any judgment that might be recovered against the ship "D. C. Whitney."

The local judge held that the court had jurisdiction and the action was tried, resulting in a judgment for plaintiffs, the damages being assessed by a referee. The defendants appealed to the Supreme Court of Canada.

W. D. McPherson for the appellants. The learned counsel contended first that the jurisdiction of the Exchequer Court in Admiralty was derived wholly from "The Colonial Courts of Admiralty Act, 1890,"

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and "The Canada Admiralty Act, 1891," and was thereby limited to cases of Canadian ships in Canadian waters. Secondly, even if the court had jurisdiction it should not be exercised in a case like this where the parties could resort to their own courts, citing *The "Ida"* (1); *The "Belgenland"* (2).

Hanna for the respondents.

THE CHIEF JUSTICE.—I am of opinion that the appeal should be allowed.

DAVIES J.—This was an action in the Toronto Admiralty District of the Exchequer Court of Canada, commenced on the 30th day of October, 1902, by a writ of summons *in rem* against the ship "D. C. Whitney."

The summons was subsequently amended as to the names of the plaintiffs and a copy of the amended summons served upon the captain of the ship on the 24th day of November, 1902, some two days after she had been arrested under a warrant of arrest.

The affidavits which led the warrants were sworn to in Detroit, United States, on the 10th, 12th and 13th days of November, by the respective secretaries of the two plaintiff companies, the owners, respectively, of the ship and cargo of the ship "Monguagon."

These affidavits simply state that the plaintiffs, respectively, had claims as owners of the ship and cargo against the ship "D. C. Whitney" for damages for collision in a certain amount and that the collision occurred on the 27th November, 1901, in the port

(1) 1 Lush. 6.

(2) 9 Fed. Rep. 576; 114 U.S. R. 355.

of Sandusky in the State of Ohio. No statement is made that the ship "D. C. Whitney" was, at the time of the making of the affidavit, in Canadian waters or within the Canadian jurisdiction, or that its owners or any of them resided or were domiciled in Canada nor could, of course, any such statement have been made, under the facts.

The warrant itself must either have been issued on the 13th or 14th of November, as the ship was arrested under it on the latter date. The warrant is not returned with the papers, it appearing by the affidavit of the officer who arrested the ship that he served the original as well as the copy upon the captain.

As appears by the record and as admitted on the argument, both ships were American bottoms and registered and owned in the United States, and the Inland Star Transit Company, the owner of the ship "D. C. Whitney," as also the plaintiff companies, were all American corporations carrying on their business in the United States.

At the time of her arrest, the "D. C. Whitney" was on a voyage from one port of the United States to another port of that country, and had actually entered the River Detroit on her voyage and was arrested in that river nearly opposite the Town of Amherstburg.

The channel of the river where she was sailing when arrested was on the Canadian side of the international line and ran between the Canadian shore and an island on the river belonging to Canada and was, in fact, Canadian waters.

The ship had not entered and it was not pretended that she was entering any Canadian port or

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haven or doing anything else than exercising her right of innocent passage up the river.

The waters where she was arrested are by the seventh section of the Ashburton Treaty of 1842 made between Great Britain and the United States declared to be equally free and open to the ships and vessels of both countries. The article reads as follows:

> Article VII. It is further agreed that the channels in the River St. Lawrence on both sides of the Long Sault Islands and of Barnhart Island, the channel in the River Detroit on both sides of the island Bois Blanc, and between that island and both the American and Canadian shores, and all the several channels and passages between the various islands lying near the junction of the River St. Clair with the lake of that name, shall be equally free and open to the ships, vessels and boats of both parties.

The ships which collided, therefore, being both American ships, the owners companies incorporated in the United States, not doing business in Canada and the collision having occurred in the harbour of Sandusky, State of Ohio, the only pretence for the exercise of jurisdiction on the part of the Toronto Vice Admiralty Court was the presence of the "D. C. Whitney" in one of the channels of the Detroit River, on the Canadian side of the international boundary line, while in the exercise of her right of innocent passage along that channel on her voyage to and from American ports. The defendant appeared under protest and subsequently pleaded that the court had no jurisdiction under the circumstances, and again, at the opening of the trial, formally took the objection, the evidence being received subject to it.

The local judge in admiralty held, after argument, that he had jurisdiction to hear the case, relying upon certain English decisions quoted in his judgment, which do not, however, in any way touch the ground on which I think our judgment must rest.

Without, however, dealing with the general jurisdiction of the admiralty or expressing any opinion as to whether or not "The Canadian Admiralty Act of 1891" imposes any limitation upon the extent of the jurisdiction of the court thereby created, as argued by Mr. Macpherson, or whether the powers and jurisdiction of this colonial court are not rather those conferred by the Imperial Act, "The Colonial Courts of Admiralty Act, 1890," as maintained by the judgment appealed from, I am of the opinion that, under the circumstances of this case, jurisdiction never attached.

This is not a personal action but one entirely *in rem,* and while it is enough to confer jurisdiction in an action *in rem* that the property should be in the lawful control of the state under the authority of which the court sits, and that the sovereign authority has conferred jurisdiction as stated by Lord Chelmsford in the case of *Castrique* v. *Imrie*(1), at page 446, I do not think that the "D. C. Whitney," a foreign ship, while sailing from one port of a foreign country to another port of that country and passing through, in the course of her voyage, one of the channels declared by convention or treaty to be equally free and open to the ships, vessels and boats of both countries, can be said to be within any jurisdiction conferred on any Canadian court by the sovereign authority in the control of the Dominion of Canada, even though that channel happened to be Canadian waters.

If the *res* had entered into any of the ports, harbours or havens of Canada for safety, shelter or commercial purposes of any kind, she might then fairly be said to have submitted to any Admiralty jurisdiction the courts of Canada had a right to exercise

(1) L.R. 4 H.L. 414.

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towards her. In such case, the point argued by Mr. Macpherson as to the limited character of the admiralty jurisdiction conferred upon the Exchequer Court of Canada might have arisen.

In the facts and circumstances of this case I do not think it does arise. At the time the suit originated and the summons *in rem* issued, and also when the affidavits which led the warrant issued and at the time of the issue of the warrant also, I cannot see how there could be a pretence of jurisdiction. Neither owners nor ship were, at any of these times, within the limits of Canada or the waters thereof. The wrongdoing for which she was arrested took place (if at all) in a foreign port a year previously, and the ship's arrest while exercising her right of innocent passage in Canadian waters in accordance with the treaty rights of her nation from one foreign port to another cannot, of itself, justify the attempted exercise of jurisdiction.

The summons, the affidavits and the warrant were all issued and made before even the ship came into Canadian waters.

To uphold this exercise of jurisdiction, therefore, we should be obliged to hold that the moment after a collision takes place in any part of the world, whether within or without the British Empire, each and every vice admiralty court throughout the Empire is immediately seized of jurisdiction over the case and a suit may be instituted in any of them at the instance of one of the colliding ships against the other even if both are foreign bottoms and owned by foreigners and the collision took place in a foreign port or river and that, in such suit, warrants to arrest may be issued ready to be executed in case the offending ship after-

wards came within the territorial waters of the colony, Dominion or place whose court so assumed jurisdiction and that such warrants may be executed afterwards if and when such ship comes within those waters.

Nay, we would have to go further and hold that the arrest of the ship would be legal even if she was exercising her right of innocent passage through the territorial waters.

I do not think that that is the law. Jurisdiction only attaches over the *res* when it comes or is brought within the control or submits to the jurisdiction of the court and not till then. Such jurisdiction does not exist against a ship passing along the coast in the exercise of innocent passage or through channels or arms of the sea which, by international law or special convention, are declared free and open to the ships of her nationality, unless expressly given by statute. I do nor think it is possible successfully to argue that the right to initiate an action, make affidavits and issue a warrant, can exist before the foreign ship even comes within our territorial jurisdiction.

The jealousy with which Parliament legislates on such a question is to be seen in the legislation of the Imperial Parliament, section 688 of the "Merchant Shipping Act, 1894," authorizing a foreign ship which has injured a *British* ship or property in any part of the world, to be *detained* if found within three miles of the coasts of the United Kingdom, so as to compel her owners to abide the result of any action in the courts of that kingdom. See observations of Lord Chief Justice Cockburn in *The Queen* v. *Keyn*(1), at pages 218 and 219.

(1) 2 Ex. D. 63.

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But where is the law authorizing the arrest or detention of a foreign ship while passing within three miles of the coast for injuries alleged to have been done by such ship to another foreign ship outside of the British territorial waters? Supposing one of the great foreign transatlantic steamers collided with an American ship while going out of the harbour of New York on her way to Antwerp or some other foreign port. Could it be contended seriously that the several vice admiralty courts of Nova Scotia and Newfoundland immediately became seized of jurisdiction over the collision and that the owners of the injured ship could at once issue warrants of arrest in these courts and seize the liner if, perchance, she came afterwards within three miles of the coast of either that province or that colony? And yet the argument as to jurisdiction in this case, if sound, must go that far. It does not seem to me, with great respect, open to serious argument.

It is not necessary to discuss the question raised as to the jurisdiction of the court over the owners of the *res* until and unless they were served within the jurisdiction because no service was made or attempted to be made on such owners nor indeed was any application made to serve them abroad.

The plaintiff relied upon his arrest of the ship as sufficient to give jurisdiction so far as the *res* was concerned.

On the question of personal service out of the jurisdiction, the cases seem conclusive that neither under the old law nor under the rules under the "Judicature Act" would the court have possessed jurisdiction *in personam* over the owners of the *res,* unless they could have been served within the territorial jurisdiction

and this even in the case where a foreign ship collided with and injured a British ship on the high seas. *In re Smith* (1), and *The "Vivar"* (2).

I am of opinion that the affidavits were made and the warrants issued in the case before jurisdiction attached; that the arrest was, under the circumstances, illegal; and that the defendant, appearing under protest and objecting to the jurisdiction, was within and protected his rights; that the Toronto Admiralty District Court had no jurisdiction over the case and that the case, on that ground, should have been dismissed.

The appeal should be allowed with costs in both courts.

IDINGTON J. (dissenting).—The appellant has been properly found, as I think, by the learned judge, upon the facts, liable for having run against and sunk a vessel of respondents moored in the harbour of Sandusky, in the State of Ohio.

The proceedings were had in the Toronto Admiralty District of the Exchequer Court of Canada. They were begun by a writ of summons issued on the 30th of October, 1902, and the appellants' ship was arrested on the 14th of November, 1902, by the sheriff of Essex, in the Province of Ontario and within the Toronto Admiralty District.

The arrest was made in one of the channels of the Detroit River. The channel in question is wholly within Canada, being bordered both on the east and west sides by Canadian soil.

The appearance was entered herein by the appellants' solicitor on the 29th November, 1902. He served

(1) 1 P.D. 300. (2) 2 P.D. 29.

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the plaintiffs' solicitors with notice thereof, of which, omitting the style of cause, the following is a copy:

> TAKE NOTICE that I appear under protest for the ship "D. C. Whitney," of Cleveland, Ohio, in this action.
>
> Dated at Toronto, this 29th day of November, A.D. 1902.
>
> W. D. MCPHERSON,
> Solicitor for defendant.

The preliminary act of the respondents is dated at Windsor, 8th December, 1903. That of the appellant is not dated and appears as a notice addressed to the respondents and their solicitor. It contains no allusion to the protest as to jurisdiction.

The statement of claim was delivered 22nd February, 1904. The statement of defence was delivered 7th March, 1904. This latter begins by alleging in the first five paragraphs in continuation of the protest lodged in these proceedings where an appearance was entered that each of the plaintiff companies were incorporated under the laws of a state of the United States, with head offices there, and neither was authorized according to the laws of Ontario to do business there or in the Dominion and, in fact, did not do so; that the plaintiffs' ship is of American register; the appellant ship also of that register, and the company owning her incorporated under the laws of Ohio with head office there and transacting no business in the Dominion of Canada; that from the time of the occurrence in question the appellant had at all times been engaged, to the knowledge of the plaintiffs, in her usual occupation of sailing in American waters, in the Great Lakes, between American ports, and that if plaintiffs or either had preferred a claim, it could and would have been adjudicated upon without delay

in a court of competent jurisdiction in the United States of America.

Then, the sixth paragraph submits that, under the circumstances, the honourable court had no jurisdiction to try and adjudicate the action; or if the court should be of the opinion that it had jurisdiction, then, in the discretion of the court, it should refuse to exercise it or compel appellants to submit thereto.

The seventh paragraph says

> if the honourable court upholds the jurisdiction to try and adjudicate this action, then, for a defence, but under protest as aforesaid, the company owning the appellant say, etc., etc.

The defence on the merits is then in the remaining part of such seventh paragraph and eleven following paragraphs fully set forth.

The trial took place at Windsor on 29th, 30th and 31st of March, 1905.

At the opening of the trial appellants' counsel objected to going on with the trial and submitted that the court had no jurisdiction to investigate the matter *as the collision took place in American waters and the two ships in question were American ships.*

The court ruled that the evidence be taken subject to the question of jurisdiction. The trial proceeded and appellants' counsel took part contesting ably every foot of ground.

Mr. Justice Hodgins, the local judge in admiralty, having thus tried the case, of which he was in this way seized, gave judgment on the 21st of June, 1905, holding he had jurisdiction, condemning the appellant to pay damages and referring the assessment thereof to the local deputy registrar of the court at Windsor, who was also directed to tax the costs.

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Formal judgment was entered of record on the 22nd of June, 1905, in accordance with these findings.

On the 5th of December, 1905, the inquiry was begun before the local deputy registrar at Windsor, as directed, in presence of counsel for each of the parties and was so continued that day and the next and on the 5th February, 1906.

On the 14th February, the local deputy registrar made his report to the judge. By that he assessed the damages in favour of one plaintiff at $3,751.35 and the other at $463.60, and certified that, in his opinion, the plaintiffs were entitled to the costs of the reference.

It is to be observed that the counsel for appellant not only appeared and contested vigorously throughout the trial before the learned judge, after having made the protest above set forth, but also appeared before the local registrar on the reference, *without any further protest or objection* and contested the claim in every way that he might be entitled to do as if he had never protested.

It is further to be noted that no motion was ever made to set aside the proceedings or any of them.

Appellants' counsel contented himself with resting upon his protest and now avers that he did so advisedly and gives as his reason therefor that if he had made an application to the learned judge to set the proceedings aside and failed he could not hope to carry an appeal therefrom to this appellate court, but hoped to bring the question of jurisdiction here by appeal from the findings when his case would be appealable as of right.

Instead, however, of doing so at the earliest opportunity, he took another chance throw by appeal-

ing from the report to the learned local judge, who heard his appeal, evidently at length, and, as he remarks, on several questions not set forth specifically in the notice of appeal.

The learned judge, on the 25th April, 1906, gave judgment on this appeal, reviewing at length the many contentions set up by the appeal and made some unimportant allowances that appellant got the benefit of.

Formal judgment with these variations was entered accordingly, on the 25th April, 1906. From that judgment the appellant brings this appeal and seeks thereby a judgment declaring all these proceedings null and void by reason of want of jurisdiction in the court below.

It certainly is not a contention to be encouraged in the slightest degree, after all the vast expense the respondents have incurred, largely increased no doubt by the contentious part, taken as of right, by the appellant.

The appellant chose to run the risk of doing so advisedly and not by accident or pressure for want of time or opportunity to adopt the simpler course of moving to set aside the proceedings.

The appellant had a fairly arguable case that might have been presented to the local judge at the earliest stage of the case for the exercise of the discretion of the court. He asks us to act or to direct the learned judge to act upon that discretion now.

I apprehend that, under such circumstances, there can be no possible right to appeal on the ground of want of jurisdiction unless it appear clear beyond all peradventure, that the court appealed from had no jurisdiction whatsoever.

On the 1st day of July, 1891, 54 Vict. (Imp.), ch.

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27, known as the "Colonial Courts of Admiralty Act, 1890," was brought into force in Canada.

Section 3 provides as follows:

> 3. The legislature of a British possession may by any colonial law,—
>
> (*a*) Declare any court of unlimited civil jurisdiction, whether original or appellate, in that possession, to be a colonial court of admiralty, and provide for the exercise by such court of its jurisdiction under this Act, and limit territorially or otherwise the extent of such jurisdiction; and—
>
> (*b*) Confer upon any inferior or subordinate court in that possession such partial or limited admiralty jurisdiction under such regulations and with such appeal (if any) as may seem fit;
>
> Provided that any such colonial law shall not confer any jurisdiction which is not, by this Act, conferred upon a colonial court of admiralty.

The Canada "Admiralty Act, 1891," was enacted pursuant to the powers given in the section I have just quoted. Sections three and four thereof enact:

> 3. In pursuance of the powers given by "The Colonial Courts of Admiralty Act, 1890" aforesaid, or otherwise in any manner vested in the Parliament of Canada, it is enacted and declared that the Exchequer Court of Canada is and shall be, within Canada, a colonial court of admiralty and as a court of admiralty shall, within Canada, have and *exercise all the jurisdiction conferred by the said Act* and by this Act.
>
> 4. Such jurisdiction, powers and authority shall be exercisable and exercised by the Exchequer Court throughout Canada and the waters thereof, whether tidal or non-tidal, or naturally navigable or artificially made so, and all persons shall, as well in such parts of Canada as have heretofore been beyond the reach of the process of any vice-admiralty court, or elsewhere therein, have all the rights and remedies in all matters (including cases of contract and tort and proceedings *in rem* and *in personam*), arising out of or connected with navigation, shipping, trade or commerce, which may be had or enforced in any colonial court of admiralty, under the "Colonial Courts of Admiralty Act, 1890."

It is within the meaning of the last two sections and all that they imply that we must seek for the jurisdiction of the learned trial judge to try this cause

and for the proceedings in his court leading up to the trial.

One or two observations may be made upon these sections as it is urged that in some way or other the Exchequer Court of Canada, in the exercise of its powers, must be held to be upon a different footing from the High Court in England. I am unable to find any reasons for such a contention. The jurisdiction of the court must be exercised within Canada. Again it must be exercised throughout Canada and the waters thereof. These terms designate the place *within* which the jurisdiction is to be exercised; and the place within which the appellant came and was seized clearly and indisputably was within the area thus designated. That by no means implies that the offences or the contract out of which the necessity for proceedings may arise, *in rem* or *in personam,* must have taken place within Canada or upon the waters thereof.

The subject matter with which the court thus constituted has to deal may arise out of or be connected with

> navigation, shipping, trade or commerce which may be had or enforced in any colonial court of admiralty under the "Colonial Courts of Admiralty Act, 1890."

Then turning to sub-section two of section 2, of the "Colonial Courts of Admiralty Act, 1890," we find it reads as follows:

> 2. (2) The jurisdiction of a colonial court of admiralty shall, subject to the provisions of this Act, be over the like places, persons, 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

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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.

Could anything be more comprehensive? Could language be more explicit in the way of authorizing the constitution of a court within Canada for the purpose of exercising this jurisdiction? It seems to me as if to all intents and purposes the result is just the same as if the Parliament and sovereign power that enacted the "Colonial Courts of Admiralty Act, 1890," had constituted the Canadian court a branch of the High Court in England, for convenience sake, to exercise the powers which that court might at the time of the passing of the Act have been endowed with.

Whether the limits of that jurisdiction are fixed as found by the law when the Dominion exercised the right thus conferred and established courts within that right or are liable to their being shifted from time to time as the parent parliament may determine by later legislation regarding the Admiralty Division of the High Court of Justice, without express reference to the colonial courts, may become an interesting inquiry. But, in the view I take of this case, the necessity for following such inquiry and considering the "Merchant Shipping Act" of later date, does not arise.

Having thus looked at the nature of the jurisdiction thus existing here, we can suppose this arrest of the appellant to have taken place on the Thames in England, and all I have related to have transpired in the Admiralty Division of the High Court in England, instead of in the court below; is it for a moment conceivable that, having ignored the uniform practice of moving against the proceeding, as was done in the

case of *Borjesson & Wright* v. *Carlberg*(1), and the second case, page 1322, or *The "Jassy"*(2), or *The "Vivar"*(3), and numerous other cases, an appellant would be heard after trial and reference, as here, to raise questions of the jurisdiction, unless in a case where the jurisdiction never could have existed?

There are cases of such absolute want of jurisdiction in a court that nothing can cure and bind. There are cases of another sort where the objection must be taken by plea or otherwise and be determined or waived. This case is, I conceive, of the latter.

Suppose the appellant had been acquitted in these proceedings and the respondents' action dismissed and they had in such event sought a remedy for their alleged grievance in an American court having jurisdiction, could they have hoped to succeed? Could the appellant, in such case, not have set up the supposed dismissal in the court below as a bar?

Most assuredly it seems to me so. And yet, on what could such a plea of *res judicata* rest if there was no jurisdiction in the court below?

The objection to the jurisdiction was rested neither in pleading, nor at trial, nor in factum here upon the narrow ground of practice that a ship in motion cannot or ought not to be proceeded against, but upon the broad ground that a foreign ship having offended by colliding with another foreign ship in foreign waters could not be proceeded against when it came within Canadian waters. At this stage appellant ought not to be heard on either of the narrow grounds of practice.

It is said, however, that actual seizure and taking

(1) 3 App. Cas. 1317. (2) 95 L.T. 363.
(3) 2 P.D. 29.

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possession is necessary to exercise of jurisdiction. Is that so? The case of *The "Nautik"* (1) seems against such notions of jurisdiction. See also cases cited therein.

The relation of seizure to jurisdiction is fully and learnedly set forth by Jeune J. in the case of *The "Dictator"* (2), at pages 311 and 312.

The need for seizure was to enforce the appearance and bail.

And we find here bail was given and in form it of necessity must be, as it was, as appears by bonds on file, as given without being under protest.

I conclude that, once there was bail given, and an appearance made, though under protest, but that protest not followed up by an effective motion to challenge the jurisdiction, there was an end to the question of jurisdiction in the case, by thus passing the means by which it might have been raised, if there existed on the facts a case in which jurisdiction could, in any circumstances, be asserted.

In short, all that is involved in these objections and considerations are merely matters of practice and in no way going to the root of jurisdiction and should not prevail here or be heard here.

That brings us to the consideration of the law upon which such jurisdiction rests.

The case of *The "Diana"* (3), and of *The "Courrier"* (4), in the same volume at page 541, seem absolutely decisive of the matter.

In the former case Dr. Lushington says:

> The decision of this question depends mainly, if not exclusively, upon the construction which the court ought to give to the seventh

(1) [1895] P.D. 121.
(2) [1892] P.D. 304.
(3) Lush. 539.
(4) Lush. 541.

section of 24th Vict. ch. 10:—"The High Court of Admiralty shall have jurisdiction over any claim for damages done by any ship." The object of the Act, as stated in the title and preamble, is "to extend the jurisdiction" of the court. The seventh section, which deals with the subject of damage, does not particularize any circumstances to which the jurisdiction of the court is to extend, but gives the court jurisdiction in the widest and most general terms; and there can be no doubt that the present case falls within those terms.

He then proceeds to point out that but for this amending Act the former state of the law might have presented some difficulties in the way of asserting jurisdiction over matters arising in foreign waters.

And in the latter case it appears that, as here, the parties were both foreigners and the collision in question had arisen in the Port of Rio Grande and thus beyond British waters.

I am unable to distinguish this case from those and I may observe that but for the attack made upon the assertion of jurisdiction based upon proceedings arising from the service or arrest in a place where presumably the vessel was in motion, I should have satisfied myself with the citation of these authorities, the statute on which they rest and the relations of the jurisdiction in the court below to that statute.

The recent case of *The "Jassy"*(1), is noteworthy though not a decision of the point raised here, yet shewing a recognition of the law I rely on as if undoubted. The "J.," a vessel owned by the State of Roumania, on 30th April, 1905, collided with the Greek steamship "C." at Sulina, in Roumania. On the 18th March, 1906, the owners of the "C." arrested the "J." in an action *in rem*. The "J." was then at Liverpool.

Through inadvertence an appearance was entered

(1) 95 L.T. 363.

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unconditionally. It was shortly afterwards discovered that the Roumanian Government claimed *The "Jassy"* was one of the public vessels of that state and that this fact had been overlooked by the agents who instructed the appearance. A motion was made to dismiss the action on the ground of the public ownership by a foreign state of the arrested vessel and it was dismissed accordingly.

No one seems to have thought of taking any such objection to the jurisdiction as is raised here, though the facts there presented exactly the identical case before us, except that the arrest was made in port and that port Liverpool instead of in the waters of a Canadian channel, as herein, whilst the vessel is *assumed, but not proven to have been in motion.*

Indeed, it seems so far from that to have been assumed by solicitors, counsel and the court (as a thing impossible of question), that, but for this fact of a foreign state owning the vessel, the action was brought in a court having jurisdiction to try it.

I have perused a great many cases and authorities cited and arising from such citation, that seem to me quite irrelevant to the questions in issue here.

This case rests upon the maritime lien that arises from a collision and attaches to the offending vessel by virtue of such collision and the resulting damages in favour (to the extent thereof) of the owners of the innocent and damaged vessel.

Wherever the offender goes, she is subject to that lien, and it becomes the duty of the court having such right to enforce a lien of that kind whenever the offender comes within its jurisdiction, upon being applied to, to take steps to enforce the lien. To refuse it would be a denial of justice.

Yet questions might in the exericse of such jurisdiction so arise that a proper discretion might lead to refusal to exercise it.

The collision with a vessel which is the property of a foreign power, even if that vessel be a wrongdoer, is by the comity of nations removed from any such jurisdiction, unless at the request of the foreign power so owning.

The right to navigate carries with it no exemption from such jurisdiction.

The right and the duty of an admiralty court are not in conflict.

The cases of crimes committed abroad or of damages resulting to persons therefrom, or of sailors' rights to assert their claims for wages, or of material men or others supplying necessaries to a vessel, and all cases in the nature of actions *in personam,* stand on an entirely different footing from the cases arising from collision and consequent lien *ipso facto,* as it were. The cases of life salvage is specially provided for in 24 Vict. ch. 10, sec. 54. In all these cases no lien exists as is shewn by the cases of *The "Two Ellens"*(1); *The "Veritas"*(2), and other cases though the result of adjudication upon such claims may create a lien.

The wrong done by the trespasser in a collision case may in law and fact transfer by means of the resulting lien arising from the act so done virtually the most valuable interest in the vessel from the owner to the persons entitled to the lien. It seems idle in such a case to set up the possible wrong to be done such an offender by her arrest and ignore the rights

(1) L.R. 4 P.C. 161. (2) [1901] P.D. 304.

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her wrongdoing has created and vested in others suffering therefrom.

I think the appeal should be dismissed with costs.

MACLENNAN and DUFF JJ. concurred in the judgment of Davies J.

Appeal allowed with costs.

Solicitor for the appellants: *W. D. McPherson.*

Solicitor for the respondents: *J. W. Hanna.*