

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1921

June 18.

THE OWNERS, MASTER AND
CREW OF GAS BOAT *FREIYA* . . . PLAINTIFFS;

VS.

THE GAS BOAT *R.S.* DEFENDANT.

*Shipping—Re-Arrest pending Appeal—Foreign Owners—Special
Circumstances.*

Plaintiffs sued the *R.S.* on a claim for salvage which was dismissed.

They appealed to the Exchequer Court from this decision and moved to re-arrest the ship pending the appeal.

Held: That where the owners, though foreigners, reside within the jurisdiction and carry on their business therein, the Court will not order the re-arrest of the ship pending an appeal to the Exchequer Court of Canada from the decision of the Local Judge in Admiralty, in absence of evidence of removal of the ship out of the jurisdiction, or of other good reasons. The *Abbey Palmer* 8 Ex. C.R. 462, 10 B.C.R. 383 referred to. (1904).

MOTION by Plaintiff in Chambers to re-arrest the ship after judgment had been delivered dismissing the claim of salvage against her and from which judgment an appeal had been taken to the Exchequer Court of Canada.

June 16th, 1921.

MOTION now heard before the Honourable Mr. Justice Martin at Victoria.

J. E. Clearhiue, for plaintiff: The vessel is owned by foreigners (Japanese) and should be held to answer the result of the appeal. See the *Miriam* (1); the *Freir* (2); the *Dictator* (3).

(1) [1874] 2 Asp. N.S. 259.

(2) [1875] 2 Asp. N.S. 589.

(3) [1892] P. 304, at pages 321-2.

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E. C. Mayers, for defendant: Though the owners may be foreigners the vessel is within the jurisdiction and is still being operated as a fishing vessel—there must be special circumstances which are not shown here to justify the re-arrest of a ship as there must be to hold the bail bond on appeal. The *Abbey Palmer* (1).

Martin L.J.A.

MARTIN, L. J. A. now, this (June 18th, 1921), delivered judgment.

On the 16th inst. a motion was made before me to cancel the bail bond since judgment had been pronounced in favour of the ship and I acceded to the motion according to the principle embodied in my decision in the *Abbey Palmer*, (1), as no special circumstances were shown in the opposition to the motion and in the absence of these, the bail, which takes the place of *res*, shall not be held in Court pending the result of the appeal.

After the motion was granted the present motion was made upon the same material by special leave and consent and the cases of the *Miriam* and the *Freir* were cited as authority in support of a general right to re-arrest in case of an appeal which, upon the face of it, is not consistent with reason, because if the bail which represents the *res* should not be held at the Court why should the *res* itself be held?—the same thing cannot be regarded in different ways for the purpose of the appeal—but when the cases which are relied upon are closely examined they do not support the application because in the former it was stated by counsel that the ship would 'go at once' (i.e. out of the jurisdiction), if notice of the application were given, and in the latter case the vessel was a foreign one (Dutch) and would leave the country and the plaintiffs would be left without security unless arrested without notice which was ordered.

(1) [1904] 10 B.C.R. 383, 8 Can. Ex. R. 462.

Though the former case is not as fully reported as one would want and had to be explained by counsel, it was clear that the principle upon which the respective ships were re-arrested, even though the former was British, is that it appeared to the court that they would not be within the jurisdiction to answer the appeal if the appeal went against them.

This view was supported by the following statement of the Practice in Williams & Bruce Admiralty Practice, 1902, page 521, based upon the above cases:—

“Where the effect of the decision appealed against is that property which had been proceeded against at the instance of the appellant is released from the arrest of the court below, the appellant, if he apprehends that the property will be removed out of the jurisdiction, may, after instituting an appeal obtain a warrant of arrest out of the principal registry under which the property may be kept under arrest until the appeal has been decided.”

As there is no evidence of removal from the jurisdiction or other good reasons, see the *Abbey Palmer*, I see no grounds for ordering the re-arrest of the vessel in question. Though the owners may be foreigners yet they reside here and carry on the business in these waters.

The motion will be dismissed with costs.

Judgment accordingly.

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