

THE ONTARIO ADMIRALTY DISTRICT

1964  
July 24

BETWEEN:

TORONTO WINDOW MANUFAC- } PLAINTIFF;  
TURING COMPANY LIMITED }

AND

THE SHIP AUDREY S .....DEFENDANT.

*Shipping—Practice—Admiralty Act, R.S.C. 1952, c. 1, ss. 2(1) and 18(2)—  
Meaning of "Towage"—Arrest—Jurisdiction of Court—Unlawful arrest  
a nullity—Whether parts of day to be considered with regard to time  
of institution of action.*

This is a motion on behalf of the defendant ship and its owner to set aside the writ of summons and warrant of arrest issued in this action on the ground that this Court is without jurisdiction to entertain the action on two grounds, viz. that at the time of the issue of the writ herein and the arrest of the ship, the *Audrey S* was not a ship within the meaning of the *Admiralty Act* and that the ship was not under arrest at the time this action was instituted.

The evidence established that the incomplete hull of the ship was taken by truck from its place of construction to Toronto harbour and shortly thereafter the trucker caused an action to be commenced and the ship to be arrested for non-payment of his claim for "towage charges". The ship was arrested in the present action by the sheriff on the same day as but more than two hours after it had been released from arrest in the first action.

1964  
 TORONTO  
 WINDOW  
 MANUFACTURING CO.  
 LTD.  
 v.  
 THE SHIP  
 Audrey S

*Held:* That the claim in the first action for towage services was without the jurisdiction of this Court because there had been no towing but transportation by truck, and the arrest of the ship in that action was an unlawful exercise of the power of the Court and was a nullity.

2. That there was no arrest of the ship at the time this action was instituted.
3. That even if parts of the day cannot be considered, then because the arrest in the first action was unlawful, it cannot afford a basis by which this action can be supported.
4. Order to go setting aside writ and warrant of arrest in this action and service of same.

MOTION to set aside a writ of summons and warrant of arrest of a ship.

The motion was heard by the Honourable Mr. Justice Wells, District Judge in Admiralty for the Ontario Admiralty District at Toronto.

*Peter Wright, Q.C.* for the motion.

*W. E. MacLachy contra.*

WELLS D.J.A. now (July 24, 1964) delivered the following order:

This is a motion on behalf of the defendant ship and its owner, one Craig H. Brodie, to set aside the writ of summons and the warrant of arrest issued in this action on July 15, 1964, and the service thereof on the ground that this Court has no jurisdiction to entertain the claim asserted in the action. Mr. Wright raises two points,—The first is (1) whether at the time of the issue of this writ and the arrest of the ship, the *Audrey S* was a ship within the meaning of the *Admiralty Act* and of the other statutes relevant thereto, and secondly (2) that the ship was not under arrest at the time the present action was instituted.

The definition of "ship" is found in section 2 of the *Admiralty Act*, being chapter 1 of R.S.C. 1952, and is as follows:

(i) "ship" includes any description of vessel used in navigation not propelled by oars.

Mr. Wright argues that at the time of the arrest, this ship, which had been recently transported from the owner's property at Richvale where it was built, and which is an incompleated houseboat, had not attained the state of being a ship within the meaning of the definition in the *Admiralty Act*, which is similar to the definition in the Rules of Court and substantially the same as that found in the *Canada*

1964  
 TORONTO  
 WINDOW  
 MANUFACTURING Co.  
 LTD.  
 v.  
 THE SHIP  
 Audrey S  
 Wells D.J.A.

*Shipping Act.* The condition of the ship at the time is described in an affidavit of Mr. Brodie filed and in paragraphs 2 and 3 he describes the condition of the ship on June 27, 1964, when the hull was taken by truck from Richvale and deposited in the Toronto harbour at Pier No. 7. Paragraphs 2 and 3 of Mr. Brodie's affidavit are as follows:

2. On the 1st day of August, 1963, I left my old employment and began to work on a project for the construction of a wood and metal houseboat for sale to private owners.

3. The work on the hull began on the 1st day of April, 1964, at my premises, 39 Observatory Lane, Richvale, Ontario, and continued until the hull could be floated on the 27th day of June, 1964, after the incomplete hull was taken by truck from Richvale to Toronto Bay by Pier 7.

Fortunately, in the view I take of the matter I do not think that I have to decide at what point of time in its construction a ship becomes a ship within the meaning of the definition in the statute. It may be necessary to do this at some time, but counsel were unable to point to any decisions which would throw light on the problem, and at first blush, on consideration of the matter the problem would appear to be somewhat akin to the theological arguments in the Middle Ages as to the point of time at which the soul entered the body.

Mr. Brodie's affidavit, which is not contradicted in any way or controverted, goes on to set out what happened after the ship was taken to Toronto harbour, and paragraphs 4, 5 and 6 set out the facts as he has been able to ascertain them. They are as follows:

4. On the 14th day of July, 1964, John B. Moran, the trucker, by Writ Number 1338 issued out of this Honourable Court and by Warrant dated the same day, led to the arrest of the incomplete hull for a claim for "towage services" amounting to \$318.00.

5. The said vessel was arrested during the morning of July 15th, 1964, and, as a result, I paid Peter E. Brodey, Solicitor for the said John B. Moran, the sum of \$375 48 in full settlement of the claim and costs and secured the release of the vessel.

6. I am informed by the Sheriff of York, P. J. Ambrose, and verily believe that he released the arrest of the Defendant vessel on July 15th, 1964, at 3:00 o'clock in the afternoon and that he did not receive a Warrant for the arrest of the Defendant in this action until about 5:00 o'clock on the said 15th day of July, 1964, and that he then proceeded to re-arrest the vessel at about 5:30 o'clock in the afternoon that day.

The plaintiff's claim in this action is set out in the writ in the following words:

THE PLAINTIFF'S CLAIM IS for the sum of \$732.60 for aluminum sliding windows, aluminum sliding window frames, glass, enamel molding,

1964  
 }  
 TORONTO  
 WINDOW  
 MANUFACTURING CO.  
 LTD.  
 v.  
 THE SHIP  
 Audrey S  
 Wells D.J.A.

flashing and calking supplied to Flying Scott House Boat Co. and installed on the ship Audrey S. at the port of Toronto on the 27th day of June, 1964.

It is quite true that, if Mr. Brodie's affidavit is correct, the ship was not under arrest at the time the writ in the present action was issued. It would also appear to be plain that the first claim, by Moran, which purported to be a claim for \$318.00 for towage services rendered to the ship on June 25, was, once it became clear there had been no towing but transportation by truck, without the jurisdiction of this Court. It was not for towing, in any sense of the word, but for carrying on land. The word "towage" is defined in the Shorter Oxford English Dictionary as,—the charge or payment for towing a vessel; the action or process of towing or being towed. The word "tow" is said to mean,—to draw by force; to pull; to draw or drag a vessel on the water by a rope; to drag by or as by a line. It is quite true that Mr. Brodie did not dispute the jurisdiction of the Court in this case but paid the bill. But, in my opinion, it is also clear that carrying a vessel by truck or other transport on land is not towage within the meaning of that word as used in the section of the *Admiralty Act* conferring jurisdiction on the Court. As will appear later, there was only a right to arrest the ship in the present action if at the time of the institution of the proceedings the ship is, or the proceeds thereof are, under the arrest of the Court. There is no suggestion at the time the Moran writ was issued that the ship was under any prior arrest for any cause at all. In my opinion, the arrest as a result of the Moran writ was an unlawful exercise of the power of the Court and without its jurisdiction. I do not think that Parliament intended, when it spoke of a ship being under arrest at the time of the issue of a writ, that such arrest to warrant further action should be anything but a lawful arrest, and the arrest under the Moran writ, whatever it was in fact, was in my opinion an unlawful arrest and, as far as the jurisdiction of this Court is concerned, a nullity.

The provision of the statute dealing with jurisdiction for building, equipping or repairing a ship at any time is set out in section 22 of the *Supreme Court of Judicature (Consolidation) Act, 1925*, of the Parliament of the United Kingdom, which by subsection 2 of section 18 of the *Admiralty Act* is imported into the *Admiralty Act* itself and, in so far as it can, apply and is directed to be applied

by the Court, *mutatis mutandis*, as if that section of the Act had been re-enacted by section 18. It goes on to provide that the word "Canada" be substituted for the word "England" and the words "Governor in Council" be substituted for "His Majesty in Council" and the words "Canada Shipping Act" (with the proper references to years of enactment and sections) be substituted, except with relation to mortgages, for the words "Merchant Shipping Act" (and any equivalent references to years of enactment and sections) and with the words "or other judicial district" added to the words "body of a county", wherever in such section 22 of such *Supreme Court of Judicature (Consolidation) Act, 1925*, any of the indicated words of that Act appear. Subsection 1(a)(x) of section 22 reads as follows:

22. (1) The High Court shall, in relation to admiralty matters, have the following jurisdiction (in this Act referred to as "admiralty jurisdiction") that is to say:

(a) Jurisdiction to hear and determine any of the following questions or claims:

(x) Any claim for building, equipping or repairing a ship, if at the time of the institution of the proceedings the ship is, or the proceeds thereof are, under the arrest of the Court.

The basis of the Moran action is apparently found in item (vi) of the same set of subsections and gives the jurisdiction in cases of towage, whether the services were rendered within the body of a county or on the high seas. That is apparently meant to cover river towage as well as towage on the ocean and, in the case of Canada, I would think would include towage on the Great Lakes. But the Moran claim was not for towage at all: it was for trucking services rendered for the transporting of the houseboat, which had reached a certain stage of completion, by truck from Richvale, where it was built, to a pier at the City of Toronto harbour. With respect, I do not think trucking services can be called towage. If I am correct in my view that there was no jurisdiction to do what was done in the Moran action, there was then, as I have already pointed out, an unlawful arrest. It is, I think, clear that, from the evidence that Brodie has furnished, there was no arrest of the ship at the time the writ was issued in this action. But if I am not entitled to consider parts of the day in determining whether there was arrest or not, then I think, on the ground that I have just discussed, that is, the matter of jurisdiction in the Moran action, I must conclude that there was no lawful

1964

TORONTO  
WINDOW  
MANUFACTURING Co.  
LTD.  
v.  
THE SHIP  
Audrey S  
Wells D.J.A.

1964

TORONTO  
WINDOW  
MANUFACTURING Co.  
LTD.  
v.

THE SHIP  
Audrey S

Wells D J A.

arrest of the Court at the time the writ in this action was issued and that an earlier action brought without the jurisdiction cannot afford a basis by which this action can be supported. There must be a lawful foundation to bring the present action within the jurisdiction.

There will, therefore, be an order setting aside the writ and warrant of arrest issued in this action and the service of the same. The applicant should have its costs of these proceedings against the plaintiff.

*Order accordingly.*