1920
August 10th

Statement of Facts.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

HALEY ET AL, PLAINTIFFS.

vs.

SS. "*COMOX*," DEFENDANT.

Shipping—Action for necessaries—Jurisdiction—Effect of entry in register—Admissibility of evidence to contradict.—24 *Vict., ch.* 10, *s.* 5; 53-54 *Vict., ch.* 27; (Imp.) *R.S.C.* (1906) *ch.* 141.

The SS. *Comox* was registered at the Port of Vancouver, B.C., and was owned by the H. S. Company, having its head office at the same port. While she was at the port of New Westminster, B.C., plaintiff supplied her with necessaries such as material and labour to refit her, and not being paid, action was taken in Vancouver to recover price thereof. The said H. S. Company was practically one Captain Woodside who was domiciled in San Francisco, U.S.A., being the owner of 995 shares of a total of 1,000 shares, capital stock of said Company.

Held, That notwithstanding the SS. *Comox* was registered in Vancouver, her home port was really San Francisco where the true owner thereof was domiciled; that she was a foreign vessel and that the court had jurisdiction in the matter under section 5, ch. 10, 24 Vict., and 53-54 Vict., ch. 27, sec. 3 (Imp.)

2. That evidence may be admitted to contradict entry in the ship's register to show the true owner and home port of the vessel. The *Polzeath* (1), the *St. Tudno* (2), the *Proton* (3); and the *Hamborn* (4); referred to.

In this case the plaintiff sued for necessaries supplied in the shape of material and labour in refitting the defendants' ship at New Westminster in the Province of British Columbia. The Defendants objected to the jurisdiction of the Court and alleged that the ship belonged to the port of Vancouver, on the ground that she was owned by the Henrietta Ship Company having its head office at the Port of

(1) 1916, P.D. 241.
(2) 1916, P.D. 291.
(3) 1918, A.C. 578.
(4) 1918, P.D. 19.

Vancouver, but the evidence showed that of a thousand shares of stock which comprised the capital stock of the Henrietta Ship Company, nine hundred and ninety-five shares were owned by Captain Woodside who lived and was domiciled in San Francisco.

Captain Woodside's wife and son the other directors of the Company, lived and were domiciled at San Francisco, and it was argued by Counsel for the plaintiff, Mr. E. C. Mayers, that therefore the ship was really owned in San Francisco, and was a foreign ship and that, in consequence Section 5 of the Admiralty Courts Act of 1861 applied.

The following cases were cited in support of the contention that the court should look behind the Register of the ship to ascertain the true ownership:—

The *Polzeath* (1); the *St. Tudno* (2); the *Proton* (3); the *Hamborn* (4).

By the Admiralty Courts Act, 1861, being 24 Vict., Chap. X, 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 Colonial Courts of Admiralty Act, 1890, 53-54 Vict., Chap. 27, the word "Canada" is substituted for "England and Wales."

The case was tried at Vancouver on the 19th, 20th and 21st days of July, 1920, before the Honourable Mr. Justice Martin.

(1) 1916, P.D. 241.
(2) 1916, P.D. 291.
(3) 1918, A.C. 578.
(4) 1918, P.D. 19.

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E. C. Mayers, and *G. L. Fraser*, counsel for plaintiffs;

C. B. McNeill, K.C., counsel for defendant.

Archer Martin, L.J.A., now (this 9th of August, 1920) delivered judgment.

"This is an action claiming $19,258.29 for necessaries supplied in the shape of material and labour in refitting the defendant ship at New Westminster in this Province. An objection is taken to the jurisdiction founded on the submission that the ship belongs to the port of Vancouver and that she is owned by the Henrietta Ship Company, a Canadian Company with head office at that port, but I have no hesitation whatever in finding upon the evidence that whatever the documents may pretend to show, her home port is in San Francisco and her true owner is Alexander Woodside domiciled there.

Part of the work was done under a written contract dated the 12th February, 1920, for $13,100, and the balance under a later verbal one: the submission that the plaintiffs' right to recover was dependent upon the owner being able to obtain classification from the British Corporation or otherwise is not supported. I find as a whole that the work done under both contracts was a fair job of its class, and the prices charged were reasonable, which leaves only a few items that require particular notice.

The main one relates to the engine, etc., under this clause of the written contract:—

"All propelling machinery to be installed complete with auxiliaries and pumps, also cargo winches. The above items to be supplied by the owners ready to install. It is assumed that the present tail shaft and propeller will be used."

It is submitted that under this clause the plaintiffs were required to supply the engine bed and therefore a large number of items in their bill covering the considerable cost of that work, about $5,000, should be disallowed. In the Oxford Dictionary I find these definitions:—

Install (2) To place (an apparatus, a system of ventilation, lighting, heating, or the like) in position for service or use:

Installation (2) The action of setting up or fixing in position for service or use (machinery, apparatus, or the like); a mechanical apparatus set up or put in position for use; spec. used to include all the necessary plant, materials and work required to equip rooms or buildings with electric light.

The main idea of "installing" thus conveyed is to place or set up in position for use, and though in certain circumstances and some trades it may have a special or wider meaning, yet there is nothing in the circumstances of this case to so enlarge it. I am of the opinion that it was and must have been in the contemplation of the parties that the new engine was to be placed in position upon a bed sufficient for that purpose already in "place" in the ship. The statement of the witness Lockhart, marine engineer, on cross-examination, that it meant the plaintiffs were to get the engine, auxiliaries and pumps from the owner "ready to install" and then couple them up for sea in the ship's engine room seems the reasonable view to take of the situation, and it is, moreover, supported by the correspondence between the parties, even if the blue print, Ex. 38, is to be discarded in this connection, as is rightly, I think, submitted by defendant's counsel, it being merely an over-all dimension

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plan, as explained by the witness Akhurst. Therefore said items covering the cost of the engine bed will be allowed.

As to certain "hardwood" items, it is clear from the evidence that unless otherwise specified by name local shipwrights include Douglas fir under that category and that wood was in fact used, therefore the items are allowed.

With respect to the two wing tanks for oil, that question has occasioned me the most difficulty but after a careful consideration of the evidence and the circumstances I have reached the conclusion that the owner, Woodside, has so acted that he must be held to have accepted them after full knowledge of the result of the test, and their capacity, if the plaintiff Christian's evidence is to be believed, and I prefer it to Woodside's; the latter did not insist upon larger tanks being substituted, as the plaintiffs offered to do, because they would reduce the cargo space, and, consequently, earning power, and it is difficult to understand, if his objection were so serious as now put forward, why he nevertheless put to sea without any further alterations to them: as they are now with a capacity of 3,800 gallons, instead of the 5,000 as specified for, they still give a 19 day voyage range on the engine consumption of 200 gallons per day, which he doubtless agreed to regard as sufficient; furthermore, his representative, Wallace, agreed to test them though he knew their capacity was short and that they were not $\frac{1}{4}''$ plate and did not order them to be taken out after the test, though he had the power to do so, simply because it would have delayed the vessel in sailing. I am of the opinion, on the whole aspect of this item, that it is too late for the owner to successfully contest it.

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There are five items, however, which the owner is entitled to have disallowed, viz., those charged for the time occupied in purchasing materials, under these headings in the monthly "Statement of Wages:"—

J. F. Haley, looking after extra materials, work		$ 125.00
Overhead	(April)	83.33
Do.	(May)	83·22
Do.	(June 1st half)	125.00
Do.	(June 2nd half)	125.00
		$ 541.55

The verbal contract was that the plaintiffs were to purchase the material and supply the labour and do the work on a percentage of 20 per cent of the cost, and it is submitted that the time occupied in purchasing is part of the overhead cost of labour and that as in this case the plaintiffs did not include their office expenses in "overhead" they are entitled to exclude non-productive work outside the office, that is, instead of including in "overhead" the office administrative expenses they excluded them and therefore should be allowed for them as time occupied in the "labour" of purchasing. But I am of opinion that, while it may be the plaintiffs made an error in excluding their general expenses from "overhead" and estimated too low as pointed out by witness Lockhart, yet nevertheless that was the contract they made and if they made a mistake in it they must bear the loss, so consequently the said five items will be disallowed. judgment will be entered in favour of the plaintiffs for all the other items.

With respect to the counter-claim: it has not been supported by evidence and must fail. While the

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telegram of the 26th May from the defendants to Woodside concerning the arrival of the engine, beginning "Expect engine, etc.," was an unfortunate one, yet an ordinarily prudent man would not treat such expectations of the arrival of an engine, especially in these days of delayed transportation, with much confidence; the engine, as a matter of fact, did not arrive in the plaintiff's yard until the 8th June, and after that time I am unable to find that there was any undue delay, bearing in mind the fact that under the verbal contract additional and collateral work was being continually ordered by the owner's agent, Wallace, even up to the 3rd July, two days before sailing. It is therefore impossible to hold that the owner really suffered any loss or damage on this head.

The whole result is that judgment should be entered for the plaintiffs as above indicated, and the costs will follow the event.

Judgment accordingly.