

APPEAL FROM TORONTO ADMIRALTY DISTRICT.

THE UPSON WALTON COMPANY } APPELLANTS ;
 (PLAINTIFFS)..... }

1907
 March 25.

AND

THE SHIPS "BRIAN BORU," } RESPONDENTS.
 "SHAUGHHRAN," "MONROE"
 DOCTRINE" AND "RECI-
 PROCITY," (DEFENDANTS)..... }

*Shipping—Chartered vessels—Goods supplied on credit of charterers—Lien
 against ships.*

Goods, in the nature of ship's supplies, were furnished by the appellants to the charterers of certain ships while in the possession of the charterers. It was shown that the goods were not supplied on the credit of the ships, but were charged to the charterers in the appellants books, and accounts therefor were, in the first instance, made out to the charterers.

Held, that the appellants could not assert a lien for necessaries against the ships.

APPEAL from a judgment of the Judge of the Toronto Admiralty District, reported in 10 Exchequer Court Reports, p. 176.

The facts of the case are stated in the reasons for judgment.

November 13th, 1906.

The appeal was heard at Ottawa.

J. H. Rodd, for appellants, cites:

Anglin v. Henderson (1); *Manchester Trust v. Furness* (2); *Meagher v. Aetna Ins. Company* (3); *The August* (4); *The Maud Carter* (5); *The Livietta* (6); *The Petapasco* (7);

(1) 21 U. C. Q. B. 27.

(2) (1895) 2 Q. B. D. 539.

(3) 20 Gr. 345.

(4) (1891) P. D. 328.

(5) 29 Fed. R. 156.

(6) 8 P. D. 209.

(7) 13 Wall. 329.

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The *Alvira* (1); The *Comfort* (2); The *Havana* (3); *Norwegian SS. Company v. Washington* (4); The *Cumberland* (5); The *Pioneer* (6); The *General Tompkins* (7); The *Atlantic* (8); *Saylor v. Taylor* (9); *McCrae v. Bowers Dredging Company* (10); *Maclachlan on Shipping* (11).

Reasons for
 Judgment.

F. A. Hough, for the respondent, cited :

In re Hydraulic Steam Dredge No. 1 (12); *Pile Driver E. O. A.* (13); *Am. & Eng. Ency. of Law* (14); *The Now Then* (15); *Berwind v. Schultz* (16); *The Bertha M. Miller* (17); *The Lulu* (18).

Mr. *Rodd* replied.

THE JUDGE OF THE EXCHEQUER COURT now (March 25th, 1907) delivered judgment.

This is an appeal from a judgment of the learned Judge of the Toronto Admiralty District given on the 14th day of February, 1906, whereby he dismissed the action with costs.

The plaintiff company in the year 1904 and for a number of years prior thereto carried on at Cleveland, Ohio, a ship chandlery business. For ten or twelve years they had furnished goods for small amounts to the Donnelly Contracting Company, one of their customers. The course of business, as given by Mr. Charles R. Doty, the secretary of the plaintiff company, was to collect upon delivery the price of the goods sold. He does not think that there had ever been an open account; but as to this he was not sure, and could not say without examining

- (1) 63 Fed. R. 144.
- (2) 25 Fed. R. 158.
- (3) 54 Fed. R. 201.
- (4) 57 Fed. R. 224.
- (5) 30 Fed. R. 449.
- (6) 30 Fed. R. 206.
- (7) 9 Fed. R. 620.
- (8) 53 Fed. R. 607.
- (9) 77 Fed. R. 476.

- (10) 86 Fed. R. 344.
- (11) 4th ed. p. 174.
- (12) 80 Fed. R. 545.
- (13) 69 Fed. R. 1005.
- (14) 2nd ed. vol. 19, pp. 1093, 1094.
- (15) 55 Fed. R. 523.
- (16) 25 Fed. R. 912.
- (17) 79 Fed. R. 365.
- (18) 10 Wall. 192.

the books. In September of 1904 and later in that year the Donnelly Contracting Company were engaged in the work of filling in a breakwater at the entrance to Cleveland Harbour. Part of the plant with which that work was carried on consisted of a dredge, the *Brian Boru*, a tug-boat, the *Shaughraun* and two dump scows, the *Monroe Doctrine* and the *Reciprocity*. These vessels and others the Donnelly Contracting Company had leased for the season from the Dunbar and Sullivan Dredging Corporation. During the months of September, October and November of 1904, the plaintiff company supplied to the Donnelly Contracting Company a quantity of goods which were used on the vessels mentioned or in connection with the work that was being carried on by means thereof. The goods were ordered by the contracting company's foreman and were charged to that company in the plaintiff company's books, and the accounts therefor were in the first instance made out to the contracting company. In that respect there was at the time no change in the manner of keeping the accounts with the contracting company. The copies of the accounts in evidence are made out against the defendant vessels respectively. But these statements were made out after the Donnelly Contracting Company had got into difficulties and had made an assignment and represent the plaintiff company's contention and position after that happened. It was at this time, according to the witness Doty, that the question of the ownership of this plant first came up between the plaintiff company and the Donnelly Contracting Company. Up to that time, he says, the officers of the former company thought these vessels belonged to the latter company. An offer or settlement made by the contracting company was refused by the plaintiff company, which thereafter sought to enforce the claim against the defendant vessels.

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To sustain that claim it is necessary, among other things, to find that the goods were supplied on the credit of the vessels themselves and not on the credit of the Donnelly Contracting Company. Mr. Doty, who has been mentioned as secretary of the company, states in his evidence that the goods were supplied on the credit of the vessels. That, I think, is an inference that he draws, and I do not attach any greater weight or importance to it than that; and the rest of his evidence and the admissions he made lead, it seems to me, to an opposite conclusion. If it had been said that the possession of this plant in 1904 by the Donnelly Contracting Company for the purpose of carrying on their work had had the effect of giving them better credit with the plaintiff company than they had enjoyed as customers in former years, I should not have had any difficulty in accepting the statement. But when it is said that credit was not given to them, but to the vessels themselves, I am not able to accept the statement. The entries in the books are not of course conclusive; but in this case they show truly, I think, that the credit was given to an old customer, the Donnelly Contracting Company, and not to each defendant vessel for goods supplied to each. I rest my judgment on this view of the facts.

I express no opinion on the questions discussed by the learned judge of the Toronto Admiralty District; but I agree that the judgment that he directed to be entered in this case is the judgment that ought to be entered.

The appeal is dismissed with costs.

Judgment accordingly.

Solicitors for appellants . *Rodd & Wigle.*
Solicitor for respondents : *F. A. Hough.*
