Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Foong Tai and Company v. *Buchheister and Company, from His Britannic Majesty's Supreme Court for China and Corea at Shanghai; delivered the 20th July 1908.*

Present at the Hearing:

LORD MACNAGHTEN.
LORD ATKINSON.
SIR J. H. DE VILLIERS.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.

[*Delivered by Lord Atkinson.*]

This is an Appeal from a decree, dated the 10th January 1907, of the Supreme Court for China and Corea, in a suit in which the Respondents, a German firm carrying on business at Shanghai, were Plaintiffs, and the Appellants, a Japanese firm carrying on business at Kobe in Japan, and also at Shanghai, were Defendants.

The action out of which the Appeal arises was an action *in rem* brought against a steamship named the "Draco" under the provisions of Section 5 of the Admiralty Court Act, 1861, as applied to Shanghai by Section 100 of the China and Corea Order in Council, 1904, and Sections 2 (2), and 3 (*a*) of the Colonial Courts of Admiralty Act, 1890, to recover a sum of 2,750*l.* with interest, for necessaries, *i.e.*, for repairs done to, stores and equipment provided for, and disbursements made on account of, the above-mentioned vessel at certain ports in England, at

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Shanghai, and at Port Said, Aden, Colombo, Singapore, and Hong Kong, at which latter ports she called on a voyage from Cardiff to Shanghai.

The writ was issued and served on the 22nd September 1906. The ship was arrested by the Marshal of the Court on the 14th November 1906, and released on the 2nd April following.

The ship not having been arrested till after the institution of the suit, Section 4 of the Act of 1861 does not apply. Section 5, however, confers on the High Court of Admiralty jurisdiction "over any claim for necessaries sup-" plied to any ship elsewhere than in the " port to which the ship belongs, unless it " be 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." Section 10 gives the Court jurisdiction over, amongst other things, any claim of the master of any ship for wages earned on board of her, and for disbursements made on her account. By Section 8 the Court is empowered to decide all questions arising between co-owners or any of them touching the ownership, possession, or employment, or the earnings of any ship registered at any port in England or Wales " or any share thereof," and to " settle all " accounts outstanding . . . in relation thereto," and to "direct the said ship or any share " thereof to be sold" and to "make such " order in the premises as to it shall seem " fit." Section 35 provides that the jurisdiction conferred by the Act may be exercised either by proceedings *in rem* or by proceedings *in personam.*

The expenditure in respect of which the Plaintiffs claimed to recover may be divided into three heads, according as it took place in England, or at Shanghai, or at the intervening

ports of call already mentioned. The disbursements in England were made by Messrs. Palmer and Company direct, those at ports of call were made by the Captain's drafts on Messrs. Palmer and Company, which drafts were duly met. Messrs. Palmer and Company in turn rendered accounts of both these classes of disbursements, and drew on the Plaintiffs for the amount thereof, after giving credit for advances on account of freight. The Shanghai disbursements were made by the Plaintiffs direct.

The contentions put forward at the trial on the part of the Defendants were apparently: 1. That the Plaintiffs' claim was not in reality a claim for necessaries within the meaning of Section 5 of the Act of 1861, but merely a claim for the balance of an ordinary mercantile account. 2. That there being no maritime lien for necessaries, a suit *in rem* could not be maintained under that section, unless at the time it was instituted the "*res*" proceeded against belonged to a person or to persons personally liable to the Plaintiffs in that suit as a debtor or debtors in the sum sought to be recovered. 3. That owing to the relations *inter se* of the several parties concerned in the transactions connected with this ship, and to the notice and knowledge which the Plaintiffs had of the Defendants' equitable interest in, or claim upon, her, before any of these disbursements were made, it would be inequitable to enforce the Plaintiffs' claim against the ship to the prejudice of this interest of the Defendants.

The learned Judge who presided at the trial held that these contentions were not sustained, and that the Plaintiffs were entitled to recover under Section 5 for necessaries. He referred it to the Registrar and Merchants to inquire and report which, amongst the several items charged for, were necessaries, and what was the reasonable

and proper amount to allow in respect of these. The Registrar reported that the proper amounts to allow, after making all deductions and allowances, were £1,117 8*s.* and $1,830.85. Upon a motion to the learned Judge to vary these amounts an addition of 102*l.* 5*s.* was made to them, and a sum of 52*l.* 8*s.* 1*d.* was referred to the Registrar for consideration. In the present Appeal their Lordships have not to consider the propriety or sufficiency of the amounts thus found in the Plaintiffs' favour.

The facts are somewhat complicated, and, so far as material, are as follows :—

One John Baessler, a German subject, who carried on at Shanghai the business of shipbroker, and was, in the opinion of the Plaintiffs, a man living from hand to mouth, to whom nobody acquainted with him would give credit, in the month of December 1905 desired to purchase from Messrs. T. Wilson, Sons, and Company, the well-known shipowners of Hull, a steamship belonging to them, registered of that port, named the "Draco." He was not acquainted with Wilson and Company, and for that reason, as well, perhaps, as because of his financial position, he approached the Defendants and requested them to act as his agents in procuring through Palmer and Company, of London, the purchase of this ship. He also, according to the statement contained in his affidavit of the 12th October 1906, employed them as his "agents" to finance the ship on her voyage from England to Shanghai. This the Defendants agreed to do on receiving 2½ per cent. commission on the purchase money of the ship. No formal agreement was drawn up, but divers letters and telegrams passed between the several parties concerned, with the result that the "Draco" was on the 30th December 1905 purchased by Palmer and Company from Wilson and Company for the sum of

5,000*l*. Baessler, on the 12th January 1906, paid to the Plaintiffs 4,000*l*., part of the price of the vessel, and on the 3rd February paid 1,000*l*., the balance. These sums were immediately on receipt transmitted by the Plaintiffs, by wire, to Palmer and Company, and by the latter paid over to Wilson and Company, who, having received the price of the vessel from the firm with which alone they dealt, by bill of sale, dated the 20th January 1906, transferred her to them.

Palmer and Company thus became the registered owners of the "Draco," and she remained a British ship, registered, as theretofore, as of the port of Hull.

If matters had rested there, Palmer and Company would, in equity, have been mere trustees of the ship for Baessler, her beneficial owner. Any complication that has arisen in the case is due to the fact that on the 3rd January 1906 Baessler had, to the knowledge of the Plaintiffs, entered into an agreement in writing with the Defendant firm, who purported to act as agents for some undisclosed Japanese principals, for the sale to them of the same ship, the "Draco," for the sum of 6,250*l*., of which 6,000*l*. was to be paid on the signing of the agreement, and the balance, 250*l*., on the ship's arrival at Kobe in Japan, where Baessler was bound to deliver her in the month of March or April 1906.

This agreement is signed by R. Tatlock (an assistant in the Plaintiffs' firm) "*per pro* Buchheister and Company, Limited." Some controversy arose at the trial as to whether the signature of Tatlock was attached before or after that of the Defendants. It is not a matter of importance, as Hsi Chung Yu, one of the two partners composing the Defendant firm (one residing at Shanghai and the other at Kobe), stated in

his evidence at the trial that he knew "Baessler "was going to treat through Buchheister for "the purchase of the ship," that he had himself "no direct negotiations with Buchheister" about the ship, and that he "left it to Baessler." And Baessler himself deposed that he informed the Defendants that he was transacting the business through Buchheister and Company, that they were acting as his agents in the transaction, and that this was the reason why the Defendants asked to have the contract witnessed and signed by Buchheister and Company. He also stated that "Buchheister signed as security to them," and that "No doubt they (the Plaintiffs) knew "who the purchaser was."

On the 8th January 600*l.* was paid by the Defendants to Baessler; on the 12th, 4,000*l.*; on the 2nd February, 1,400*l.*, making 6,000*l.* in all. And there can be little doubt that the whole of the second payment and 1,000*l.*, part of the third, were paid over by Baessler to the Plaintiffs on the 12th January and 3rd February respectively, the remaining 1,000*l.* being applied by him to his own purposes. On the 18th September Baessler had drawn up a document, marked A., in which he had estimated approximately the expenses of the ship on her voyage from England to Shanghai at 2,385*l.* He showed this document to Tatlock before the latter agreed to bring out the ship. No doubt at that time Baessler hoped and expected that the vessel would earn on the voyage freight to the amount of about 3,000*l.*, sufficient, as he thought, to meet her expenses; but from the telegrams which passed it is perfectly clear that even before the ship was purchased these hopes had proved delusive. To use Baessler's own words, they "had to take any freight to bring the ship out "to China," and ultimately the "Draco" had to be chartered to carry a cargo of coals from Cardiff

to Singapore, at a freight which only amounted to about 1,440*l.*, four-fifths of which was to be paid in England. Before the vessel ever set sail on the 21st February 1906, a sum of 1,076*l.* 8*s.* 7*d.* had been expended on her account, leaving only a balance of the freight of between 300*l.* and 400*l.* to meet the subsequent expenses of the voyage to Singapore. Yet the Plaintiffs paid, apparently without murmur and without demanding any payment or security from Baessler, four drafts of the captain drawn at Port Said, Aden, Colombo, and Singapore respectively, for four sums amounting in the aggregate to 1,661*l.* 1*s.* 6*d.*

It is scarcely conceivable that any commercial man of ordinary intelligence would, for a commission of 125*l.*, advance sums such as these on the personal credit of a person in Baessler's position. Mr. Tatlock stated in his evidence that his firm always looked to the steamship as security, that no one would give credit to Baessler, and that they regarded the business as safe because they had the steamer in hand. The trial Judge who saw the witness believed him. Their Lordships see no reason to disagree with the conclusion at which the Judge arrived.

It is not disputed that necessaries, within the meaning of Section 5 of the Act of 1861, are such things as the owner of a vessel, as a prudent man, would have ordered, had he been present at the time they were ordered as being fit and proper for the service on which the vessel was engaged (*Webster* v. *Seekamp*, 4 B. and Ald. 352; *The Riga*, L.R. 3 Adm. and Eccl. 516), nor that some, at all events, of the things supplied to this ship at the several ports were *primâ facie* of the character of necessaries. If so, the *quantum* is not a matter for consideration on this Appeal.

It cannot be questioned that the cases of *The Rio Tinto*, 9 A.C. 356, and *The Henrik Björn*,

10 P.D. 44, amongst others, establish that the person who pays for necessaries supplied to a ship has, as against that ship and her owners, as good a claim as the person who actually supplied them, and further that he who advances money to the person who thus pays, for the purpose of enabling him to pay, stands in the same position as the person to whom the money is advanced. The Plaintiffs, therefore, on the facts found, stand in the position of one who has supplied necessaries to a ship on the credit of the ship.

That, no doubt, does not give them any maritime lien for the sums so advanced, or any rights against the ship till action brought; *The Rio Tinto*, 9 A.C. 356, *The Henrik Björn*, 11 A.C. 270. But having regard to the wide words of the above-mentioned sections of the Act of 1861, it by no means follows that they cannot sue *in rem* to recover these advances unless, as is contended, they are at the same time in a position to sue at law *in personam* for the same sums every person having a proprietary interest in equity in the ship.

The position of the Defendants in the present case is entirely different from that of the Defendants in any of the authorities cited, for, though the Plaintiffs could have sued Baessler *in personam* on his contracts for the sums they expended, the liability of the ship, in this case, does not at all depend upon the existence of any maritime lien in the ordinary sense, so much as on the effect of the transactions which took place between the several parties concerned on their respective proprietary rights and interests to and in the ship.

This effect was, in equity, in their Lordships' opinion, to transfer to the Defendants, subject to the agreement, almost the whole of Baessler's beneficial interest in the ship, and to make them

joint beneficial owners of her with him, Palmer and Company being trustees for both, not for Baessler alone.

As on the 3rd February, before any of the expenditure which the Plaintiffs seek to be repaid, other than some three or four insignificant items, had taken place, Baessler had been paid by the Defendants 6,000*l*. of the stipulated price of 6,250*l*., all but a remnant of his beneficial interest in her had in equity passed to them.

The Defendants could not sell the ship without the concurrence of Palmer & Co. and Baessler. Their own interest in her, though valuable, was not of a very marketable kind. It was in Japan she became valuable to them. It was there they desired to have her brought. To bring her there without the provision of adequate necessaries was impossible. Baessler, apparently, could not or would not provide them. He swore, in effect, that he had appointed the Plaintiffs to do that. If provided at all they must have been provided by the Plaintiffs or by the Defendants themselves. The expenditure incurred in respect of them, so far as it was reasonable and proper was, therefore, *quoad* the Defendants, in the nature of salvage expenditure incurred in their interest, to protect their property, and so enhance its value to them. There can be little doubt that the Defendants could have instituted a suit in Shanghai in any court having equitable jurisdiction, if such there be, to have it declared that almost all the beneficial interest of Baessler in the ship had passed to them, and possibly that, on their taking delivery of the ship at that port, the balance of the purchase money should, *pro tanto*, be set off against their claims against Baessler for damages, that he should be directed to transfer to them the residue of his interest in the ship, and that Palmer & Co. should be directed to perfect the Defendants'

title by executing a formal transfer, or bill of sale, of the ship to them. Section 8 of the Act of 1861 seems to confer on the High Court of Admiralty a jurisdiction wide enough to enable it to deal with such a suit between co-owners beneficially interested, but it scarcely admits of question that, if such a suit were instituted before a tribunal competent to entertain it, the Plaintiffs in this action would be allowed to intervene, and the relief prayed for would only be granted on the terms that they should be repaid the expenditure incurred by them in providing those necessaries without which the ship could never have reached Shanghai at all. Their Lordships are, therefore, of opinion that there is no reason why the Plaintiffs' claim for the money so advanced on the credit of the ship, so far as it was employed to procure necessaries for her voyage reasonable and proper in character and amount, should, in this action, be postponed to the Defendants' claim on the ship under the agreement, and that the second and third contentions put forward by the Defendants at the trial cannot be sustained.

It remains to consider the first contention, namely this, that the Plaintiffs sue, not for necessaries, but for the balance of any ordinary mercantile account. The accounts furnished to Baessler are printed in the record from pages 9 to 21, both inclusive. They are solely concerned with one ship, the "Draco," and with disbursements made for her in one adventure, her voyage from Cardiff to Shanghai. Those dealing with expenditure at the several ports of call and at Shanghai do not contain a single credit item. They are little more than lists of items of disbursements. It is only in Account A—the account dealing with the expenditure in England before the vessel sailed—that credit items are to be found and a balance

is struck. Two of these credit items are for sums of 4,000*l.* and 1,000*l.*, obviously the purchase money of the ship received and paid over before any expenditure had been incurred. The remaining credit item is 813*l.* 13*s.* 6*d.* (four-fifths of the freight to Singapore) paid in England on February 23rd, less deductions, leaving a balance of 414*l.* 13*s.* 8*d.*, which balance the Plaintiffs paid Palmer and Company. No accounts, therefore, have been rendered in this case which in fact resemble ordinary mercantile accounts. But on an examination of the authorities to which their Lordships have been referred, and especially of the cases of *The Twentje* (13 Moore P.C. 185) and *The Underwriter* (1 Asp. 127), it will be found that what they really decide is this, that, as necessaries supplied to a ship are *primâ facie* presumed to have been supplied on the credit of the ship, and not solely on the personal credit of her owners (*The Perla*, 1 Swabey, 230), the form in which accounts are rendered by an agent, who has supplied or paid for necessaries, to his principal is evidence to rebut that *primâ facie* presumption, and show that the agent looked for payment to the principal alone. There is nothing in the Act of 1861 to prevent an agent suing for necessaries under Section 5, nor is there any rule or principle of law that an agent loses his right so to sue if in the account he furnishes to his principal for those necessaries he gives credit for sums received. In the case of *The Underwriter*, the governing consideration on which the Judgment of Sir R. Phillimore in favour of the Plaintiff turned was this, that there, as here, the suit was instituted, "not to recover any particular or " selected item of a general account, but the " whole of the sum expended upon this particular " occasion in payment of the necessaries required " by the exigencies of the ship and without which

" she could not have continued her voyage." Their Lordships think that the form in which the accounts were furnished in this case affords no evidence that the Plaintiffs intended to look to Baessler alone for repayment of the large sums advanced by them, and that even if it did afford such evidence, that evidence is outweighed by the other evidence in the case. They are therefore of opinion that the Judgment appealed against was right, and should be affirmed and this Appeal dismissed. They will humbly advise His Majesty accordingly. The Appellants will pay the costs of this Appeal.