

1869
Dec. 18. 20.

The Proceeds of the Ship "Persia."

Edward Gardner...

Plaintiff.

The *Persia*, on a return voyage from Jeddah to Singapore, was driven into Bombay harbour through stress of weather.

The owner, resident at Singapore, though frequently applied to, omitted to furnish funds to repair her, or to pay the wages of the mariners, and the master being unable to raise funds for these purposes on the credit of the ship or owner, on the application of the mariners, the ship was, in order to levy their wages, sold by the Magistrate under the provisions of Secs. 55 and 56 of Act I. of 1859.

The master, who had been engaged at Singapore, then brought a suit on the Admiralty Side of the High Court, to recover out of the surplus proceeds of the ship his wages up to the time when he could return to Singapore, and his passage-money to that port.

Held, that he was entitled to recover such wages and passage-money.

This suit was brought on the Admiralty Side of the High Court by Edward Gardner, master of the ship *Persia*, against the proceeds of that ship in the Registry of the Court to recover Rs. 2,857-8, the balance of his wages due and to become due, under Articles dated the 30th October 1868, up to the 31st December 1869, and Rs. 450, the expense of a passage by steamer from Bombay to Singapore.

The case was heard by WESTROPP, J., in a Division Court on the 18th December 1869.

The facts fully appear in the judgment of the Court.

There was no appearance on behalf of the owner.

Ferguson, for the plaintiff, contended that the plaintiff was entitled to compensation in the nature of wages up to the time when he could return to Singapore, and to the expense of a passage to that port from Bombay, as by the default of the owner he was prevented from bringing the *Persia* back to Singapore. By sec. 58 of Act I. of 1859 the master is placed in same position as a seaman in respect of the recovery of his wages, &c.; and by Sec. 205 of the Merchant Shipping Act 1854 (17 and 18 Vict., c. 104) if by reason of the sale of the ship, or otherwise, a seaman is discharged abroad, the master is bound to find him a passage home;

and if he does not do so, the passage-money is made a charge upon the ship. The analogy of that enactment applies here. He also cited *The Olive* (a), *The Elizabeth* (b).

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cur. adv. vult.

December 10—WESTROPP, J.:—This is a suit by the master of the ship *Persia* to recover Rs. 2,857-8-0 in respect of wages, and Rs. 450, the expense of a passage by steamer, to Singapore from Bombay.

The ship's articles (dated 30th October 1868) provide for a voyage "from Singapore to Jeddah, or any ports or places in the Indian and Red Seas, until the ship returns to Singapore, as a final port of discharge of the crew; term of service not to exceed twelve months." Edward Gardner, the plaintiff, who was engaged at Singapore, took the command of the *Persia* on the day of the date of the Articles, his wages being 110 dollars per mensem. The vessel arrived at Jeddah on the 22nd February 1869 with pilgrims, having touched in the course of the voyage at Malacca, Penang, Allipee, and Makullab.

She remained at Jeddah until the 11th July 1869, when she sailed. She touched at Hodeida and at Zibbir. The owner, Shaik Selim bin Omar Easharahil (who had, until the vessel came off Aden on the return voyage, been on board the *Persia*) landed in a native craft at Aden, stating that he intended to proceed thence by steamer to Penang; and ordering the plaintiff to take the *Persia* to Penang and Singapore. After passing Aden the *Persia* met with heavy weather, got five feet of water in her hold, and her pumps choked with sand ballast. The passengers came in a body to the master, and required him to run for the nearest port, then Bombay, which was 500 miles off. He complied, and succeeded in reaching Bombay harbour on the 7th or 8th of August 1869. The owner had, when he went ashore at Aden, left his nephew and another Arab on board the

(a) Swabey 292; S. C. 2 Prit. Ad. Dig. 670.

(b) 2 Dodson 405; S. C. 2 Prit. Ad. Dig. 936.

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Persia as joint supercargoes. That nephew wrote to the owner at Penang by the first mail after the arrival of the *Persia*, advising him of what had occurred. The master wrote to him by the following mail, five times subsequently, without obtaining any reply. The owner has, however, it has been stated in evidence, written several letters to Shaik Mahomed Abdul Latiff, the ship's agent, who has been aware of the pendency of this suit from its commencement. The master had certain repairs made to the *Parsia*, and he not having any funds in hand belonging to the ship, the agent advanced money for that purpose. The ship having been subsequently surveyed on behalf of Government, was condemned as unfit to carry passengers. Neither the master nor agent being able to procure money or means from the owner to provide for the support of the seamen, or for their wages, or to make further repairs, the agent declining to make further advances, and the owner refusing to repay those which the agent had already made, the seamen took proceeding under Secs. 55 and 56 of Act I. of 1859 before the Senior Magistrate of Police for recovery of wages due to them. To levy these wages he sold the ship on the 8th November last. She realised Rs. 12,000. By warrant tested as of the 23rd November in this suit (issued pursuant to an order made in Chambers by Sir Charles Sargent on the 15th November 1869) the Sheriff was ordered to arrest the proceeds of the *Persia* remaining in the hands of the Senior Magistrate; and on the 7th December instant the Sheriff returned that he had so arrested Rs. 9,305-9-3, stated to the balance of such proceeds.

The plaint in this suit was presented to Sir Charles Sargent on the 15th, and filed on the 16th of November last that is to say, eight days after the sale of the ship by the Senior Magistrate, which was, I think, reasonable diligence on the part of the master in bringing his suit.

Section 58 of Act I. of 1859 enacts that "Every master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages which by this Act, or by any law or custom any seaman not

being a master^e has for the recovery of his wages ; and if in any proceeding in any Court of Admiralty or Vice-Admiralty, touching the claim of a master to wages, any right of set-off or counter-claim is set up, it shall be lawful for such Court to enter into and adjudicate upon all questions, and to settle all accounts then arising or outstanding, and unsettled between the parties to the proceeding, and to direct payment of any balance which is found to be due."

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That enactment is similar to Section 191 of the English Merchant Shipping Act of 1854 (17 and 18 Vic., c. 104). Its 185th Section is analogous to Section 51 of Act I. of 1859, which latter is as follows:—"In cases where the service of any seaman terminates before the period contemplated in the agreement by reason of the wreck or loss of the ship, and also in cases where such service terminates before such period as aforesaid by reason of his being left on shore at any place abroad under a certificate of his unfitness or inability to proceed on the voyage, granted under the provisions of the Merchant Shipping Act of 1854, such seaman shall be entitled to wages for the time of service prior to such termination as aforesaid, but not for any further period." Assuming that Section 56 of Act I. of 1859 so operates as to render that Section (51) applicable as well to a master as to a seaman, yet it does not govern this case in which the voyage has not been out short by wreck or loss of the ship, nor has the master been left in Bombay by reason of any inability or unfitness on his part to proceed on the voyage. I will not say that this is a case of wrongful dismissal of the master by the owner, but it does more nearly resemble such a case than any of the cases specified in Section 51 of Act I. of 1859. It is by reason of the default of the owner to supply sufficient funds to repair the ship that she has been condemned as unfit to carry her passengers to Penang and Singapore; and it is by reason of his default also to supply funds for payment of marines' wages that her sale has been rendered necessary. His omissions, therefore, have caused the untimely termination of the voyage. In the Treatise on Admiralty Practice, by Messrs. Williams and

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Bruce, at page 164 is this passage: "The claim mentioned in the 10th Section of the Admiralty Court Act (1861), is a claim for *wages earned on board any ship*. Ship, for the purposes of the Act, includes any description of vessel used in navigation not propelled by oars. The words *wages earned on board the ship* would seem to exclude all claims merely in the nature of damage, such as for wrongful dismissal before the termination of the engagement, and the like, and to confine the extension of jurisdiction to wages actually earned on board the ship on which the seaman is employed. Thus the Court would not have jurisdiction to award compensation for a wrongful dismissal in any case in which the seaman was engaged under a special contract; the only jurisdiction which the Court has in such a case being that conferred by the section. The Court, however, has *always* exercised jurisdiction in ordinary wages suits to award to seaman, either as wages, or as compensation in the nature of wages, what at common law would be recoverable only as damages. Thus, when there has been a wrongful dismissal, the Court has awarded to the seaman wages up to the time when the contract would have expired in ordinary course, less such a sum as the seaman may have earned in the meantime, and, if discharged abroad, has also awarded to the seaman the expense of returning to his port of discharge. So, too, in the case of foreign seaman improperly discharged in this country, the Court has always been in the habit of awarding to them the expenses of their return to their own country."

In the case of the *Elizabeth (ubi supra)* the voyage agreed for was from Portsmouth to St. Petersburg and back. The *Elizabeth*, on the 27th September 1818, without the default of any person, and owing to the extreme darkness of the weather, ran on shore on the island of Gothland. The crew got her off, and carried her into the port of Ostergam for repairs. The master, on the 21st October, discharged the crew, as he told them, "because the ship could not be repaired in time before she would be blocked up by the ice, and therefore it was necessary, in order to save the

expense of maintaining them the whole winter there." They were conveyed to the ports of Wisby and Elsinore, and thence embarked for London, where they arrived in January 1819. The ship *Elizabeth* was in April following brought to English by a Swedish crew, picked up at Gothland. The original crew claimed wages up to the arrival of the ship in April, and their passage-money to England. The owners tendered wages up to the discharge of the crew in September only, and objected to pay any passage-money. Lord Stowell thought that the crew claimed too much and that owners offered too little. After referring to cases of wrongful discharge, or, as the French express it, *sans cause valable*, upon idle or false pretences, in which there was, he said, "tyranny, passion, and injustice on the part of the master that warranted a penal retribution against him or his owners," and that hence arose the rule, founded on the civil law, and prevalent in most countries, that the mariner wrongfully discharged has a right to charge up to the time of the return of the vessel to her original port, Lord Stowell said: "But here is a case arising from mere misfortune, and approaching to almost a necessity. The rule to be applied must not to be founded upon any idea of penal retribution, but upon just ideas of a fair protection to be given to the seamen, under the casual and common misfortune that has occurred. See what his real damage and loss has been; compensate that, and then real justice and all honest policy is satisfied." In reply to the question what was their just claim, his Lordship replied by deciding that they were entitled to have their passage paid, and their wages up to the time of their arrival in England in January. He said: "I think the master had a right to discharge them under such circumstances of extreme pressure. They did right by acting upon this discharge; and if they are paid their passage and their wages up to the time of their return, they have all they can demand against their innocent owners. In this I go quite as far as the partiality of the law for this class of men will carry me; to go further would be to gratify an unwarrantable pretension. This is the rule which I am disposed to extract, from considerations of pri-

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vate equity and public policy, in a case not provided for by any existing regulation, either in the ordinances or decisions of this country, or in the books of authority given to the world by ancient jurists. Nothing can be more generally or more peremptorily laid down than that a master, discharging a seaman wrongfully, is answerable for the whole wages of the voyage of that ship; but can such a rule apply either in its terms or meaning to a case where in consequence of an uncontrollable misfortune, for which no person was at all to blame, but which affects all parties, on a grave and imperious necessity arising thereon, a crew is discharged in order to exonerate the owners from a most oppressive burthen; care being at the same time taken that the seamen shall be protected from all injurious loss. It is to be said down that in no such case the master possesses no such responsible discretion, and that he is bound to let that crew derive a most unjust profit from the misfortune of their employers? I conceive not. He is not certainly, in their discharge, to act hastily or with precipitate fear. He is not to discharge but where the circumstances will make it *cause valable*, a real and sufficient ground for such a procedure; still less is he to turn them adrift pennyless, and without resource, in a foreign country."

The present case is a stronger case than that of the *Elizabeth*. The inability of that vessel to proceed upon her voyage was, as Lord Stowell phrases it, caused by "uncontrollable misfortune," not as in the case of the *Persia* by the persistent refusal and default of the owner to provide the funds necessary for the repairs of the ship and the sustentation and wages of her crew. Under the circumstances of this case the master was, I think, notwithstanding the limit in the Articles of the term of service to twelve months, right in remaining in Bombay in charge of the *Persia* until the default of the owner occasioned her sale. The voyage not having been completed, the agent not apparently having instructions to take charge of the vessel, and refusing to advance further moneys for her repair, or for the support of the crew; and it being quite possible that a remittance from

the owner, sufficient for those purposes, might have arrived at the eleventh hour. The sale having been made on the 8th November, the master with all due despatch presented his plaint on the 15th November, and it was filed on the 16th November. He was necessarily detained here to await the hearing of his suit. Messrs. Williams and Bruce in note (a) at page 165 of their treatise mention some cases apposite in the present circumstances, which I have not elsewhere met with, as follows:—

“ In *The San Jose Primeiro*, the Registrar and merchants (to whom the matter stood referred by the Court of Admiralty according to its usual practice) in their report (29th June 1860) allowed Portuguese seamen their passage-money home.

“ In the *Ermina* (8th August 1860) a colonial ship, where the voyage was from Halifax to Falmouth and back again to Halifax, they allowed the master, on the ship being sold in this country (England), wages up to his discharge, and for a period sufficient to enable him to get back to Halifax, his passage-money and ten days double pay. In *The Onni* (8th December 1860), *The Onyion, Gustf* (21st July 1862), *The D. Jex.* (2549), *The Ernst Merck* (13th December 1865), similar allowances were made.”

The Court of Admiralty has, notwithstanding the words “ wage earned by him on board the ship ” contained in the Admiralty Court Act, 1861, Sec. 10, referred to by the learned authors above quoted, regarded itself as having jurisdiction in the case of a wrongful discharge to give compensation in the nature of damages to a master: *The Camilla* (c); or to Seaman: *The Great Eastern* (d).

The same principle appears to me to apply to the case of a voyage prematurely terminated by the obstinate default of the owner, and was, it would seem, applied in the *Ermina*, a case apparently of necessity, the colonial ship in that instance having been sold in England.

The plaintiff cannot reach his destination, Singapore, so soon as the 30th of December, the period up to which he

(c) Swabey, 312.

(d) L. R. 1 Adm. 384.

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asks for his wages. Looking at the circumstances of this case, and at the authorities to which I have referred, his demand is in my opinion reasonable, and within the scope of those authorities. I therefore pronounce in favour of the whole of his claim, viz., Rs. 2,857-0-8, balance of wages up to the 30th December instant, and Rs. 450 passage-money to Singapore, and costs, with speedy execution.

The Sheriff is to pay into the hands of the Admiralty Registrar the moneys in his hands in this cause.

Attorneys for the plaintiff—*Manisty and Hurrell.*

* It was held that the Sheriff was not entitled to poundage on the moneys brought into Court, or on any part of them.