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March 6.

NOVA SCOTIA ADMIRALTY DISTRICT

PERCY W. SHAW.....PLAINTIFF;

VS.

THE SHIP *FIELDWOOD*.....DEFENDANT.

Shipping and seamen—Loss of wages by desertion—Loss to owner by desertion—Ship's articles—Canada shipping Act, R.S.C. ch. 113 Sections 287-297.

On September 22nd, 1920, plaintiff signed articles at Weymouth, N.S., agreeing to serve as cook and steward on defendant ship for a voyage from Weymouth to any ports or places in British or Foreign West Indies and any ports or places between certain limits of degrees of latitude, trading to and fro, as required, for two years. Final port of discharge to be in the Dominion of Canada. The ship sailed from Weymouth to Mobile, Spain, etc., and thence to Providence, Rhode Island, where plaintiff left the ship contrary to the master's orders, asking for his wages to date, which request was refused, and action was taken to recover the same.

Upon plaintiff leaving, the master hired another cook at Providence for less money than was given the plaintiff.

Held, That, notwithstanding that plaintiff was not justified in leaving the vessel by reason of the master's conduct, the owners having lost nothing by reason of his refusal to continue the voyage, but on the contrary having profited by his so doing, plaintiff was entitled to recover his wages.

ACTION in rem claiming the sum of \$291 for wages as cook on board the ship *Fieldwood*, etc.

February 22nd, 1922.

Action tried before the Honourable Mr. Justice Mellish, L.J.A., at Halifax.

The plaintiff on September 22nd, 1920, signed articles at Weymouth, N.S., agreeing to serve as cook and steward on defendant ship at \$120.00 per month for a voyage from Weymouth, N.S., thence to any ports or places in the British or Foreign West Indies (and) or any ports or places between the limits of 65 degrees North (and) or 65 degrees south latitude, trading to and fro as required, for a term not exceeding twenty-four months, final port of discharge to be in the Dominion of Canada; that he so served from September 22nd, 1920, to May, 26th, 1921, a period of eight months and four days at \$120.00 a month, amounting to the sum of \$976.00, and that he had received at various times credits or cash to the amount of \$685.00, leaving a balance claimed as due him of \$291.00.

The ship sailed from Weymouth, N.S., to Mobile, Alabama, U.S.A., thence to Bilbao, Spain, back to Terra Vigo in the Mediterranean and from there to Providence, Rhode Island, where the Plaintiff left her and returned on another ship as a passenger to Nova Scotia. The defendant ship, after the plaintiff left her sailed for New York, and from New York returned to Lunenburg, Nova Scotia. The evidence also showed that whilst at Providence the Captain had told the plaintiff what he would do to him if he were not a cripple, and that the plaintiff visited the British Consul and in the presence of the Captain had asked that he be paid off and discharged which the Captain refused. They had also had words on the voyage across the Atlantic. The plaintiff left the ship at Providence and remained there until after the ship sailed for New York visiting the vessel several times before she sailed and was standing on the wharf when she put out. His clothes were left on board and were brought home by the ship. No action was taken

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against the plaintiff as a deserter or for being absent without leave. A new man was shipped at Providence at \$35.00 a month to replace plaintiff, who acted as cook for the balance of the voyage. There was also evidence that the Captain, who was a part owner of the ship, had reduced the wages of some of the crew at Providence and intended to reduce those of the plaintiff.

Varley B. Fullerton for plaintiff.

The plaintiff is entitled to his wages up to the date he left, even if he then deserted. *Shelford & Mosey* (1) and in any event desertion was not proved. Abbott on Shipping 14th ed. page 241, *Button & Thompson* (2), and plaintiff was justified in leaving the ship being in fear through threats made by the Captain. The owners lost nothing by the plaintiff leaving the ship. In the case of forfeiture the idea seems to be to make good any loss the ship has suffered by the seaman leaving. The Canada Shipping Act, R.S.C. Cap. 113, Section 287 and 297, seems to control this case. In the case of *Shelford vs. Mosey* (3), Lord Reading decided that the master had not tendered to the proper officer under section 28 of the Marine Shipping Act, 1906, the wages of the seaman. He had omitted to tender the bonus which Lord Reading held to be wages.

The amendment to the Merchant Shipping Act passed in 1906 and found in Statutes of Canada, 1907, pages 1 to 40 or (XIII to LII) does not add in any way to the rights of seaman for wages, and therefore, Lord Reading when deciding this case did so irrespec-

(1) [1916] 86 L.J.K.B. 289.

(2) [1869] L.R. 4 C.P. 330.

(3) [1917] 1 K.B. 154 at p. 158.

tive of the 1906 Act, and in the light of the Merchant Shipping Act or Common Law as it stood, and this is what he said: "In this case the seaman did not complete the voyage. He committed an act which put an end to the contract by virtue of the Merchant Shipping Acts, he is nevertheless entitled to the payment of his wages up to the time of his leaving the ship and that part of the law cannot be impugned. There is no question that a seaman's wages would become payable up to a certain time even though he had deserted or forfeited the right to continued employment. That disposes of any question as to wages."

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W. C. McDonald for defendant.

Plaintiff was guilty of desertion and was not entitled to any wages. There was no justification for plaintiff in leaving the ship, he does not say that the Captain abused him in any way. *Kay on Shipmasters & Seaman* 505-506-509. *Ex. parte Lowery* (1)

Plaintiff signed on for the entire voyage which was to end in Canada. The completion of the voyage was a condition precedent to his right to payment. The Canada Shipping Act, R.S.C. c. 113, Section 186, provides that wages of seaman shall be paid three days after delivery of the cargo or five days after discharge. The articles provide that Shaw was engaged for a voyage, to end in Canada. This is clearly shown by the provision "no cash nor liberty granted abroad other than at the master's option." The case falls within the decision in the case of *Hulle v. Heightman* (2) There the agreement contained a provision that no seaman should demand money in foreign parts. *Button*

(1) [1893] 32 N.B.R. 76.

(2) [1802] 2 East. 145.

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v. *Thompson*, (1), can be distinguished. In the latter case there was no stipulation that money need not be paid abroad. The *Button* case, too, was not one of desertion. In *Shelford v. Mosey* (2), Lord Reading states that the plaintiff (who had quit his ship abroad while serving under articles) would not be entitled to wages at common law. He found, however, that the plaintiff would succeed under the Merchant Shipping Act Amendments passed in 1906, and that he would be entitled to wages up till the time he left the ship.

The amendments to the Merchant Shipping Act passed in 1906 (or the M.S.A. 1906, as it is usually called) are not applicable to Canada, and its provisions have never been incorporated into the Canada Shipping Act or the amendments thereto.

It is submitted that to succeed in this case the plaintiff was obliged to show he was ready and willing to carry out his part of the agreement. The evidence expressly negatives such readiness or willingness.

The facts are stated above and in the reasons for judgment.

MELLISH, L. J. A., now, this 6th March, 1922, delivered judgment.

This is an action for wages. The plaintiff was engaged under articles to serve as Cook and Steward on the *Fieldwood* on September 22nd, 1920 monthly wages, \$120.00. He left the ship on the 26th of May 1921 at Providence. Up to that date, if he had been regularly discharged his wages then would have been \$291.00, the amount sued for herein. There is some evidence that on account of exchange, this would be somewhat larger, but it is too indefinite for me to give

(1) [1869] 4 C.P. 330.

(2) [1917] 1 K.B. 154 at p. 158.

effect to it. The evidence, including the plaintiff's letters, lead me to the conclusion that he was not justified in leaving the vessel, although the master's conduct was not such as would be likely to keep the crew together. The owners, however, lost nothing, but on the contrary profited by his so doing. The only defence is that the wages have been forfeited by desertion.

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The Canada Shipping Act Cap. 113 Revised Statutes of Canada, 1906 Section 287 provides that a seaman on summary conviction may for desertion be punished by imprisonment and forfeiture of clothes and effects left on board and of all or any part of the wages he has earned.

Section 297 provides that any question concerning the forfeiture of wages may be determined in any proceedings with respect to such wages in such a ship as this, notwithstanding that in criminal proceedings imprisonment as well as forfeiture might be awarded.

I think the justice of the case will be met by reducing the Plaintiff's claim by the amount of wages for the days which he served during the month in which he left the ship—the month for the purpose of computation running from the 23rd of one month to the 22nd of the next, inclusive of such dates. This makes four days, and the plaintiff was paid at the rate of about \$4.00 per day.

The reductions accordingly will be \$16.00, and the plaintiff will have judgment for the balance of his claim, \$275.00 and costs. See also Kay on Shipmasters & Seaman, 2nd edition, Pages 373-376.

Judgment accordingly.