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Oct. 12.

ON APPEAL FROM THE NOVA SCOTIA ADMIRALTY DISTRICT

THE STEAMSHIP *VENOSTA* (DEFENDANT) ..... } APPELLANT;

AND

IVAN COLLIERS AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

Shipping and seamen—Wages of seamen—Dismissal—Forfeiture—Deserters

The *V.* was a fishing trawler, and it appeared by the evidence that when trawlers such as the *V.* arrive in port on Sunday they usually only leave on the following day, and the crew are not asked and do not work at the landing of fish and are allowed to go ashore. In this case the crew did go ashore, without notice from the proper officer when to return, and did not return until Monday at six or seven a.m. when they were dismissed. The master refused to pay the crew the wages earned up to that day, on the ground that they were deserters, and that their wages were thereby forfeited.

Held, by the trial judge, that the plaintiffs were not hired for any definite time and, even if rightly dismissed from their employment, the em-

(1) [1874] 2 Asp. M.C. (N.S.) 202.

(2) [1905] 10 Asp. M.C. N.S. 103; [1905] P. 106.

ployers were not entitled to retain their wages for the period which they had served on the ship. The right of peremptory dismissal does not carry with it a forfeiture of the wages applicable to such period unless there is an indivisible term of service fixed by the contract of hiring.

Held, on appeal (affirming the judgment of the Local Judge in Admiralty for the Nova Scotia Admiralty District) that although the crew may have unduly extended their absence, it could not be said that they had remained away so long as to warrant the master in regarding their absence as an abandonment of the work, that they were not deserters, and that forfeiture of their wages could not be enforced.

APPEAL from the judgment of the Local Judge in Admiralty for the Nova Scotia Admiralty District maintaining plaintiffs' action with costs (1).

Halifax, 16th day of September, 1925.

Appeal now heard before the Honourable Mr. Justice Audette.

W. H. Holmes for appellant.

J. E. Griffiths for respondents.

The facts are given in the reasons for judgment.

AUDETTE J., now this 12th October, 1925, delivered judgment.

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(1) The following are the reasons for judgment of Mellish L.J.A.:

This is an action for wages against the defendant ship,—a trawler, and compensation up to the time of plaintiff's dismissal as members of the crew.

The plaintiffs were not under Articles, but paid at a monthly rate, with a share in the proceeds of the catch made from time to time.

Plaintiffs were absent without leave from the ship when in port on Sunday. They left the ship Sunday morning. It was intended by the master to go to sea again at 10 p.m. on Sunday evening and as the men had not returned by 9 p.m. they were considered dismissed and were not allowed to ship again on the following morning. The plaintiffs did not desert, and I do not decide whether the master had a right to dismiss them. Nor do I decide whether the work which they were required to do on Sunday, viz: go to sea on a fishing trip would if performed be a violation of law. The plaintiffs were not hired for a definite time, and even if they were rightly dismissed from their employment, their employers were not in my opinion entitled to retain their wages or compensation for any of the period which they had served on the ship. A right of peremptory dismissal does not I think carry with it a forfeiture of wages applicable to such period unless there is an indivisible term of service fixed by the contract of hiring. I do not think that the hiring was a monthly hiring or a hiring from month to month. It was a general hiring and the practice was to pay at or near after the beginning of each month.

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The present controversy arose under the following circumstances. The captain of the defendant (appellant) ship before arriving at Halifax, being delayed by fog, sent a wireless to get coal, if possible, on a certain Sunday, and told his mate that if they could get coal on Sunday they would leave for the next trip Sunday afternoon at 6 o'clock. The vessel docked somewhere around one o'clock on Sunday morning.

It is clearly established by the evidence that, when arriving on Sunday, the crew of such trawlers as the *Venosta* are not asked to and do not work at the landing of the fish and are allowed to go ashore.

The plaintiffs, who are all seamen, have earned the wages claimed as deck-hands on board a fishing trawler, and were not articled, but were engaged for no definite time or period. Some were told to go on board and work, and that they would be paid so much per month and a certain percentage on the catch and no more. Others were told of the amount of their pay, without either any mention if the engagement was for a week, a month or a year, or how it would run. As I apprehend the evidence the hiring was not by the month, but the amount of the wages was to be ascertained on a basis of so much a month, and I entirely concur on these two points respecting the contract of engagement with the decision of the learned trial judge. Possibly it is a fair inference from the evidence that the engagement ended with each fishing trip. In the view I take of the case it is, however, unnecessary to pass upon that point.

There is a deal of contradictory evidence as to whether or not the plaintiffs were notified by the proper officer and in the proper manner that they should return at 6 o'clock on Sunday afternoon. The plaintiffs affirm they were not so notified and they were under the impression, as was mostly the practice, that as they had arrived on a Sunday they would only leave next day, and they behaved accordingly—only returning to work between 6 and 7 o'clock Monday morning, when they were discharged.

The evidence of the plaintiffs on this question of notification and as to whether the vessel would sail on the same day, is all one way. Most of the evidence on behalf of the defendant controverts this, but it is given by some wit-

nesses who seem to disclose an interest which might lead to bias. Moreover, the captain's evidence is controverted on several points, even by counsel for the plaintiffs who took the stand to do so. However, the mate, who was the proper officer to notify the deck-hands, testified that before docking the captain told him that if he could get coal on Sunday they would sail at 6 o'clock the same day, and this he said he repeated on the galley when the ship made fast, just after they had arrived.

He afterwards became aware they were actually going that day as soon as the skipper had gone ashore and received orders from the office, and that was when he (the mate) was on the wharf where he was later kept busy taking the weight of the fish, and he worked up to 25 minutes to 5 o'clock. At that time he thought everybody was asleep. He then went to bed and got up at 7 hrs., and at breakfast time he told three or four men aboard then,—the others were ashore by that time—that they were sailing at 6 o'clock. Then being asked about the plaintiffs:

Q. They had gone without knowing?

A. Yes, I did not know when they went.

Witness Anstey, one of the plaintiffs, confirms that. He met the mate on the Sunday evening, at about 10 p.m. who informed him he had been replaced; Anstey then told him he had never received any orders from him, and thereupon the mate answered no.

Considering the conflict of evidence between the plaintiffs and the defendant, and especially the unsatisfactory character of the defendant's evidence, when placed in juxtaposition to the clear evidence of the mate who was the proper officer to advise and notify the plaintiffs, who were all deck-hands under his special direction, I am disposed to find that the plaintiffs left the ship, as they said, that morning under the impression that they were not to sail until next day, as had been done on several other occasions, and further that they left when they had not been notified to the contrary by the proper officer.

These seamen (plaintiffs) were not deserters. They could go ashore on Sunday morning without leave, that is conceded by all parties; the most that can be said is that they may have unduly prolonged their absence—although that

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may possibly be excused by the fact that on most occasions when they arrived on Sunday they only left on the following day. Under the circumstances would that vest the captain with the power to discharge them peremptorily, and deprive them of their earned wages up to that time? I must find in the negative.

Even if, under the circumstances of the case, there was a stipulation for forfeiture it could not be enforced.

Labatt's Master and Servant (2nd ed.) vol. 2 at pp. 1469, 1470 and 1471 bears out this view when he says:—[Sec. 507 is here cited at length.]

The only challenge under the present circumstances is that the plaintiffs

merely absented themselves temporarily from their duties

by extending their leave—and whether or not such extended absence did or did not import fault on their behalf; but the forfeiture is only enforceable when

they remain away so long as to warrant the master in regarding the absence as an abandonment of their work.

And that was not the case here; they all reported next morning early. Therefore, apart from what has been said above as to whether or not the plaintiffs were properly notified on Sunday morning to return for 6 o'clock I find that there cannot be any forfeiture of the wages so earned on board by the plaintiffs.

I am strengthened in this view by the fact that the Admiralty Court has always shewn a favourable inclination towards the interest of mariners, consistent, however, with justice to all concerned.

In the *Minerva* (1) Lord Stowell at p. 358 said:

Seamen are the favourites of the law . . . and placed particularly under its protection.

And McLennan L.J. in the *Ship Marshall* (2)—

It has been an immemorial and benevolent practice of the court, if there is any doubt about a contract, to give the seamen the benefit of it.

Citing in support of that view: *The Nonpareil* (3) and Roscoe's Admiralty Practice, 4th ed. 251.

The plaintiffs have satisfied the burden of proof on the issue of the liability for wages earned—their evidence is accepted both by the learned trial judge and by myself and their claim ought to be maintained.

(1) [1825] 1 Hagg. 347. (2) [1921] 20 Ex. C.R. 299 at 304.
(3) [1864] Br. & L. 355.

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The defendant seeks to escape liability by urging forfeiture by absence from work without leave. On this point the evidence is contradictory and for the reasons above mentioned I find the burden of proof cast upon him has not been satisfied.

The appeal is dismissed with costs.

Judgment accordingly.