

1924
Feb. 28.

BRITISH COLUMBIA ADMIRALTY DISTRICT

OSTRUM PLAINTIFF;

AGAINST

THE SHIP *MIYAKO*

Shipping and seamen—Wages of engineer—Loss thereof by desertion—Jurisdiction.

On the 4th of July, 1923, O. shipped as engineer for the fishing season, lasting four months, at \$150 a month. On October 4 there was a balance of \$134 due him, and on the 25th October he deserted the ship without lawful justification or excuse. He then sued for \$286.64, balance of wages due up to October 20. It was contended by defendant, that all wages earned from October 4 to time of desertion had been forfeited, and further, that the balance being for a sum under \$200, the court had no jurisdiction.

Held, that in this case the wages must be deemed to have been forfeited from the time of the last monthly payment which the contract contemplated, and that, as by deducting these from the claim, the sum due plaintiff was under \$200, viz., \$134, this court had no jurisdiction, and the action must be dismissed for want thereof.

Plaintiff took action against the defendant's ship, alleging a contract with her to serve as engineer at a wage of \$5 per day together with board and provisions, and stating that he served from the 4th of July, 1923, to the 20th October, 1923, and claimed a balance due him of \$286.64.

The defendant claimed that the plaintiff was engaged by the master of the ship *Miyako* as engineer, on a contract of service from month to month at a wage of \$150 per month together with board to be furnished on the said ship *Miyako*.

The defendant also alleged that on or about the 17th of October, 1923, the plaintiff deserted the ship at Steveston, B.C., and subsequently refused and neglected to return on board when ordered to do so by the master and thereby forfeited his wages for the current month. They also allege that at the time of action the plaintiff had coming to him as wages only \$130 and that accordingly the court had no jurisdiction to entertain the action by virtue of the provisions of the Canada Shipping Act, R.S.C. (1908), chapter 113.

February 5, 1924.

Case now heard before the Honourable Mr. Justice Martin at Vancouver.

Roy B. Ginn for plaintiff.

Sidney Smith for defendant.

The facts and questions of law involved are stated in the reasons for judgment.

MARTIN L.J.A. now, this 28th February, 1924, delivered judgment.

This is a question of seaman's wages, and I find upon the facts adduced that the contract was that the plaintiff should be paid the sum of \$150 a month during the fishing season, which was understood to last for a period of four months beginning on the 4th July, the date of the hiring.

It is admitted that there was a balance of \$134 due the plaintiff on the 4th October, but the difficulty arises from the fact that on the early morning of the 25th October, as I am constrained to find, the plaintiff deliberately deserted his ship without any lawful justification or excuse. In such circumstance it was submitted that whatever might be said of the amount due on the 4th October, it was clear he had forfeited his wages from that day up to the time of desertion. I experienced some reluctance bearing in mind the favourable inclination this court as a matter of history has always had towards the interests of mariners, to give effect to this strict construction, seeing that he had so nearly completed his contract, *i.e.*, at the end of the third day of the next month, and therefore requested counsel to furnish me with further authorities upon the point.

After carefully considering them I find that there is no legal escape from the result that, upon the facts, the wages here must be deemed to be forfeited from the time of the last monthly payment which the contract contemplated. The authorities in general are to be found chiefly collected in MacLachlan *On Shipping* (1923) 178; Macdonell *on Master and Servant* (1908) 619 (*e*) 20 Hals., 85; 26 Hals., 49, and I refer particularly to *Taylor v. Laird* (1); *Button v. Thompson* (2); *Saunders v. Whittle* (3); *Roberts v. The Tartar* (4), and *Selig v. Arenburg* (5).

Seeing then that at best the plaintiff can only recover \$134, objection is taken that the action must be dismissed

(1) [1856] 1 H. & N. 266.

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

(3) [1876] 33 L.T. 816.

(4) [1908] 13 B.C. 474.

(5) [1917] 51 N.S.R. 198.

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for want of jurisdiction, the wages recovered being "under the sum of \$200," as required by section 191 of the Canada Shipping Act, R.S.C., cap. 113, and the decision of this court in *Cowan v. The St. Alice* (1), followed in *Kouame v. The Maplecourt* (2), is relied upon, and as the objection is precisely sustained by that decision, the only order that can be made is that the action be dismissed, with costs to follow the event, according to the general rule (132) in that behalf, there being no circumstances, I think, which would justify me in departing from said general rule, and seeing that the law on the jurisdiction point has been settled for over eight years.

This result may seem a hardship, but the longer I sit upon this Bench the more I am convinced that the only real justice is strict justice for all concerned, and here, for example the plaintiff was hired not by the defendant owner but by one who chartered the vessel from the owner and has not paid the charter money, so for that reason, I am informed by counsel, the owner resists the plaintiff's claim so as to reduce his own loss as much as possible.

Judgment accordingly.