

1922
Dec. 2.

QUEBEC ADMIRALTY DISTRICT

JOSEPH ROULEAU PLAINTIFF;

VS.

THE S.S. *ALEDO* DEFENDANT.

Shipping—Foreign vessel—Wages—Protest of foreign consul—Admiralty Court Rule 37 (a)—Contents of affidavit to lead warrant—Discretion of the court—Jurisdiction.

A seaman who had signed on an American ship at Norfolk, Va., instituted an action in the Quebec Admiralty District against the ship for wages. No notice of the institution of the action was given by him to the United States consul, and the affidavit to lead to warrant omitted to state the national character of the ship. When at the port of Montreal the seaman refused to obey the commands of the master, was guilty of disorderly conduct and of being intoxicated. He was arrested and convicted by a local magistrate. Moreover, the consul, by virtue of the powers conferred on him by the law of the United States, discharged the seaman at this port upon the request of the master, who deposited with the consul the seaman's wages to that date and his fare home.

The defendant moved to dismiss for defects in the affidavit and the consul filed a protest against the action being allowed to proceed.

Held, that failure by plaintiff to comply with the provisions of section 37 (a) of the Admiralty Rules, is alone sufficient to justify the dismissal of his action by the court.

2. that, while the American consul had power to deal with the dispute between the plaintiff and the American ship, his protest to the court did not deprive it of its jurisdiction. On the other hand the court, under proper circumstances, may exercise its discretion to decline to proceed with such an action.

ACTION *in rem* by a seaman for wages against an American ship the property of the United States Shipping Board.

December 2nd, 1922.

Case now heard before the Honourable Mr. Justice MacLennan, at Montreal.

E. W. Westover, for plaintiff.

W. B. Scott, for defendant.

The facts are stated in the reasons for judgment.

MACLENNAN, L.J.A. now (December 2nd, 1922) delivered judgment.

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This is an action by a seaman for wages against an American ship the property of the United States Shipping Board. Plaintiff signed articles at Norfolk, Virginia, on 19th June, 1922. The *Aledo* was in the port of Montreal on July 3rd, 1922, when plaintiff refused to obey the lawful commands of the master, was guilty of disorderly conduct and was intoxicated, and in consequence whereof he was arrested and convicted on 7th July, 1922, before one of the judges of the Sessions of the Peace. The American consul has filed a protest against the prosecution of this action. Defendant moves for its dismissal on the ground that the affidavit to lead to warrant did not comply with the rules of practice and in the alternative that in consequence of the protest of the American consul that the action be dismissed or not allowed to proceed. Rule 37 (a) requires in an action for damages that the affidavit should state the national character of the ship and if the ship is foreign, that notice of the action has been served upon a consular officer of the state to which the ship belongs, if there is one residing in the district within which the ship is at the time of the institution of the suit, and a copy of the notice should be annexed to the affidavit. In this case there was no notice in writing to the American consul in Montreal, consequently no copy of the notice annexed to the affidavit. This omission alone would be sufficient to justify the court in dismissing the action. The protest of the American consul states that he is authorized by the statutes of the United States to discharge an American seaman (and plaintiff having regularly signed on the articles of an American steamship is to be regarded as an American seaman) from service on an American vessel in his jurisdiction upon the application of the master, if it appears to him that the seaman is entitled to be discharged under any Act of Congress or according to the general principles or usages of maritime laws as recognized in the United States, and to require payment of any arrears of wages; that misconduct on the part of a seaman constitutes a usual case for discharge by a consular

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officer upon the application of the master; that the master of this ship applied for the discharge of plaintiff on the ground of the latter's misconduct and refusal to obey the lawful command of the master; that the consul agreed to discharge the plaintiff on 12th July, 1922, and that the master of the vessel deposited with the consul balance of wages due to plaintiff to said date \$22.16, and a further sum of \$10.43, the cost on that date of a railway ticket from Montreal to Portland, Maine, a seaport of the United States of America, and the consul has in his possession the total of these deposits \$32.59, which he will hand to plaintiff whenever he may personally appear and give a receipt for the same and sign a discharge certificate, and the consul protests that the action should not be proceeded with and that the court in its discretion should decline to exercise jurisdiction. The representations contained in the protest of the American consul are not challenged by plaintiff. The consul's protest does not deprive the Admiralty Court of its jurisdiction in a cause for wages against the foreign ship, but the court will use its discretion whether or not to exercise its jurisdiction.

The Herszogin Marie (1), *The Octavie* (2), *The Nina* (3), *The Bridgewater* (4), *The Leon XIII* (5).

The American consul had power to deal with the dispute between the plaintiff and the American ship and for the reasons stated in the consul's protest, the court is entitled to exercise its discretion to decline to proceed with the present suit, and for these reasons as well as for the defective affidavit already referred to plaintiff's action is dismissed with costs, and there will be judgment accordingly.

Solicitor for plaintiff: *E. W. Westover*.

Solicitors for defendant: *Lasfleur, MacDougall, MacFarlane & Barclay*.

(1) [1861] Lush. 292.

(4) [1880] 7 Q.L.R. 346.

(2) [1863] Br. & Lush. 215.

(5) [1883] 5 Asp. M.C., 73.

(3) [1867] L.R. 2, P.C. 38.