

NEW BRUNSWICK ADMIRALTY DISTRICT.

1921

January 19.

ELIAS LOUPIDES AND OLGA LOU- } PLAINTIFF;  
PIDES..... }

vs.

THE SCHOONER CALIMERIS..... DEFENDANT.

Shipping and seamen—Action In Rem—Assault on seaman by Master—  
Jurisdiction—Viaticum.

Held: That no maritime lien attaches in the case of an assault by the Captain, on a seaman, on board ship; and that the action *in rem* did not lie against the vessel to recover damages due to such assault.

- 2. That although the master of a ship may take all reasonable means to preserve discipline, where, to enforce an order given by him, he unnecessarily lays hands on a member of the crew (a woman) he is technically guilty of an assault on her; and, if the action had been properly before this court, notwithstanding the absence of all proof of actual damage, the court would have allowed \$10.00 as exemplary damages.
- 3. That in the case of an English vessel, the ship's articles are conclusive as to the amount of wages. *Thompson v. Nelson*, 1913, 2 K.B.D. 523, referred to.
- 4. Where the seaman is not wrongfully dismissed, but on the contrary leaves of his own free will and for his own accommodation, before the termination of the voyage, the court should not allow him anything by way of viaticum to enable him to return to his home port.

REPORTER'S NOTE:—Although dismissing plaintiff's claim for assault on the ground that the action did not lie, the judge discussed whether there was or was not an assault, so that in the event of an appeal being taken from his judgment, and it being held that such an action did lie before this court for assault, it would not be necessary to send the case back for a new trial.

ACTION *in rem* by the male plaintiff to recover \$220.13, wages due as cook, and \$625.70 for wrongful dismissal before the termination of the voyage, and by female plaintiff, for \$151.55 wages, \$48.66 for wrongful

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dismissal, and \$1,000.00 for assault upon her by the captain, on the ship. Both also claim viaticum, having engaged for the return voyage to Cardiff (Greece) and having been dismissed at a Canadian port.

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The case was heard before the Honourable Mr. Justice Sir Douglass Hazen, L.J.A., at St. John, N.B.

*D. Mullin K.C.* for the plaintiff.

*F. R. Taylor K.C.* for the defendant.

TAYLOR K.C.—There seem to be four claims made by the plaintiff: First, for wages of both plaintiffs; second, damages for wrongful dismissal; third, for a viaticum; fourth, damages for an assault. As to the fourth claim, it is submitted that there is no jurisdiction *in rem* for an assault by the captain. The Admiralty Court Act 1861, Sec. 7, *The Teddington* (1), *The Theta* (2), *The Nederland* (3). Furthermore, as the assault occurred in Morocco, the plaintiff must show that under the laws of Morocco, such cause of action would lie there, the foreign law being a question of fact to be shown by the plaintiff. *The M. Moxham* (4). The claim for wages is very largely a question of fact. *Thompson v. H. & W. Nelson, Limited* (5), holds that the ship's articles are conclusive as to wages. If therefore, this were an English ship, and Mrs. Loupides were on the articles at five shillings a month, she could not receive more than the amount stated in the articles, notwithstanding an agreement to pay her more for work as a stewardess. It is submitted that in this case the law of the flag, that of

(1) Stockton 45.

(2) [1894] P. 280.

(3) 12 Ex. C.R. 252.

(4) 1 P.D. 107.

(5) [1913] 2 K.B. 523.

Greece, is applicable. An English seaman engaged on a voyage to end in the United Kingdom, as this was, must wait until he gets to the United Kingdom unless regularly discharged. 26 Halsbury 53, Merchants Shipping Act, 1906, s. 30. It may be open to question if this applies to foreign seamen. There is no viaticum; the voyage was at an end; they were voluntarily discharged. *The Raffaellucia* (1).

*D. Mullin K.C.*—The ship is liable *in rem* for the assault. *The Sarah* (2). The very title indicates it was an action *in rem*, and the decree was for 70 pounds. In the case of *The Teddington*, (3) the damage was done by the ship. *The Enrique* (4), *The Maggie M.* (5). The ship is liable for all the acts of the master in the discharge of his duty, and there cannot be any distinction made between an act which he does wilfully in the discharge of his duty and negligence for which the ship unquestionably has been held liable. The Court: If the master of the ship should steal some valuable article belonging to a passenger, is the ship responsible? Yes. It is *per se* as master that he renders the ship liable. No duty devolves on the plaintiffs to produce the laws of Greece. If there was to be any intervention on the part of the Greek authorities, it should have been by the Consul General taking some step to protest. He was notified and no protest was entered. As to the contention that the action for assault would only be maintainable if it were so under the laws of the country in which it took place, the assault took place under the Greek flag on board the vessel, and the law of Morocco has no bearing on it at all. *The Nina* (6), *The Leon XIII*, (7).

(1) 37 L.T. 365.

(2) 1 Stuart 89.

(3) Stockton 45.

(4) Stockton 157.

(5) Stockton 185.

(6) 37 L.J. Adm. 17.

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The facts are stated in the reasons for judgment.

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HAZEN, L. J. A. now (January 19th, 1921) delivered judgment:—

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This was an action *in rem*, brought by Elias Loupides and Olga Loupides, his wife, against the five masted schooner *Calimeris*, a Greek ship registered under the Greek flag. The plaintiff Elias Loupides claimed a balance for wages due him as cook, and a further amount for damages for wrongful dismissal before the termination of his voyage; and the plaintiff Olga Loupides claimed a sum due her as wages as assistant cook and a further sum for damages for wrongful dismissal before the termination of her voyage, and she also claimed damages for assault and battery, alleged to have been committed by the captain of the schooner, George Nicolaris, on her on board the said schooner on the voyage, while she was assistant cook; and both plaintiffs claim a sum of money by way of viaticum to enable them to return to their home in Cardiff.

First of all I will deal with the question of assault, which it was alleged was committed while the schooner was in the harbour at Rebat, in Morocco. In this connection the defendant has raised the point that an action *in rem*, against a vessel for assault committed by the captain is not warranted by any statute or decision, and that the Court has no jurisdiction in such a matter. Mr. Roscoe in his work on Admiralty Practice says:—

“The jurisdiction of the Admiralty over actions of damages is at the present day based partly upon its original jurisdiction and partly on the modern statutes.

Under the seventh section of the Act of 1861 it has been held that it includes all injuries done by ships to ships or by ships to things other than ships, or by other objects to ships, wherever the damage is done. The jurisdiction of the High Court of Admiralty was extended by the Imperial Statute passed in the year 1861, and the seventh section of that Act indicated that the Court should have jurisdiction over any claims for damage done by any ship. The jurisdiction of the Vice Admiralty Court was also extended by the Imperial Act of 1863, which among other clauses contained a provision in its tenth section similar to the above, viz., that these Courts shall have jurisdiction over "claims for damages done by any ship." The object of the two statutes of 1861 and 1863 was to extend the jurisdiction of the respective Courts, and the decisions of the High Court in construing the meaning of the seventh section of the Act of 1861 are as pointed out by Judge Watters in the case of the *Teddington* (1), very applicable and may be safely followed in considering that portion of section 10 of the Act of 1863 relating to this Court. In the case of the *Theta* (2), the facts were that the plaintiff issued a writ *in rem* and arrested a vessel claiming damages for personal injuries sustained through falling down in the hold of that vessel, owing to the hatchway being covered with a tarpaulin at the time he was crossing to his own ship, which was moored outside of the first mentioned vessel in the Regent's Canal Dock, but it was held by Bruce J. that the action must be dismissed, for though the word damage included personal injury the damage was not "done by any ship within the meaning of the Act." The learned judge said:—

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(1) Stockton P. 45.

(2) 1894. P.D. 280.

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"I cannot think that the present case falls within the provisions of the Act of Parliament (1861). Damage done by a ship is I think applicable only to those cases where, in the words of the Master of the Rolls in the *Vera Cruz*, 9, P.D. 96, at p. 99, the ship was the active cause of the damage. The same idea was expressed by Bowen L.J. who said the damage done by a ship means damage done by those in charge of a ship with the ship as the noxious instrument."

The case of the *Nederland* (1), was an action by the plaintiff for damages for personal injury sustained while working on a foreign ship as stewardess, such injuries being sustained by faulty construction of hatch covers and beams supporting the same, and Mr. Justice Martin, Local Judge in Admiralty for the province of British Columbia allowed a motion to set aside the proceedings, on the ground as I understand it, that the ship must be the active cause of the damage. In that case counsel for the plaintiff relied on the case of *Wyman vs. Dewart Castle* (2), in which the judgment was given by the late Judge of this Court Sir Ezekiel McLeod. I do not think, however, that it in any way conflicts with the authority of the *Theta*. In that case a valve spoken of as a stop valve, broke on board the ship and caused injury to the plaintiff. On the morning of the accident the stop valve was closed, and a valve called a butterfly valve was also closed. After the accident, however, the butterfly valve was found open but was not broken, and witnesses on behalf of the defendant said that if it had been closed it could not have been forced open, that it would break first, while the plaintiff claimed that it was forced open by the rush of the steam and he was thereby injured, and that that was an injury that was

(1) 12 Ex. C.R. 252.

(2) 6 Ex. C.R. 387.

caused by the ship itself. While the suit was dismissed I understand the learned judge to have held that the valve being part of the machinery of the ship it was the active cause of the injury, and that the damage was done by the ship, and that it could not make any difference in what way the ship did the damage or what part of the ship did the damage. The suit, however, was dismissed on other grounds, and it seems to me is really an authority in favour of the defendant's contention on the point which I am now considering.

The learned counsel for the plaintiffs cited three cases in support of his contention that an action *in rem* for assault would lie. The first case was that of the *Sarah* (1), but an examination of this case shows that it was not an action *in rem*, but an action for damages brought by the steward of the vessel against the master for various assaults during the voyage of the ship. The second case to which he called my attention was the *Enrique*. In that case a foreign steamship while in the harbour of St. John, New Brunswick, loading a cargo of deals, bought and received on board a quantity of coals for the use of the ship. The coals were purchased to be delivered in the bunkers of the steamer, and the coal merchant employed a third party to put the coals on board. The steam power to hoist the coals on board was furnished by the *Enrique*. The plaintiff was employed by the third party to put the coals on board, and as so employed was injured by the breaking of the hoisting rope. It was held that an action could not be maintained against the steamer, that the Court had no jurisdiction and that the Vice Admiralty Courts Act, 1863, section 10, did not confer authority to entertain such an action.

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(1) 1 Stewart's Vice Adm. Cases, 89:

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It is true that the learned judge based his judgment to some extent on the case of the *Robert Pow* (1), and in a subsequent case, that of the *Maggie M.*, decided two years afterwards, the same learned judge (Watters), stated that the case of the *Robert Pow* did not appear to have been followed by any subsequent case, but he held that the Court had jurisdiction to entertain a suit in the case where a tug-boat was engaged by the charterers of a vessel to tow through the falls at the mouth of the river, beneath the suspension bridge which spans the falls at the point where the river flows into the harbour, and the tug having waited to take another vessel in tow, together with the vessel first mentioned, was too late on the tide, and in coming under the bridge the top-mast of the *Enrique* came into collision with the bridge and was damaged.

I can find no authority that would lead me to the conclusion that I should go so far as to decide that a maritime lien attaches in the case of an assault on board of a ship by the captain. To do so I would have to decide that such an assault was damage done by the ship, or that the ship was the active cause of the damage. In the present instance that cannot be said to have been the case. I therefore decide that the claim for assault must fail on this ground. It may be well, however, that I should consider the matter and make a finding on the question on the merits, so that in the event of an appeal being taken from my judgment and it being held that on the point just considered that I have come to a wrong conclusion it will not be necessary to send the case back for a new trial. There were many witnesses called by both plaintiff and defendant in respect to this branch

(1) 1 B.R. & Rush, 99.



of the claim. The evidence of Mrs. Loupides is to the effect that when the vessel was lying in the harbour at Rebat she was working in the galley with her husband. Some trouble occurred, and the captain who had previously sent word to her to go in and do the work of the toilets instead of the galley, came in where she was working and without her knowing anything about it or having any idea with regard to it, struck her on the left side with his fist. That he then turned her around and pulled her outside of the door—to use her own words “laid me down outside the door.” Asked if she was on her feet when the captain left her, she says “When the captain left I fell down, and then my husband pick me up.” That after that she had violent pain inside and at night, but continued working until she got to St. John, though the pain was worse every day. After getting to St. John she remained on the vessel for eleven days working about as usual, and then went to the hospital, remaining there for sixteen days. She stated positively that she continued working up to the day the vessel got to St. John, and after coming to St. John every day but one before going to the hospital. Her statement with regard to the assault is confirmed to a certain extent by her husband, who says that he saw the captain strike her in the galley in the afternoon. That the captain came in the galley and hit his wife from the back, and then dragged her out and left her on the deck, and that she was lying down when he left her, and that he went over and lifted her up. The only other witness called by the plaintiff was Elias Glissis, who was a sailor on the *Calimeris* at the time, who says he saw the captain in the door of the galley, and he saw him pulling Mrs. Loupides outside from the galley. That he took her out and

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left her on the deck and got away from her. This was all he saw but he says that when the captain left Mrs. Loupides she was standing up on her feet and remained standing, thus contradicting both Mrs. Loupides and her husband in one somewhat important respect.

The defendant stated in most positive terms that he did not hit Mrs. Loupides; that he was summoned to the galley by the steward; that he went forward to the galley and told Mrs. Loupides she had no business there in the way of the cook and the steward, and said "You had better get out of the way the time they are getting the grub along because you are always in the way." In reply she said to him "I am helping my husband," to which he replied she had better go to her room. She said "No, I won't come out." He said "You had better come out—I will make you come out because I am the captain of the ship and when I say anything to you you must do it for you have no business here." He then put his hand on her to pull her out, taking hold of her by the wrist, but he alleges that as soon as he put his hand on her she came out without any force, complaining a little and saying something of which he took no notice. He absolutely denies having struck her or having knocked her down, or that she was lying on the deck. In cross-examination he stated that he did not go into the galley but went in the door of the galley and remained out on the deck close to the door all the time, and that Mrs. Loupides was in the kitchen not far from the door; that he reached in and took hold of her and grabbed her by the hand, but that he did not pull her out for when he put his hand on her she came out without making any fuss.

Nicolas Dimitriades, a witness called for the defendant, says he saw the disturbance that took place, and he contradicts the captain in one important particular. He states that the steward went out and called the captain to go over and take Mrs. Loupides out of the galley, as she was creating a disturbance there, and when the Captain came and told her to get out of the galley and she did not pay any attention to him, he took her by the hands and just as she got outside of the door Mr. Loupides came out with a knife and then he got hold of his wife. He swears that the captain did not hit Mrs. Loupides, but in cross-examination stated that the captain went inside the galley and did not stay outside or just at the kitchen door as he alleged in his own evidence. He supports the statement of the captain, Nicolaris, that he spoke to Mrs. Loupides and told her to go to her room, and emphatically states that the captain could not have struck her because he was there at or close to the galley when the captain came and saw what took place. The other witnesses called were Michael Casedas, the steward, who states that the captain stayed outside the kitchen door and did not go in, and simply took Mrs. Loupides out by the hand, and that she pulled back a little and then went out. John Cotrogos, whose evidence is not of very much value, as he was 150 feet away from where the occurrence took place, and George Gogas, who swears that he saw the alleged attack by the captain on Mrs. Loupides at Rebat, and that he did not strike her, though he was not in a position to see what happened inside the door of the galley. His statement agrees with the captain's as to his not going into the galley, however, and he says that he simply stayed outside the door and told her to come out, and when she did

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not do so the captain got angry and pulled her from the hand, taking her out gently, however. He subsequently stated that he was not very angry, and that the captain did not use any force to pull her out on the deck.

It will be seen therefore, that there is a great deal of conflict of evidence, but having heard the witnesses and noted their demeanour on the stand I have come to the conclusion that the weight of evidence is against the contention of the plaintiffs that the captain struck Mrs. Loupides a blow on the left side. I have come to the conclusion, however, taking the evidence of the captain and that of his own witnesses, that there was an assault, more or less of a technical character, as it was not necessary for the captain to take Mrs. Loupides by the arm and pull her out on the deck. According to the evidence of the witnesses, after he put his hand upon her she came out quietly and without making very much opposition, and I cannot think that it was necessary for him in order to make her obey his order and come out on the deck, to place his hand upon her and to pull her towards him in the way in which he did. That she received a blow on the side such as she described is I think negatived not only by the evidence of a number of witnesses but also from the fact that she continued to work about the ship as she had done previously for a number of weeks, or until the vessel arrived in St. John, and that she remained on the ship for eleven days after the ship arrived in St. John, working, as her husband has said, every day but one before going to the hospital. There is no evidence of an independent character to show that her going to the hospital was in consequence of the blow she received on board the vessel, although it would have been an easy matter to have

summoned some of the doctors or other officials of the hospital to have given evidence in regard to this. I do not think it would have been possible for her, had she received such a blow as she said the captain gave her to have continued working for so long a period of time. There is nothing to show that there was any expense incurred in consequence of the assault, and the statement that after she was pulled out by the captain she was left lying on the deck is contradicted by one of the witnesses who was called on her behalf. I have come to the conclusion, therefore, that an assault was committed, but that it was a very slight one. It was not of an aggravated character, and there is nothing but her own unsupported evidence to show that she suffered at all in consequence of it. I would therefore have found damages against the captain for ten dollars for assault, had the action been one *in personam*, and I decide that that is the amount of damage which should be awarded the female plaintiff in the event of its being held that an action *in rem* will lie against the ship and that I am in error in deciding otherwise. I have not lost sight of the fact that a master may, apart from the power conferred upon him by statute, take all reasonable means to preserve discipline in his ship, and that he is given power under the Criminal Code to do so. I do not think, however, there was any necessity in this case for his laying hands on the defendant at all, and that is the reason why I find that the assault was proved as I have stated.

[His Lordship here discusses the evidence touching upon the question of wages to the female plaintiff, and accepts the version of the captain, that she was only on the ship as a favor to her, and to keep her husband, and was put on the ship's articles solely because of the

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provision forbidding the carrying of passengers on such ships. This is not printed here as being entirely a finding on the facts.]

In the course of his remarks on this point, His Lordship says "We therefore have her statement to the effect that she shipped with an understanding that she was to receive five pounds a month, and the captain's explanation that he took her solely to oblige her husband, and the further fact that she is entered on the ship's articles at five shillings a month, a fact about which if she was an English ship there would, I think be no question, because it has been held that the ship's articles are conclusive as to wages. (See *Thompson vs. Nelson*, 1913, 2 K.B.D. p. 523.) There is this difference, however, that the articles were not signed by Mrs. Loupides. Under the system that prevails on a Greek ship, as sworn to by the captain and other witnesses, the captain makes out on a slip of paper the agreement of each man hired, and takes it to the consul and the consul then fills in the articles in his own handwriting and they are not signed by the crew. Mrs. Loupides did not sign any slip which was taken to the Consul, and I think under the circumstances of the case, especially as this is a Greek ship registered under the Greek flag, I had better deal with the case upon its merits."

[His Lordship then discusses the evidence as to whether the plaintiffs were wrongfully dismissed, and therefore entitled to damage or whether, on the facts, they were not simply discharged at their request and with their approval, and upon the male plaintiff furnishing a substitute, and arrives at the conclusion] "That they were not wrongfully dismissed, but left the ship of their own free will, and that their action for wrongful dismissal cannot be maintained."

His Lordship then continues:—

“For the same reason the claim so far as money by way of viaticum is concerned to enable them to return to their home in Cardiff must also fail.”

“It was stated by counsel that there never had been any unwillingness to pay Mrs. Loupides five shillings a month from the time when she joined the vessel at Swansea until she left it to go to the hospital in St. John, or to pay to Loupides the £3 that had been deducted from his wages during the few days that he was unable to cook in consequence of sea-sickness. I find therefore that they are entitled to these amounts, and there will be no costs of this trial.”

“In view of the conclusion which I have come to as above, I have not considered it necessary to determine the point raised by the learned counsel for the ship to the effect that as the assault occurred in Rebat, within the exclusive jurisdiction of Morocco no action can be brought in this court against the ship, unless the plaintiff first shows affirmatively that under the laws of Morocco such action would lie in that state, the foreign law being a question of fact to be shown by the plaintiff.

“I only mention it now so that in case of an appeal it will be clear that the point was taken in this court.”

*Judgment accordingly.*

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