Appeal dismissed.

Counsel for the Appellant—Rufus Isaacs, K.C.—E. Browne. Agents—Pattinson & Brewer, Solicitors.

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HOUSE OF LORDS.

Monday, July 29.

(Before the Lord Chancellor, Lords Macnaghten, James of Hereford, Robertson, and Atkinson.)

PALACE SHIPPING COMPANY, LIMITED *v.* CAINE AND OTHERS.

Ship—Seaman—Wages—Articles of Agreement—Breach—Refusal to Sail with Contraband of War—Merchant Shipping Act 1894 (57 *and* 58 *Vict. c.* 60), *secs.* 134, 187, 188, 225.

Seamen in December 1904 signed articles agreeing to serve on a three years' voyage commencing at Glasgow and proceeding to Hong-Kong and any other ports within certain specified degrees of latitude. The vessel arrived at Hong-Kong with a cargo of coals in February 1905 at a time when war had been going on between Russia and Japan for more than a twelvemonth. At Hong-Kong the seamen were ordered by the master to take the vessel to Sasebo, a port within the specified degrees, and a naval base of Japan. Coal had been declared contraband of war by both belligerents, and the vessel would accordingly be liable to be captured or (according to Russian practice) be sunk upon the voyage. The seamen refused to proceed, and were sentenced to ten weeks' imprisonment by the port magistrate, and no wages were paid to them.

In an action by the seamen against the owners of the vessel, *held* (*affirming* a judgment of the Court of Appeal) (1) that the seaman were justified in refusing to proceed to Sasebo, as the voyage was a voyage of a character not contemplated by the articles according to their fair meaning; (2) that they were entitled to a decree for the amount of their wages from December 1904 until the date of the judgment of the Court of Appeal; (3) (*diss.* Lord Atkinson) that in the special circumstances of the case they were entitled to a further sum under the head of "maintenance" or "damages."

This was an appeal from an order of the Court of Appeal (the MASTER OF THE ROLLS now LORD COLLINS, and LORDS JUSTICES COZENS-HARDY and FARWELL) dated December 21, 1906, which varied a decision of Mr JUSTICE LAWRANCE.

The facts are stated in the Lord Chancellor's judgment.

At delivering judgment—

LORD CHANCELLOR—This is an action brought by nine seamen against the defendant company, as owners of the s.s. "Franklyn," for malicious prosecution, wages, and maintenance, and damages. The men agreed by their articles to serve on a "voyage of not exceeding three years' duration to any ports or places within the limits of 75 degrees north and 60 degrees south latitude, commencing at Glasgow, proceeding thence to Hong-Kong *via* Barry and or any other ports within the above limits, trading in any rotation, and to end at such port in the United Kingdom or Continent of Europe (within home trade limits) as may be required by the master."

They sailed from Cardiff with a cargo of coals, and reached Hong-Kong on 20th February 1905. War had been raging between Russia and Japan for more than a twelvemonth. At Hong-Kong the men were told for the first time that the "Franklyn" was to proceed with her cargo of coal to Sasebo, a naval base of Japan. Coal had been declared contraband of war by both belligerents, and accordingly a vessel carrying coal to Sasebo was liable to be captured, if the Russians could capture her, and to be sent to a Russian port for adjudication. More than that, under the practice adopted by Russia in that war, she ran the risk of being sunk instead of being taken into port. The right to sink a neutral ship in such circumstances was wholly denied by Great Britain, but it is none the less true that Russia claimed, and in some cases exercised, her supposed right.

If, therefore, the men had gone on with the ship to Sasebo, they ran the risk of losing their employment and their kit, of being cast adrift in a Russian port during war, and of their ship being destroyed on the high seas, and themselves exposed to whatever danger that might involve.

The master claimed that the men were bound to go on to Sasebo. The men refused, but offered to go if the captain would make good their wages and clothes till the time they arrived in the United Kingdom in the event of the ship being taken or sunk. The master said his owners would not allow him to do that, and no better evidence can be given to prove that in their opinion there was some real danger.

Upon this the master threatened the men that if they refused to proceed he would take them before the harbourmaster, who is also port magistrate.

That was done, the men still refusing to sail for Sasebo, the harbourmaster sentenced them to ten weeks' imprisonment, and they were imprisoned accordingly with circumstances of much hardship and indignity. The wages they had already earned were not paid to them but into the shipping office, and applied, it would seem, to defray the cost of maintaining the men in prison. At all events, no part of it was paid to the men. After serving their sentence they were sent home as distressed seamen, and reached London on 15th July 1905. In August they brought this action.

When this case came before Mr Justice Lawrance, he held that the action for malicious prosecution failed (as is now admitted), but awarded to the men their wages up to the time when they arrived in England. The Court of Appeal went further and ordered payment of wages from 16th December 1904, the date of the articles, down to "the date of the final settlement or judgment herein," that is to say, the 21st December 1906. And further they gave the plaintiffs maintenance from the 20th February 1905 up to 21st December 1906. It is manifest that both Mr Justice Lawrance and the Court of Appeal considered these men had been treated with harshness and injustice. I think the same, but your Lordships will none the less give effect to the legal rights of the parties.

In my opinion the conduct of the defendants to these men was illegal from beginning to end. It is suspicious that the destination in Japan was never communicated to the seamen till the ship arrived at Hong-Kong. And though statutory provision has been made for the protection of seamen the ancient power of the Admiralty Court to shelter them from wrong is not superseded. I cannot doubt that your Lordships would apply that jurisdiction in a fitting case. Here it is unnecessary. The master had no right to require that these men should sail for Sasebo, for the risk was not a commercial risk nor the voyage a commercial voyage such as the articles contemplated. The contention that there was in fact no danger of capture is not established. I cannot doubt that the owners themselves thought there was danger, and the men thought so also, and with reason. It is nothing short of preposterous to expect that seamen in a strange port shall speculate on the movements of belligerent war vessels and nicely weigh the chances of capture. I will not say that the proceedings of the harbourmaster, purporting to act judicially, were vitiated by a departure from the safeguards of justice, for he is not before your Lordships. But I think his action in this case and his communications with the master of the "Franklyn" are a proper subject for further inquiry by those who have control in such matters. Undoubtedly the sentence was wrong and unjust, for no offence had been committed; and the refusal to pay the wages already due was illegal. The handing of the money to the shipping office was also illegal. I regard the whole transaction as a piece of calculated oppression designed to force into a hazardous enterprise, partaking of the risks of war, seamen who had agreed to serve on a peaceful voyage.

I hold that the master wrongfully discharged and left behind these seamen under sections 187 and 188 of the Merchant Shipping Act 1894, for he procured their imprisonment on an unlawful ground. He obtained a certificate which recited the discharge, and he was bound under section 189, sub-section (3), of the Merchant Shipping Act 1894 to pay to these men themselves the wages due to them. This he failed to do. Accordingly, I am of opinion that section 134 of that Act applies. The men lawfully left the ship, for they were compelled by law against their will to leave it. Their engagement was in fact ended, and they brought their action on the footing that it was ended a few weeks after their return to London. The delay in payment of their wages was not due to the act or default of the seamen, or to any reasonable dispute as to liability, for the liability to past wages was never disputed. It was due solely to the wrongful act or default of the owner or master. And therefore the seamen's wages continued to run and be payable until they received them, which was not till the judgment of the Court of Appeal. "Final settlement" in section 134 means, in my opinion, payment or other such settlement as that section prescribes.

It is not easy to imagine a case more appropriate for the infliction of a sharp penalty provided by that section, the object of which is to require prompt payment and to prevent evasion of this duty either by carelessness or dishonesty.

The Court of Appeal awarded also a sum for maintenance, apparently regarding that as included in the term "wages." I would prefer to treat it as damages for the wrongful discharge. In the result it comes to the same thing, for the men were deprived of their provisions, and that was an item of their loss. We were reminded in argument that the men, or some of them, had earned something after their return to England in other service. If any deduction was to be made from the damages on that score, it ought to have been established for the shipowners in evidence. There is nothing which enables us to form any proper estimate of this deduction, and therefore I disregard it altogether.

I am, accordingly, of opinion that the judgment of the Court of Appeal should be affirmed.

Lord Macnaghten—I concur in the judgment that has just been delivered by my noble and learned friend on the Woolsack.

It seems to me that there are three questions for our consideration—1. Were the seamen justified in disobeying the order to proceed on the voyage from Hong-Kong to Sasebo? 2. Up to what time are the seamen entitled to wages? 3. Are they entitled to maintenance either as included in the claim to wages or as damages for breach of agreement?

On the first question I agree entirely in the view taken by the Court of Appeal. Although an expedition to Sasebo with contraband of war was not illegal, and although that port is to be found within the vast area described in the agreement as the intended scene of future operations, I think the voyage was not a voyage of the character contemplated by the agreement according to its fair meaning. A voyage to Sasebo, a naval base belonging to one of the two belligerents, would necessarily involve risks to life and property different from and in excess of those incident to the employment of seamen engaged in peaceful commerce.

The next question is, Up to what date are the seamen entitled to wages? It seems to me that this question is determined by reference to sub-section (*c*) of section 134 of the Merchant Shipping Act of 1894. At the time of the hearing before the Court of Appeal the men's wages had not been paid or settled as mentioned in that section. Inasmuch as the delay was not due to the act or default of the seamen, or to any reasonable dispute as to liability, or to any cause but the wrongful act or default of the owner or master of the "Franklyn," the wages continued to run and be payable until the time of final settlement. There was no final settlement until an arrangement was come to in the Court of Appeal, and sanctioned by that Court after judgment was pronounced. Sub-sections (*a*), (*b*), and (*c*) are connected by the common preface which limits their application to foreign-going ships. Otherwise sub-section (*c*) is, I think, as much a distinct and independent enactment as if its provisions were contained in a separate section.

There is more difficulty about the question of maintenance. I do not think that the term "wages" as used in the Merchant Shipping Act of 1894 can include an allowance for maintenance. But I do not think that the judgment of the Court of Appeal ought to be disturbed, because it seems to me that the claim for maintenance may be sustained under the head of damages for breach of agreement. It is quite true that it appears that some at least of the seamen obtained other employment between the date of their wrongful dismissal and the final settlement of their wages. Wages earned in that employment might, perhaps, have been put forward as a ground of set-off against the claim for damages, but I agree with the Lord Chancellor in thinking that no case has been proved in this action which can fairly be taken into consideration in diminution of damages.

I am therefore of opinion that the appeal ought to be dismissed with costs.

LORD JAMES OF HEREFORD—I accept the statement of facts in the judgment delivered by my noble and learned friend on the Woolsack, and I do not need to repeat them.

With the judgments delivered in the Courts below I agree the main point to be determined is—Were the men justified in refusing to continue the voyage beyond Hong-Kong to Sasebo?

I think they were. They shipped for an ordinary commercial voyage to a neutral port, a voyage subject only to the incidents of peace. Any other destination was kept back from them. It is true that coals had to their knowledge been proclaimed to be contraband of war, but there was no risk of seizure whilst on a voyage to Hong-Kong. But when they were required to proceed to a naval base port of Japan their voyage became subject to the incidents of war, for they knew that their ship would be a fair object of seizure when carrying contraband to Japan by any Russian vessel she might encounter. It may well be that they were told that a portion of the Russian Fleet was in Port Arthur, and that the Baltic Fleet was still at Madagascar. Their general knowledge would tell them that Russia had many ships afloat, and that any one of them coming off Sasebo might capture and carry the ship to a Russian port to be, according to the Russian proclamation, condemned.

In determining what amounts to a justification for seamen refusing to proceed to sea I do not think that they are called upon to prove by positive and legal evidence that there was an actual probability of capture; their decision has to be formed upon such general information as is at the moment at their disposal. Doubtless their decision must not be based on merely arbitrary grounds. Good faith is a necessary element, and such good faith would not exist unless some reasonable grounds for the refusal can be alleged.

In this case I certainly should, for the reasons I have given, find as a fact that such reasonable grounds existed. The authorities that were quoted at the bar and in the Courts below seem to sustain this view. I particularly refer to *Burton* v. *Pinkerton* (1895), 2 Q.B.; *O'Neil, Armstrong, and Sibery* v. *Connelly*, 94 L.T.

The suggestion that the conviction at Hong-Kong amounted to an estoppel against the reasonableness of the men's refusal being alleged, was, I understood, not persisted in, at any rate it cannot be maintained. The alleged tender of the wages at Hong-Kong was accompanied by a demand that the seamen should in effect abandon all further claim for wages. They rightly refused to do so.

I am well aware of the difficulty there is in dealing with the exigencies of service in the Mercantile Marine in distant parts, and therefore I refrain from saying more than that I deeply regret that it was found necessary to sentence these men, who were acting in perfect good faith, to ten weeks' imprisonment, an imprisonment accompanied by much indignity.

The amount to be recovered and the method of recovering it are matters of some practical difficulty. It suffices for me to say that I concur with the views expressed by the Lord Chancellor on this subject. I submit that the appeal should be dismissed with costs.

LORD ROBERTSON—While I share some of the difficulties which are expressed in the judgment of Lord Atkinson, I do not disagree with the affirmance of the judgment under appeal.

LORD ATKINSON—I have the misfortune to differ from my noble and learned friends who have preceded me, but only as to the amount to be recovered and the principle on which it is to be recovered.

The main questions for decision in this case are, in my view—Whether the crew of the ship "Franklyn" were, under the terms of the contract contained in the articles which they had signed, justified in refusing to serve in the ship on the voyage from Hong-Kong to Sasebo; and if so, Were they entitled to recover damages for their illegal

dismissal on the ordinary principles applicable to such a cause of action, or to recover the penalties imposed by the 134th section of the Merchant Shipping Act 1894, plus compensation for loss of maintenance?

There is no doubt that the carriage in time of war in a neutral ship of contraband of war is not in itself an illegal act. It merely subjects the ship to the risk of being captured by one of the belligerents and treated as a lawful prize of war.

It is, I think, equally clear that this risk of capture is not one of the risks ordinarily attending a commercial voyage or adventure of a peaceful nature. The risk of capture may be so remote that it leaves the character of such a voyage practically unchanged, or so proximate and imminent as to entirely change its character. It must be a question of degree to be determined in each case on its own special facts, but it would certainly appear to me that a voyage with a contraband cargo across seas which are admittedly the theatre of war to a port belonging to one of the belligerents, which is itself a naval base, and therefore likely to be the object of such surveillance and attack as the other belligerent is able to subject it to or direct against it, is *prima facie* not an ordinary commercial voyage of a peaceful nature. It was, however, for an ordinary commercial voyage of a peaceful nature that the crew in this case engaged to serve. And in my opinion the burden of rebutting the *prima facie* presumption above mentioned and establishing that the risk of capture was so remote that the character of the voyage remained practically unchanged from that which the crew supposed it to be when they signed the articles rested upon the owners of the ship or their agent, the master. I do not think that they or he discharged that burden simply by proving that at the port from which the voyage across the theatre of war was to commence, it was the opinion of officials in a position to judge that, owing to the crippled condition of the naval forces of that belligerent by whom capture, if it was to take place, was to be apprehended, there was no real risk or danger of capture at all.

On the facts of this case I am therefore of opinion that the crew of the "Franklyn" were justified in refusing to serve on the voyage from Hong-Kong to Sasebo on the ground that that voyage was attended with other and different risks, and was of a different character from the risks and character contemplated by the contract they had entered into, and that by so refusing they had not committed any breach of their contract or any offence under the 225th section of the Merchant Shipping Act 1894. What took place at Hong-Kong at the instance of the master of the ship amounted to a breach by the owners of the contract entered into by them with their crew. Each member of the crew could, on his return to this country, have sued the owners to recover damages for this breach of their contract, and the measure of such damages would have been the loss of wages and maintenance from the time they left their ship till they had on their return to this country obtained employment in their calling, or until a reasonable time had elapsed to enable them to obtain it, whichever was the shorter period. Their treatment at Hong-Kong could not, in my opinion, be legitimately taken into account in measuring their damages for the breach of contract.

The crew might have taken another course, namely, that taken by the crew in the case so much relied upon, of the *Great Eastern Steamship Company* v. *William and Others* (4 Aspinall Mar. Cases, 511). They might have accepted their discharge, terminated their engagement, and thus brought themselves within the provisions of section 134 of the above-mentioned statute, and recovered the penalties imposed by it if the wages earned by them up to the time when their engagement terminated had not been paid to them. There was no dispute about the amount of these wages. The dispute, such as it was, arose out of an entirely different matter, namely, "their obligation to serve on the voyage to Sasebo."

The crew, however, did not take that course; they refused to sign off the ship and thereby terminate their engagement. They, on the contrary, insisted that their engagement continued. They were within their rights in so insisting (*Frost* v. *Knight*, L.R., 7 Ex. 12), but having insisted that their engagement continued notwithstanding their illegal removal from their ship under compulsion of legal process, they cannot now, in my view, be permitted to contend that they "lawfully left their ship at the end of their engagement" so as to bring themselves within the words of sub-section (*a*) of section 134 of the Merchant Shipping Act of 1894. In my opinion section 134 does not apply to the case at all. I have been unable to persuade myself that sub-section (*c*) of that section applies in any case not falling within sub-sections (*a*) or (*b*) of that section. The words of sub-section (*c*)—"In the event of the seamen's wages or any part thereof not being paid or settled as in this section mentioned"—must, I think, be interpreted as meaning as mentioned in the two preceding sub-sections (*a*) and (*b*), as those sub-sections, and those alone, contain provisions as to how the wages properly so called are to be paid, sub-section (*c*) dealing with the infliction of penalties for non-payment, and with that alone.

If the damages were awarded by Mr Justice Lawrance on the assumption that this section did apply, as they appear to have been, they were in my opinion awarded on a wrong principle; but as I find in the appendix that he stated that he would give judgment "up to such time as the men came back to this country and got work again," I think the amount awarded is such as the seamen would have been entitled to recover as damages for illegal dismissal, irrespective altogether of the provisions of the 134th section. I am therefore of opinion that his judgment for this sum should be allowed to stand.

The Court of Appeal have not only awarded wages from the 10th December 1904, the date of the articles sued upon, down to the date of this Order, but have also allowed maintenance from the 20th February 1905 down to the same date, on the ground apparently that "wages" in section 134, sub-section (*c*), includes maintenance, and that this Order on Appeal is the "final settlement" mentioned in that sub-section. With all respect to the learned Lords Justices, I think that their conclusion on this point is erroneous. It is obvious that the word "wages" as used in sub-sections (*a*) and (*b*) of section 134 cannot include maintenance, as *prima facie* wages are earned while the seamen are serving on the ship and are presumably maintained. There is no reason for giving to the word a different meaning in sub-section (*c*) of the same section. And besides it is I think impossible to read the fasciculus of sections from 134 to 167 both inclusive, and especially sections 159, 160, 161, without coming to the conclusion that the word "wages" is not used in the statute to cover maintenance, and that the emoluments which the word "wages" covers by section 742 of the statute are not applicable to maintenance.

I accordingly am of opinion that the judgment of the Court of Appeal should be reversed in that respect and the appeal allowed.

Appeal dismissed with costs.

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