1884

THE "MARY STUART" v. THE "NEVADA."

owners of the "Nevada," no liability could arise to the former on account of any damage done by the tug. The case to which the Chief Justice has just referred (*The Parlement Belge*) seems to show that this view would not be correct.

Appeal allowed.

Attorney for impugnant: *Barrow & Orr.*

Attorney for promovent: *Watkins & Watkins.*

REFERENCE UNDER THE BURMAH COURTS' ACT.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Wilson.

1884
June 19.

FRITZ OLNER (PLAINTIFF) *v.* LAVEZZO (DEFENDANT.)*

Jurisdiction—Foreign ship—Suit by sailor for wages—Mofussil Small Cause Court Act, XI of 1865, *s.* 8 (*expl. a*)—*Consul to receive notice of suit.*

Civil Courts have, as a general rule, jurisdiction to try all civil suits against all persons of any nationality within the local limits of their jurisdiction.

A captain of a ship, who was at the time loading or unloading his vessel within the local limits of the Small Cause Court of Rangoon, was sued by one of his sailors (who had contracted to serve on a voyage from Bremerhaven to East India), for wages in the Small Cause Court of Rangoon; *held*, that the sailor's cause of action arose within the local limits of the Small Cause Court, where the defendant was residing when the suit was brought, and that, therefore, the Small Cause Court had jurisdiction to hear the suit.

THIS was a reference under s. 54 of the Burmah Courts' Act, 1875.

On the 9th November 1882, one Fritz Olner, a British subject, engaged at Bremerhaven in Germany to serve as an able seaman on board the Italian vessel *Gentili*, whereof the captain was one Lavezzo, for the voyage from Bremerhaven to East India at the pay of £2-8 per month, and at Bremerhaven received an advance of £4-16, from that amount.

* Civil Reference No. 825 of 1884, by C. F. Egerton Allen, Esq., Officiating Recorder of Rangoon, under s. 54 of the Burmah Courts' Act, dated the 6th November 1883.

1884

FRITZ OLNER v. LAVEZZO.

It appeared that Fritz Olner entered into his contract to serve on board the ship at Bremerhaven; that he was not taken before the Italian Consul there, nor did he sign any ship's articles.

In the month of May 1883 the *Gentili* arrived at Rangoon. Whilst lying within that port, several of her sailors (amongst whom was Fritz Olner) were charged by the captain of the vessel with desertion; but the Magistrate refused to treat the men as deserters, as it was not proved to his satisfaction that the engagement with the sailors was accompanied by the necessary legal formalities.

Fritz Olner, on the 23rd May, brought a suit in the Rangoon Court of Small Causes against the Captain of the vessel for wages.

The Judge of the Small Cause Court gave a decree in favor of Fritz Olner.

On the 17th July the Government Advocate, under instructions from the local Government, applied to the Recorder of Rangoon for an order that the proceedings of the Small Cause Court might be called for, and, on this application being granted, the question as to whether the Judge of the Small Cause Court had jurisdiction to entertain the suit was fully argued; the Consul for the Kingdom of Italy having, at the request of the learned Recorder, handed in to the Court the Italian law on the subject, and certain other papers.

The Recorder, after setting out the facts, gave the following opinion.

"After hearing the Government-Advocate, and considering the memorandum of the Italian Consul, I determined to send the case for the decision of the High Court of Judicature at Fort William in Bengal, and I now submit the following questions:—

(1.) Had the Court of Small Causes in Rangoon jurisdiction to entertain a suit for wages alleged to be due by the mariners of an Italian barque against the master, such barque being in the port of Rangoon within the local limits of the jurisdiction of the Judge of the Court of Small Causes—supposing no law applicable to the parties and no agreement between them forbad the bringing of such a suit?

(2.) Had the Court jurisdiction, supposing a law applicable to the parties or an agreement between them, which forbad the bringing of such suit?

1884

FRITZ OLNER v. LAVEZZO.

It may be admitted that, whether the substantive law of Italy as alleged by the Consul forbids the bringing of such suits or not, and whether there was an agreement between the parties precluding such suits or not, no satisfactory evidence of such law or agreement was before the Judge of the Court of Small Causes.

It must be remembered that the port of Rangoon is not a port of discharge, and *primâ facie* no seaman is entitled to his discharge at it, but this is only matter of sufficiency of evidence in proof of the claim, and does not affect directly the question of jurisdiction.

In giving my opinion on the questions submitted, I may say that I cannot agree with the proposition of the Government Advocate that, supposing a jurisdiction, there was in the Judge of the Court of Small Causes a discretion as to exercising it, if there was jurisdiction it seems to me he was bound to exercise it.

I do not contend that the master of an Italian barque would not be liable to the jurisdiction of the Court of Small Causes, supposing he entered into an obligation within the local limits of its jurisdiction to be discharged within such limits, nor supposing he entered into an obligation by the nature of which the liablity to discharge such obligation clearly arose within the local limits of the jurisdiction as in the case of the *Queen* v. *Small Cause Court, in re Williams* v. *Smith* (1).

But it seems to me that the question of liability for wages, not depending on what amounts to a written promise to pay within the limits of the jurisdiction, arising between the master and mariners of a foreign vessel, temporarily brought within the limits of the jurisdiction, on an obligation entered into in a foreign country, is distinguishable from the liabilities I have before mentioned.

It does not seem to me at all clear, that our Courts should be open to decide questions between foreigners temporarily residing within our jurisdiction as to matters arising from arrangements entered into by them, unless it is shown in the very clearest manner that the cause of action arose within the jurisdiction.

(1) 2 Taylor & Bell, 4.

1884

FRITZ OLNER v. LAVEZZO.

It does not seem to me at all clear, that the master of a foreign vessel coming for the purpose of trade within the jurisdiction, and there conducting his business by unloading and reloading his vessel, can be said to be residing or working for gain within the local limits, and I should be glad if the High Court would give a ruling on this point.

I am of opinion that, even according to the English view of international law, a suit may be brought by the mariners against the master of a foreign vessel for wages at a port which is not a port of discharge. Yet that such a suit would not be sustainable, if the positive law of the foreign country forbad its institution, and the authorities quoted by the Italian Consul seem to me to go far to show that the law of Italy does prohibit the bringing of such suits.

No one appeared on the reference.

The opinion of the High Court was delivered by

GARTH, C.J. (WILSON, J., concurring.)—This is a reference made to the High Court by the Recorder of Rangoon under s. 54 of the "Burmah Courts' Act, 1875."

The circumstances which gave rise to it are these:

The plaintiff in the suit was engaged as a mariner on board the Italian barque *Gentili* on a voyage from Bremerhaven in Germany to Rangoon; and the defendant was the master of that vessel.

On her arrival at Rangoon some of the sailors, including the plaintiff, went on shore, and were then brought up by the master (the present defendant) before the Magistrate, charged with desertion. This charge was dismissed.

Thereupon some of the men, including the present plaintiff, brought suits against the defendant in the Small Cause Court to recover their wages; and an objection was then taken on the part of the defendant that the Court had no jurisdiction to entertain those suits.

It is with one suit only, *namely*, that brought by the present plaintiff, with which we are now dealing; but the objection appears to have been taken in all the suits.

In this case the Small Cause Court Judge found the facts as follows:—

1884

FRITZ OLNER v. LAVEZZO.

"The plaintiff was a British subject. He was engaged in the defendant's ship under the Italian flag to serve as a sailor on board of her from Bremerhaven to Rangoon, where his voyage was to terminate. He was not taken before the Italian Consul at the time when he was engaged, nor did he sign any ship's articles. He worked his passage out, for which he received an advance of two month's pay, and he claimed Rs. 115-3-3, as due to him for the balance of his wages."

At the time when the suit was brought the defendant was at Rangoon, engaged, we must presume, during his stay there, in the business of the ship.

Upon these facts the Judge of the Small Cause Court overruled the plea of jurisdiction, and gave the plaintiff a decree for the amount which he claimed, and costs.

An application was then made to the Recorder of Rangoon, under s. 622 of the Civil Procedure Code to set aside the proceedings in the suit, upon the ground that the Small Cause Court had no jurisdiction to try it; and the learned Recorder, having granted a rule to show cause, and entertaining some doubt upon the subject, the case has been referred to this Court with the following questions. [The learned Judge here read the questions above set out and continued.]

There is no doubt whatever that by the law of this country, which is the same in that respect as the law of England, Civil Courts, as a general rule, have jurisdiction to try all civil suits against all persons of any nationality, within the local limits of their jurisdiction; and there is nothing, so far as I can see, in the nature of the present claim, or in the relative position of the parties, or in the fact of the plaintiff having contracted to serve on board an Italian ship, which would in any way affect the jurisdiction of a Civil Court in British Burmah to try this suit.

I think it clear, therefore, that both questions above referred to us should be answered in the affirmative.

But there is a further question of a different kind, which is also submitted to us by the Recorder in a subsequent passage of the reference, which appears to me to present more difficulty.

The Small Cause Court of Rangoon, which is constituted

under Act XI of 1865, has only power to try any suits "if the defendant at the time of the commencement of the suit shall dwell, or personally work for gain, or carry on business, within the local limits of the jurisdiction of the Court;" and the further question which we are asked by the Recorder is, whether the defendant who was temporarily residing within the local limits of the Small Cause Court at Rangoon at the time when this suit was brought, for the purpose of unloading and reloading his vessel, could be said to be "residing or working for gain within such local limits?"

I think that this question must be answered with reference to explanation (*a*) of s. 8 of Act XI of 1865.

That explanation is as follows:—

"Where a person has a permanent dwelling at one place, and also a lodging at another place for a temporary purpose only, he shall be deemed to dwell at both places in respect of any cause of action arising at the place, where he has such temporary lodging." Now it seems to me that the present case comes within both the language and the meaning of that explanation.

The defendant, when the suit was brought, was dwelling at Rangoon for a temporary purpose only; but the plaintiff's cause of action, as found by the Judge of the Small Cause Court, was complete when the ship arrived at Rangoon. The plaintiff contracted to serve as a sailor on board the ship from Bremerhaven to Rangoon; and we must assume, I think, from the judgment of the Small Cause Court Judge, that he considered that the plaintiff had fulfilled his contract.

His contract was made on board the ship, and his right to sue upon that contract did not accrue till the ship arrived at Rangoon. I think, therefore, that his cause of action arose within the local limits of the Court, where the defendant was dwelling at the time when the suit was brought; and I think also that, so far as this point depended upon a question of fact, the Judge of the Small Cause Court must be considered as having found it in the plaintiff's favour.

This disposes of all the points of law, which have been submitted to us by the Recorder.

1884

FRITZ OLNER v. LAVEZZO.

I now proceed, out of respect to the Consul for the kingdom of Italy, whose memorandum I have carefully perused, to explain one or two other points, upon which, as it seems to me, he is under some misapprehension.

In the first place I would observe, that there is no connection whatever between the Magistrate's Court at Rangoon, which is a *Criminal Court*, and the Small Cause Court, which is a *Civil one*. These two Courts are constituted for very different purposes, and even if it were a fact, that one of them had made a mistake in exercising a jurisdiction which it did not possess, that would in no way affect the powers or duties of the other.

The reference which has been made by the Recorder has nothing to do with the decision of the Magistrate. All that we have had to consider under that reference is, whether the Small Cause Court had any jurisdiction to entertain the suit brought by Fritz Olner against the master of the *Gentili*. I think it due to the learned Consul to explain this, although probably any remarks which I have made may be equally applicable to the proceedings in the Magistrate's Court.

Then, again, I should observe, that I think it extremely probable, (indeed I will assume for my present purpose) that the Consul has stated the Italian law with perfect accuracy, both as to the nature of the contract made by a sailor when he engages to serve on board an Italian ship, and as to the obligation which the law of Italy imposes upon him to enforce that contract in no other Courts than these of a maritime nature, or of the Italian Consul.

But assuming this to be so, the contract thus entered into by the sailor can only be a *personal obligation*. It is an obligation created by the combined effect of the contract which he makes on the one hand, and of the law of Italy on the other. It in no way affects the jurisdiction of British Courts, but only the relative rights of the contracting parties.

If a sailor bound by these obligations sues the master of his ship for wages in a British Court, as the plaintiff has done in the case before us, it is necessary for the defendant, if he wishes to avail himself of the plaintiff's obligation as a defence to the suit

to allege and prove it in due course of law, as he would any other defence.

The Judge of a British Court cannot take judicial cognizance either of the Italian law, or of the nature of the contracts entered into by sailors on board Italian ships. If he were so bound, he would be equally bound to take judicial notice of the laws of all nations, and of all contracts made by sailors of every nationality.

The law of Italy and the contracts made by sailors on board Italian ships *are facts which must be proved like any other facts*; and unless they are so proved in Court in the regular way, the Judge has no means of giving effect to them.

The case of *Gienar* v. *Meyer* (1) affords a clear illustration of this rule. That suit was brought by a Dutch seaman for wages in the Court of Common Pleas in England; and at the trial the defendant put in evidence the ship's articles, by which the plaintiff and the rest of the crew had bound themselves to bring no suit against the master in any Court, except in Holland. Upon this evidence being given, Lord Chief Justice Eyre and the rest of the Judges considered that this contract was a defence to the suit. This was not because the Court had no jurisdiction to try the case, because the suit was regularly tried and decided in the English Court; but because the contract made by the plaintiff, when duly proved in Court, was considered to be a valid ground of defence.

And there is a decision to the same effect by Lord Ellenborough in the case of *Johnson* v. *Machielsne* (2)

In the case now before us, if the defendant in the Small Cause Court had brought forward proper evidence to prove the contract made by the plaintiff and also the Italian law bearing upon the question, he would probably have resisted the claim successfully. But no evidence of the kind was given. The only evidence appears to have been that of the plaintiff himself; and the Court was bound to decide the case upon the evidence before it.

I suppose there would have been no difficulty in bringing forward the necessary proof if the case had been properly conducted. The Consul himself, being learned in the law, would,

(1) H. B. R. Vol. 2, p. 603. (2) 3 Camp. 44.

1884

FRITZ OLNER v. LAVEZZO.

at any rate with the assistance of his books, have been a competent witness; and it is only to be regretted that the defendant, when the trial came on, was not better advised.

In the Admiralty Court in England a rule has been in force for a great many years, "that when a suit is brought by a sailor for wages against a foreign vessel, notice of the institution of the suit is always to be given to the Consul of the State to which the vessel belongs, if there be a Consul resident in England." This, of course, is to enable the Consul to take any steps that he may think proper for defending the suit. But whatever the nationality of the vessel, there is no doubt as to the jurisdiction of the Court to entertain the suit. See the case of *La Blache* v. *Rangel* (1).

There is no such rule in force in the Civil Courts of this country; but it would undoubtedly be only right, as a matter of courtesy and propriety, for any Court here, in which a claim for wages may be made hereafter by a foreign seaman, to give the Consul of the nation to which the ship belongs, a notice that the suit has been instituted.

(1) L. R., 2 P. C., 43.