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*Nov. 5.
*Dec. 22.

THE SHIP "FORT MORGAN" (DEFENDANT)..... APPELLANT;

AND

HANS JACOBSEN (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, NOVA SCOTIA ADMIRALTY DISTRICT.

Master and servant—Wrongful dismissal—Hiring of shipmaster—Change of voyage—Notice.

J. was hired in New York as master of a Norwegian ship for a voyage to Halifax and thence to the West Indies. On arriving at Halifax he found that the ship was to go to Newfoundland and from there to Italy. He was offered $400 a month for the new voyage and agreed to go for $450 or, at all events, more than was paid to the chief engineer. Without further notice the owner engaged a new master and chief engineer paying the latter $400 a month. J. left the ship and, the owner refusing to pay the account he rendered, brought an action claiming damages for wrongful dismissal.

Held, affirming the judgment of the Local Judge (19 Ex. C.R. 165; 49 D.L.R. 123), that he was entitled to recover; that not having been hired for a definite term he was entitled to reasonable notice before being dismissed; and that the assessment of his damages at three months' wages, the arrears due when he was suspended, and expenses of his trip to Norway after dismissal should not be disturbed.

APPEAL from the judgment of the Local Judge of the Nova Scotia Admiralty District (1), in favour of the plaintiff.

The facts of the case are stated in the above headnote.

Rogers K.C. for the appellant.
Kenney for the respondent.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 19 Ex. C.R. 165; 49 D.L.R. 123.

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THE CHIEF JUSTICE.—I concur in the opinion of Mr. Justice Anglin.

IDINGTON J.—Having regard to the peculiar terms of the hiring, whereby the respondent was always to get a higher wage than the engineer, with which Anderson was conversant, I do not think he was treating respondent fairly in supplanting him by another captain without first telling him he had an engineer duly qualified and willing to go at $400 a month and offering something in excess of that wage.

And none the less is that so, when regard is had to the terms of the telegram to him (Anderson) from appellant's Halifax agents, on which its counsel laid so much stress in argument here, for that clearly indicates respondent was not in accord with the possibly excessive and imperative demands of the rest of the crew whereby the engineer would get $475 a month yet respondent was offering to take $450, but by no means clearly putting it as an ultimatum.

I am clearly of opinion that there was a dismissal and no refusal on the part of respondent to go.

In view of the express concession of the appellant's counsel that the Norwegian law was intended to govern, I see no alternative which entitles us to consider English law as the binding basis of the contract or anything therein relative to the consequences of a breach thereof.

The intention of the parties contracting is in that regard the rule of law however variable and difficult of application may be the general respective presumptions which any given set of circumstances may give rise to.

The appellant and respondent being agreed in that regard herein, we are relieved from any of the difficulties

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that sometimes exist in such cases. The only other question involved is the measure of damages and they must be measured by the terms of the contract made in light of and rendered definite by a reading of the relevant law.

I cannot help having a suspicion that the respondent may have had, and possibly even availed himself of, the opportunity of minimizing his damages by accepting another engagement, but as no such contention is in fact set up I cannot assume that a return to Norway, though for past twenty odd years resident in New York, apparently was not the alternative he chose to abide by when this litigation had ended, if not before.

Primâ facie at least the extreme limit of the statutory provision is what, as he claims, he is entitled to when as here no alternative basis is presented by the evidence.

The appeal should be dismissed with costs.

DUFF J.—I think there is evidence to support the finding that the contract made in New York between Anderson, the representative of the owners, and the respondent as master, was subject to the condition that he should not be bound to serve in any voyage taking him across the Atlantic. The contract appears to have been indefinite as to the duration of hiring. The rule of English law, which in such circumstances would govern the rights of the parties, is that the contract cannot be terminated without reasonable notice. *Creen* v. *Wright* (1). Whether this rule of English law be applied to the present case or the rule of the Norwegian law as explained in the evidence, the judgment of the trial judge seems to be a satisfactory disposition of it. As to the jurisdiction

(1) 1 C.P.D. 591.

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of the Court of Exchequer, a Court of Admiralty in such cases has jurisdiction to award damages; *The Great Eastern* (1); and any difficulty which might otherwise have arisen from the decision in *The Courtney* (2), seems to be met by sec. 10 of the "Admiralty Courts Act" of 1861, 24 Vict. ch. 10.

ANGLIN J.—The learned trial judge, as I read his judgment, found that the plaintiff was employed by the owner of the defendant ship not by the month, as the latter contends, but for a voyage from New York to Halifax and thence to the West Indies. Since the evidence of the plaintiff, corroborated to some extent by that of Martin Marsden, supports this finding we should not disturb it merely because the defendant testifies to the contrary. Another not unreasonable inference from the evidence and all the circumstances might be that the plaintiff was engaged for an indefinite term as master of the "Fort Morgan" to take her wherever ordered subject to the limitation that she would not be sent overseas nor into the war zone.

The contract of employment was made in New York. The evidence also warrants a finding that it was one of its terms that the plaintiff's wages as master of the "Fort Morgan" should be higher than those of any other officer on the ship.

The vessel proceeded to Halifax under the plaintiff's charge and while it lay in that port the owner notified the master that the ship had been chartered to go to Newfoundland and thence to Italy instead of to the West Indies. While the master was willing to assent to this change of route and destination, he and the owner were unable to come to terms as to his wages

(1) 1 Ad. & Eccl. 384. (2) Edw. Ad. R. 239.

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for the new voyage. The owner recognized his right to a substantial increase owing to the fact that the vessel would proceed to the war zone, and offered him $400 a month. The captain's demand was for $450 but not less than should be paid to the chief engineer. The owner engaged new officers in New York agreeing to pay the new chief engineer $400. When the new master and his officers arrived at Halifax the plaintiff, who had never been offered more than $400 a month by the owner, left the ship. The learned trial judge found that he was discharged without notice and

> under the English law * * * would be entitled to compensation for such damages (*sic*).

The facts in evidence I think warrant this conclusion.

There was some discussion at bar as to the law by which the nature of the contract, the question of its breach and the relief to which the plaintiff might be entitled should be determined and as to the jurisdiction of an English Admiralty Court to enforce *in rem* rights based on foreign law in excess of those conferred by the general maritime law. Counsel were agreed that the Norwegian law applied and evidence of it was given by the Norwegian Consul at New York. No evidence of any other foreign law was adduced. The law of the state of New York, should it be applicable, must therefore be deemed to be the same as the law administered by English courts.

In the view I take of the case it is unnecessary to decide to what law the rights of the parties were subject. If they were governed by the Norwegian law the plaintiff's damages appear to have been assessed in accordance with its provisions as proved by the witness Ravn. If they should be determined by English law the amount allowed does not appear to have been excessive—at all events, not sufficiently so to

justify interference. The total judgment was for $1,888.85. The plaintiff's wages when dismissed were $343.75 per month, and there was then due to him for wages earned and unpaid $727.60. His damages for wrongful dismissal were therefore assessed at $1,121.25, or $120 more than three months' wages. I am not prepared to hold that this amount was so excessive for loss of the voyage to the West Indies that the assessment of the local Admiralty Court should be set aside.

There is no evidence that the plaintiff actually obtained, or could by reasonable effort have secured, other employment which he would have been bound to accept in order to minimize his damages.

I would for these reasons dismiss this appeal with costs.

BRODEUR J.—This appeal does not, to my mind, present any serious difficulty.

The engagement of the respondent as master of the "Fort Morgan" was for a trip from New York to Halifax and the West Indies. The "Fort Morgan" is a Norwegian ship and the respondent is also a Norwegian. The contract should be governed by Norwegian law because *primâ facie* the law of the flag governs, unless the parties have provided otherwise in the language of the contract. It was said in *The Johann Friederich* (1), that

> in cases of mariners' wages whoever engages voluntarily to serve on board a foreign ship, necessarily undertakes to be bound by the law of the country to which such ship belongs, and the legality of his claim must be tried by such law.

The Leon XIII (2); *The Livietta* (3); *Lloyd* v. *Guibert* (4).

(1) 1 W. Rob. 35 at p. 37.
(2) 8 P.D. 121.
(3) 8 P.D. 209.
(4) L.R. 1 Q.B. 115.

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The law of Norway, as was proved, shewed that the plaintiff was entitled to damages for wrongful dismissal.

The plaintiff having been engaged for a particular voyage could not be forced to go elsewhere; and if on his refusal he was replaced by another master, that constituted on the part of the owners of the ship a breach of contract.

The amount of the damages awarded was not excessive.

The appeal should be dismissed with costs.

MIGNAULT J.—This is by no means a satisfactory case and the reasons for judgment of the learned trial judge are extremely brief. The evidence, as I read it, is contradictory not only as to the salary agreed to be paid to the respondent as master of the ship "Fort Morgan," but also as to the term and the voyage for which he was hired. The learned trial judge finds that when the ship arrived at Halifax, the respondent's salary was $343.75 per month, and this finding I would not disturb as it evidently rests on the credibility of the respondent's evidence as opposed to the statement of Anderson, owner of the ship, that his salary was then only $250.00 per month.

As to the voyage for which the respondent was hired, the finding is that he came to Halifax with a view to a West India charter, but that after remaining there the owner chartered the ship for the war zone, and offered the captain and crew an increase of wages provided they would agree to go to Italy, but that the respondent refused the wages so offered him and was discharged without notice. I do not find in the reasons for judgment any express statement as to the term for which the respondent was employed,

but I take it that the finding was that the respondent, as he testified, was engaged for a voyage from New York to Halifax and thence to the West Indies. Very probably the appellant, in chartering the ship for the war zone, found such a charter much more profitable than the intended voyage to the West Indies.

On the basis of the findings of the learned trial judge there can be no doubt that the respondent was wrongfully dismissed, and the only question is with regard to the amount of the damages to which he is entitled for wrongful dismissal. The judgment appealed from allows him three months' salary and the price of transport to Norway, granting him such compensation "by analogy to the Norwegian Maritime Code," and the amount for which judgment was entered, after a reference to the Registrar, was $1,888.85, being, I take it, $1,031.25 for three months' wages, $302.00 for return to Norway, and the difference, $555.60, for wages due the respondent at the date of his dismissal. Both parties have admitted that the issues in this case are governed by the law of Norway, and proof of this law was made by the Consul General of Norway at New York, Mr. Ravn, who referred to articles 63, 64, 65 and 66 of the Norwegian Code, the effect of which is to give the master wrongfully dismissed in a port outside of Europe, when not engaged for any fixed term, three months' wages, plus his travelling expenses, including subsistence, to the place at which he was engaged in Norway, but otherwise to that port to which the ship belongs.

The respondent had been in the United States for over twenty years and was hired at New York, although he says he belongs to Stavanger in Norway. He was not asked whether he had any intention of returning there. If the Norwegian law governs the matter, as

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both parties admit, the respondent would appear to be entitled to claim the amounts which the learned trial judge allowed, and no special complaint is made in the appellant's factum as to the sum granted for travelling expenses.

As I have said this is far from being a satisfactory case, but I cannot find sufficient ground to justify me in setting aside the judgment of the trial court, and therefore I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. L. Hall.*
Solicitor for the respondent: *L. A. Lovett.*