

husband could qualify no interest in the wife's subscribing, it might afford some handle for the other party's plea; but, it is evident, the husband had a direct interest in the wife's signing. Where the husband settles the conquest on the children of the marriage, and the wife gives up her legal claims of terce and *jus relictae*, it must be understood, that the wife's giving up her legal claims, was the inductive cause of settling the conquest on the children; and, therefore, if she refuse to sign the contract, the husband, or his heir, cannot be bound to implement the obligations he came under, in the belief that his wife was to accept of the conventional provisions stipulated by the contract, in place of her legal claims.

The following interlocutor was pronounced on both petitions, when advised, with answers.

"THE LORDS find the contract of marriage betwixt James Wemyss and Elizabeth Tod, in respect of the subsequent marriage betwixt them, subsisting and obligatory upon all parties, viz, upon David Wemyss, upon the widow, and upon the younger children."

And refused, without answers, a petition for the widow, and another for David, the eldest son, reclaiming against said interlocutor.

For David, *Macqueen & Ilay Campbell.*

For the Widow, *Alexander Bruce.*

For the Younger Children, *Lockhart.*

A. E.

Fol. Dic. v. 4. p. 16. Fac. Col. No 78. p. 324.

1771. February 22.

ANDREW ROSS, and Others, Mariners, *against* JOHN GLASFORD and Co. Merchants in Glasgow.

THE pursuers were engaged as mariners on board the ship *Ingram*, the sus- penders' property, destined to proceed on a voyage from Clyde to Newfound- land, from thence to Spain or Portugal, and from thence home. A months pay was advanced to them before they sailed; the ship proceeded on her voy- age, discharged a small cargo of three hogsheads of tobacco, and took in a com- plete cargo of fish at Newfoundland; arrived and sold the same at Lisbon; and having taken in a cargo of goods there, sailed again for Clyde, but was captur- ed in her passage by the *Belleisle* privateer, commanded by *Thurot*, who put the crew ashore in Ireland.

Having come home, the pursuers applied to the owners for the wages due at the time of their arrival at Lisbon; which, being refused, they brought an action before the Judge Admiral, who gave judgment in their favour. The owners brought the cause into Court by suspension; when, after allowing a proof to be taken of the custom of the trade at Glasgow, Liverpool, and Lon-

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A vessel on a trading voyage being captured, the sailors en- titled to wages *pro rata itine- neris.*

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don, the LORD ORDINARY, on the 2d March 1765, pronounced an interlocutor, finding, " That the mariners are entitled in equity to their wages *pro rata itineris*, during the time the owners received the freight and profits of the vessel; and that the proof brought by the suspenders of the custom of Glasgow, with respect to the payment of sailors' wages, is not sufficient to establish an exception from the general rule, especially as the practice of other trading towns appears agreeable to that rule: Therefore finds the chargers entitled to their wages from the river Clyde to Newfoundland, and from thence to Lisbon." Thereafter, on the 20th December 1770, the LORD ORDINARY pronounced a judgment, finding, " That there being but one agreement and one voyage, the chargers, who did not accomplish the voyage, have no claim at common law for wages, though the failure was not occasioned by their fault, but by the fate of war; and also finds, that they have no claim in equity *pro rata itineris*, seeing the suspenders were not *locupletiores*, but lost considerably by the voyage."

The chargers, in a reclaiming petition, *pleaded*;

imo, It was a general rule in law and equity, applicable to contracts both by land and sea, that a person hired to perform any work had a title to his wages as soon as the work was performed, or as soon as the design for which he was employed, in so far as depended on him, was carried into execution. According to this principle, the chargers had acquired a right to their wages from their sailing from Clyde to Newfoundland, and to their arrival at Lisbon; as by their labour the ship had got safely to these places, and had been delivered of her cargo.

It was not disputed, that when sailors were hired for a single run or voyage, and the ship either totally lost, or taken by an enemy, they had no right to wages; for the freight being lost, their claim, which depended on it, was at an end. This took place only when there was a total loss; for if the ship with her cargo had from inevitable necessity been landed upon any intermediate coast, or if a part only was saved from the shipwreck, the mariners were entitled to their wages in the first case *pro rata itineris*; and in the second, proportionally according to what was saved.

When such were the regulations of the maritime law as to a single run or voyage, the application of the rule contended for to a trading voyage, such as that in question, was extremely obvious. In a trading-voyage, if the ship reached all the different ports of delivery, and arrived safe at home, the mariners had a right to their whole wages; if she reached only some of these ports, they had right only *pro rata*, or for so far as the vessel had sailed; if she did not reach any of the destined ports, but by stress of weather, or some other misfortune, had been obliged to put in to land, the mariners were nevertheless entitled to their wages *pro rata itineris*; and the only case in which they could have no claim was, when the ship had been totally lost, or captur-

ed before reaching any of the destined ports, and without any part of the cargo being saved. If a contrary rule was held, the sailers in a trading voyage would be in a much worse situation than in any other; as they might navigate the vessel for any number of years, and to any number of different ports specially pointed out in the contract, and unless the last voyage was successful, have no right to any part of their wages.

2do, The disputed fact, whether the owners were rendered *locupletioris* by the whole adventure, did not properly enter into the question. Though by the capture of the vessel, they may ultimately have been sufferers, they were still so far gainers, or at any rate suffered so much less, in consequence of the prosperous issue of the voyage, first to Newfoundland, and then to Lisbon, which was effected by the charger's labour and exertions. The rule suggested by these circumstances was equitable and obvious. The chargers asked no more than that they should gain where their owners had gained, and bear the loss where they had suffered; that in those parts of the voyage where by their labour they had enriched their employers, they should be indemnified; and where their employers had not gained, but been sufferers, that they should respectively bear their share of the loss.

3tio, The practice of Glasgow was not by the evidence established to be such as the suspenders had affirmed; nor did it justify the argument, or authorise the conclusion drawn from it. Although it had been proved to the extent contended for, it would not be sufficient to alter the general rules and principles of law, which were decidedly in the charger's favour. The opinion also of a number of the most eminent merchants in London and Liverpool, as from certificates produced, was precisely to the same import; bearing expressly, that the sailors ought to receive their wages from Clyde to Newfoundland, and from thence to Lisbon, where the cargo was discharged.

In support of their argument, the chargers referred to the following authorities: Mollôy de jure maritimo, b. 2. t. 3. § 10. 12. B. 2. t. 4. § 4. Roccus de navibus et nauto, not. 81. Voet ad Tit. Loc. Cond. § 27. Ordinance de Lewis XIV. l. 2. tit. 4. art. 13. Ibid. tit. Of the agreement and hire of seamen, art. 9. Complete Body of Sea Laws, p. 236. 256. Lex mercatoria, p. 67. Postlethwayt, tit. Mariners, p. 149. Keble's Rep. 830. Vernon's Rep. v. 2. p. 727. Burrow's Rep. v. 2. p. 885. 890. Lutwich *contra* Gray. Dict. *voce* Periculum.

The owners answered;

1mo, It was agreed on all hands, that when a ship was sent out upon a single run or voyage from one port to another, and was taken or lost, neither freight nor wages became due; no freight was exigible, because the voyage had not been completed; and there being no freight, there was no foundation for wages. The same rule held when a ship was freighted upon an outward and homeward voyage; the owners of the ship agreed that she should complete both runs, and the mariners agreed to navigate her accordingly. Unless, there-

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fore, that agreement was completed, nothing was due either to the one or the other: The owners could not demand freight, because they had not completed their covenant; and, upon the same medium, the sailors were barred from claiming wages. Molloy, b. 2. c. 4. § 9.

When these principles were applied to the present case, the conclusion was unquestionable. The vessel was to proceed to Newfoundland to take in her cargo, (for the three hogsheads tobacco she carried thither could not be held as such;) from thence she was to proceed to Spain or Portugal to take in a new cargo, and to return home. This could be considered only as one voyage; it was properly but two distinct runs; and as the consequence was, that upon the last of these, by her being captured, all the profit which the owners could have in view upon the whole voyage was lost, there could be no freight due, and of course no claim for wages.

The distinction the chargers laid down as to a trading voyage did not therefore apply to the present case. A trading voyage consisted of a number of different runs and ports of delivery; but here there were no more of either than what a ship in the Newfoundland trade must always necessarily make. The rule laid down by the chargers, as to trading voyages, was merely an assumed proposition. The owners of a vessel might no doubt make a stipulation in the charter party, settling a stated freight for every run, or every other run, whatever might be the subsequent fate of the ship, in which event wages would be due; but if no such stipulation was made, the general rule would hold: And as, notwithstanding the number of stages, there was but one agreement and one voyage, no freight could be due to the owners, and of course no wages to the seamen, unless the voyage was truly completed by the ship's arriving with her cargo at the last port of delivery. Molloy, b. 2. c. 4. § 7.

2do, The chargers argument, upon the owners being rendered *locupletiores*, or at least so far benefited by the adventure, proceeded entirely upon an erroneous view of the case. It went upon the idea of there having been three separate voyages, and as many separate adventures; whereas there was but one: And hence it was absurd to talk of the owners being enriched by any particular branch of this voyage, or at any particular period of this adventure, if in fact they were sufferers upon the whole. Not only had they been severe sufferers upon the whole concern, but in the intermediate stages even of the adventure had they been very considerably out of pocket: And as this assumed fact, which was the sole foundation of the chargers plea in equity for wages, was destitute of foundation, their demand on that ground for recompence or indemnification could not be sustained.

3tio, Whatever might be the law or practice of other places, the practice of the river Clyde must necessarily be the rule in the present instance. The evidence on this head was conclusive, and established the proposition maintained in its fullest extent: For it was proved, 1st, That when a ship was freighted out and in, no wages were due to the sailors if the ship was lost or taken in the

homeward passage, however safely she may have carried the outward cargo to its destined port; 2d. Where a ship was freighted to carry goods first to one port and then to another, no wages were due unless she reached the second port; 3d. That even in a trading voyage, no wages whatever were due in the event of the ship's being lost or taken in the homeward passage. The practice of London or Liverpool could be of no avail in construing an agreement that had been entered into elsewhere, and which had in contemplation the practice of another place. The certificates produced were not evidence, and had been obtained, not upon a mutual application, but upon an *ex parte* statement of the case by the other party.

THE LORDS were of opinion, That the first interlocutor, pronounced by the Lord Ordinary on the 2d March 1765, was a proper judgment. They thought that the cases referred to, of Lutwich *contra* Gray, Burrow, v. 2. p. 885. and that of Jenifer *contra* the East India Company, Vernon, v. 2. p. 727. should be followed; and that neither of these were so strong as the present. The practice of Glasgow, if such a practice existed, was highly disapproved of: That it was fraught with inhumanity, destructive to trade, and high time that it should be corrected.

They therefore, 22d February 1771, 'found the letter orderly proceeded; and farther found the chargers entitled to expenses of process, and to damages for lying out of their wages.'

Lord Ordinary, *Kames*. For Ross, and Others, *Craig*. For Glassford and Co. *Wight*.
Clerk, *Tait*.

R. H. *Fol. Dic. v. 4. p. 14. Fac. Col. No 82. p. 239.*

* * A similar decision was pronounced in the case of a wreck, 10th February 1778, Morison, &c. against Hamilton, &c. No 53. p. 304. *voce* CONDITION.

1777. February 20. HOG and Others against TRUSTEES of INGLIS.

INGLIS entered into a contract, binding himself to carry Hog, and his family and servants, together with about 200 emigrants, on board his ship Bachelor, to North Carolina; Hog, on the other hand, becoming bound to pay him a certain sum in name of freight, of which one half was paid before the ship left Leith Roads, and the other half on taking the passengers on board in Thurso Bay. The reason of this per advance payment of the freight was the peculiar nature of the outfits, and the large quantity of provisions necessary to be laid in. After sailing from Thurso Bay, the ship was forced into Stromness by stress of weather; and on sailing thence, she was driven by a storm into Voila Sound in Shetland, in the utmost distress. Inglis, on intelligence of what had happened, sent out a sloop from Leith, with materials for refitting the vessel; but

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Freight had been paid before hand, by some emigrants to America. The vessel not having proceeded on the voyage, not totally disabled, but only put back to repair;—the freight was ordered to be returned.