

Case No. 16,214. UNITED STATES V. SALISBURY.
[2 N. Y. Leg. Obs. 53.]

Circuit Court, S. D. New York.

1843.

SEAMEN SENT HOME BY CONSUL—SERVICES ON PASSAGE—ASSAULT WITH DANGEROUS WEAPON.

1. Where a distressed American seaman was sent home on board of an American vessel by the consul from a foreign country: *Held*, that he was bound to do duty as a seaman when called upon by the mate, although his passage had been paid by the American consul.
2. The mate had a right to order such seaman to do duty, unless directed to the contrary by the master of the vessel.
3. If such seaman was unable to do duty, the onus probandi lay upon the seaman to show his inability when called upon to do duty.
4. A prisoner indicted for an assault with a dangerous weapon on another, on the high seas on board of an American vessel, under the act of March 3, 1825, § 22 [4 Stat. 121], would be guilty of the offence charged if he could have reached the person intended to be assaulted by extending his arm so as to inflict a blow, although no blow was actually given.
5. The person who flourishes or points a deadly weapon at another, intending personal harm, is guilty of an assault within the act of congress, although no battery had been committed.
6. The pointing of loaded fire-arms with an intent to commit injury, is an assault, although the parties stand at a great distance, provided the distance is such that personal injury may be inflicted by the discharge of such fire-arms.

The prisoner was indicted under the act of congress passed March 3, 1825 (section 22), for an assault with a dangerous weapon, to wit: a knife of the length of 12 inches, and of the breadth of 2 inches, done and committed upon the mate of the American packet ship called the "Mediator," on a voyage upon the high seas from the port of London, in the kingdom of Great Britain, to the port of New York. The act in substance declares, that if any person or persons upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state, on board any vessel belonging to the whole or in part to the United States, or any citizen or citizens thereof, shall, with a dangerous weapon, commit an assault on another, such person shall on conviction thereof, be punished by fine not exceeding \$3,000, and by imprisonment and confinement to hard labor not exceeding 3 years, according to the aggravation of the offence.

It appeared in evidence that the prisoner was a distressed seaman and consular man, sent home by the American consul at London to the United States. The act gives the consul the right and makes it his duty to send home American seamen who are destitute and found in a foreign country. See the act of congress passed February 28, 1803, § 3 [2 Stat 203]. And it is also made the duty of the seamen so sent home, to perform such service on board of the vessels bringing them

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to the United States, as they shall be able to perform according to their several abilities. And by the same act the masters of vessels are to receive a sum not exceeding \$10 for each person so sent home by the consuls, vice-consuls, commercial agents, and vice-commercial agents of the United States. In this case, two or three days after the Mediator had left London, while on her voyage, the 2d mate, while forward, ordered the prisoner to take up a knife and scrape off the tar from some of the buckets belonging to the ship. The prisoner had not thus far been put on duty, but he had lived in the fore-castle, and was sitting down at his ease on the spar on the deck of the vessel, smoking his pipe, when the order was given. The prisoner was directed to proceed aft, man the hatchways, and do the duty. He got up reluctantly; indeed, one witness testified that he refused to do the duty pointed out to him. The 2d mate then seized him by the neck, and gave him a strong shove forward. He appeared to have pushed the prisoner about three or four feet from him. The prisoner then drew his knife and turned to the mate, threatened to stab him, and told him he would do so if he did not let him alone. One of the crew then took up a hand-spike, and threatened to knock down the prisoner if he did not go aft and perform the duty; whereupon the man retreated aft. The witness called for the government was here cross-examined by the prisoner's counsel. He stated that when the prisoner drew the knife, and threatened to stab the mate, he was about three or four feet from him; that he flourished his knife, and told him he would cut him open if he approached him.

The counsel for the prisoner and the United States respectively summed up to the jury.

The counsel for the prisoner submitted that the mate was the aggressor. That he had no right to call upon the prisoner to do duty in the manner he did, unless by the order of the captain. That the mate had assumed to put the man on duty without the captain's orders, and the prisoner in such a case was not bound to obey. The counsel also urged, that it had not been shown that the man was able to do duty, within the meaning of the act of congress. That the prisoner, although he had drawn his knife and flourished it at the mate, yet he was not guilty of having committed an assault upon the mate, within the meaning of the act of congress. That in order to bring the prisoner within the act, he must first have been within reaching distance of the mate, so as to have inflicted the blow upon him if he designed it. That the assault, if committed within reaching distance, must have been made in such a manner as that the jury would be bound to infer circumstances of force and harm, in respect to the mate or the person assaulted. There should be such acts of violence, or such threats, menaces, signs or gestures, as might give ground to the person assaulted to apprehend some injury or danger of his person while standing in the defence of himself. In this case the mate had shoved the prisoner, and the fair inference was that he had shoved him beyond the reach of the knife, when the prisoner turned upon the mate, and it then became optional with the mate whether he would come to closer

quarters or not. He certainly was not bound to do so, and that therefore the prisoner was entitled to an acquittal.

The district attorney, for the United States, contended that the prisoner clearly had been guilty of an assault with a dangerous weapon; that he was bound to have done duty when called upon by the mate; that the prisoner should have proved on trial his "inability to have done the duty required of him, if that was his excuse.

A. Nash, for prisoner.

The District Attorney, for the United States.

THE COURT thereupon charged the jury that distressed American seamen, who are sent home, are bound by law to render what assistance they can in the ship's service, while on their passage, and this, although their passage is paid by the United States. That in the present case, the order of the mate appeared to have been a proper one, and the mate had the right to call on the prisoner to do duty on shipboard, unless the captain had ordered to the contrary. That in case the prisoner refused to do duty, the officer had the right to remove or send him aft in a mild manner. That the pushing in this case did not appear to have gone beyond the line of duty on the part of the mate. The court said that they would not undertake to lay down any definite rule how near the parties must be to each other, to enable one of them to commit an assault upon the other, within the meaning of the act of congress; and with a dangerous weapon, no battery need be proved to have been committed; the assault alone was sufficient; that if the parties stood 20 feet apart, the prisoner could not have been guilty of an assault in this case, but had he held a loaded pistol or gun, and pointed it at the mate in a threatening attitude and manner, he would have been guilty of an assault within the act, even had the parties stood at a great distance, so long as the distance was such that execution or harm might arise to the mate from the discharge of the fire-arms. He said that, in the present case, the mate had sworn that the prisoner was three or four feet from him; that is, he had shoved the man forward three or four feet when he took him by the collar. The prisoner had committed no battery upon the mate, but if the prisoner was so near the mate as to have been able to have inflicted a blow upon the mate with his knife, had he so intended by extending his arm the length of it, he was clearly guilty in law of

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the assault, and ought to be convicted; but should the jury be of the opinion, that the prisoner stood at such a distance from the mate when he drew his knife and flourished it, that he could not have possibly reached him, the prisoner was not guilty in law of the offence charged in the indictment.

The jury thereupon retired, and returned a verdict of not guilty.