THE EDWARD.

Case No. 4,289.

{1 Blatchf. & H. 286.}[1]

District Court, S. D. New York. Feb. 12, 1832.

SEAMAN'S WAGES—WHEN LIBEL MAY BE FILED—PLEADING—ANSWER TO THE MERITS—WAIVER OF EXCEPTION TO REGULARITY OF PROCEEDINGS OF LIBELLANT.

1. Where a vessel has fully discharged her cargo in her port of delivery, and leaves that port, on other voyages, without payment of wages, the seamen, although accompanying her, are entitled to an action for such wages immediately.

2. So, if she return to the same port of delivery, a seaman may institute an action at once for wages earned on the previous voyage, though the vessel be not discharged of her second cargo.

3. Where, in a suit in rem for wages, an answer is filed to the merits, and issue is joined, and the case is brought to a hearing, and proofs are taken on both sides, that is a waiver by the claimant of any right of exception to the regularity of the proceedings of the libellant as to the time of instituting his suit, under the 6th section of the act of July 20, 1790 (1 Stat. 131, 133).

{Cited in Granon v. Hartshorne, Case No. 5,689; The Heroe, 21 Fed. 528. Applied in The Grace Darling, Case No. 5,651.}

In admiralty. This was a libel in rem by a cook to recover his wages, and the value of a chest of clothes, and damages for his being deserted by the vessel and left at Callao. A claim and answer to the merits was filed, and issue joined. The cause came on regularly to be heard, and proofs were taken on both sides. It appeared that the libellant had shipped in Providence, Rhode Island, and had accompanied the vessel upon several voyages, in the course of which she had once before discharged at the port of New-York. She afterwards went from New-York to Callao, thence along the coast of Mexico, and back to Callao, where the libellant was left. The vessel then went to Canton, and from Canton, to New-York. This suit was brought for wages due previously to the first discharge at the port of New-York, and was instituted before the vessel was fully discharged the second time at the same port. A motion was now made, on the part of the claimant, to dismiss the libel, on the ground that the action was prematurely, brought, under the provisions of the 6th section of the act of July 20,1790, which provides that, "as soon as the voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to-the wages which shall be then due, according to his contract;" "but nothing herein contained shall prevent any seaman or mariner from having or maintaining any action at common law for the recovery of his wages, or from immediate process out of any court having admiralty jurisdiction, wherever any ship or vessel may be found, in case she shall have left the port of delivery where her voyage ended before payment of the wages."

John B. Staples, for libellant.

George F. Talman, for claimant.

BETTS, District Judge. The motion to dismiss the libel, in this case, rests on the ground that the action was prematurely brought, the vessel not being fully discharged at the time. The action is not for wages upon the voyage now ending, but for those earned on a previous voyage, fully terminated long since. The vessel left the port of delivery, where the voyage now in question ended, without payment of the wages earned during that voyage. Accordingly, the case is directly within the words of reservation in the statute. The restriction on the right of action applies only when the vessel, on the termination of the voyage, remains at her port of unlading, and is intended for the benefit of the shipowner, that he may be enabled to ascertain that his cargo is delivered without embezzlement, and to collect his freight before being obliged to make disbursements for wages. The seaman is bound to delay his action, that the owner may secure those advantages. It is plain that the act has relation only to the specific voyage and services for which the suit is brought; and, when the vessel has accomplished one voyage with full unlivery of her cargo, it matters not that she has made other voyages, and, when proceeded against, happens to be again in the same port at which the voyage sued for terminated and the wages claimed were payable. Those wages have no connection with the after employment of the vessel, or the after service of the libellant. The vessel will, in respect to such service, be considered as having left the port of delivery on an after voyage, equally as if she were

found and sued in a different port. The "last port of delivery," designated in the act of congress, necessarily means the port of final delivery of the specific cargo upon which the wages accrued, and in respect of which the suit is brought. There is, accordingly, nothing in this branch of the defence.

I think, also, that the claimant, by appearing and contesting the claim upon the merits, must be deemed to have waived all right of exception to the regularity of the proceedings. Proofs have been taken by both parties under the issue joined, and, after that, the claimant cannot be permitted to allege that the libellant instituted his action without observing the requisite formalities. The claimant can take no higher advantages by this motion than he could under a plea in abatement, or under a declinatory exception of that character; and such objection to a prior irregularity is not regarded by the courts after full contestation of the action upon the merits. 2 Browne, Civ. & Adm. Law (Ed. 1799) 30, 89, 104, et seq.; Pothier, Analyse des Pand. 360, 361.

Motion denied, with costs.

[1] {Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.}