

Case No. 4,615.

THE PAIR PLAY.

[1 Blatchf. & H. 136.]¹

Circuit Court, S. D. New York.

Feb., 1830.²

SEAMEN—PARTICIPATION IN EARNINGS OF VESSEL—LIBEL IN REM—ACCOUNTING.

1. Where a seaman agrees to serve for one-half of the earnings and profits of the vessel, he cannot maintain an action in rem to recover such share, unless an account has been stated, or the claim has been otherwise reduced to a certainty. An action in rem cannot be brought to compel an accounting between parties.

[Cited in *Duryee v. Elkins*, Case No. 4,197; *Martin v. Walker*, Id. 9,170; *The International*, 30 Fed. 377; *The H. E. Willard*, 53 Fed. 601.]

2. Whether an action in personam in admiralty will lie for that object, quere.

[Cited in *Duryee v. Elkins*, Case No. 4,197.]

In admiralty. This was a libel in rem for seamen's wages, as upon an ordinary hiring. The vessel was chartered from the owner, for a trading voyage between Halifax and New-York, by the claimant, who was her master. The owner was to receive one-half of her earnings. The libellant served as second in command for a period of five months, on an agreement with the claimant to divide with him equally the earnings and profits of the vessel whilst she was navigated under the charter party. The libel alleged that \$305 81 were due to the libellant as his share. The answer denied this, and averred that the libellant was himself indebted upon the adventure in the sum of \$139 60. It did not appear that any account had ever been stated or made up between the parties, of the earnings and expenses of the vessel.

George Sullivan, for libellant.

Daniel B. Tallmadge, for claimant.

BETTS, District Judge. There is no proof before the court that any profits have been made in the adventure. This the court cannot presume from the fact that freight was earned, as, in the point of view most favorable to the libellant he could have no claim upon the freight until the charges and expenses of the voyage had been ascertained and satisfied. But the true character of the arrangement, as it appears by the pleadings, was one of mutual hazard and risk between the libellant and the claimant, and it is not in the power of the former to change it at his option, to a hiring on wages certain.

The contract was, in its nature, indubitably maritime. A seaman may hire for a share of the earnings of a voyage, in lieu of a stipulated sum, and his interest and compensation under such a contract will be wages, and be recoverable in that name. *Abb. Shipp.* (Ed. 1829) 432; *The Frederick*, 5 C. Rob. Adm. 8. It is, however, the adjusted balance to which his interest attaches, and he has no property or right in anything beyond that *Abb.*

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Shipp. 432, note. The equitable claim of a seaman to earnings in an adventure, which are not liquidated, cannot assume the privilege of wages, so as to attach as a lien to the vessel, subjecting it to arrest and detention to abide the winding up of such transactions. This doctrine is maintained in the case of *The Sydney Cove*, 2 Dod. 11. When the voyage is terminated, and the profits, if any, have been ascertained

on an adjustment of the accounts, the proportion of those profits which belong to the seaman is wages, and may be sued for and recovered as such in admiralty or at law. *Wilkinson. K. Frasier*, 4 Esp. 182; 1 Chit. Com. Law, 359. A proceeding in rem is not a method allowed to be taken to compel an accounting. A vessel cannot be seized and detained to ascertain, on the settlement of accounts, whether the seaman has a claim against her. There must be positive evidence that wages are due, to justify that process. The 2d section of the act of congress of June 19, 1813 (3 Stat. 2), which gives a remedy in rem to fishermen for their shares of a fishing voyage, plainly imports that courts of admiralty are incompetent to afford that kind of relief without the authority of a positive statute.

Whether an admiralty court can entertain an action of account, on a libel in personam, is exceedingly doubtful, but that point is not raised for decision in the present case.

The libellant having failed to make out a claim which is a lien on this vessel, his libel must be dismissed, with costs.

On appeal to the circuit court, this decision was affirmed by THOMPSON, Circuit Justice. [Case not reported.]

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

² [Affirmed by circuit court, case not reported.]