FRATES ET AL. V. HOWLAND.

Case No. 5,066.
{2 Lowell, 36.}[2]

District Court, D. Massachusetts. Aug., 1871.

SEAMAN'S WAGES—WHALING VOYAGE.

1. The stipulation which was introduced some years since into the usual form of shipping articles for whaling voyages, that the owners shall have the right to ship catchings home, on freight, is beneficial to both parties, and is valid.
2. When such catchings had been shipped home, and the owners in good faith and in the exercise of their best judgment had kept them, unsold, hoping for a rise in the market, *held,* they were not bound to account for them at their value when they arrived.
3. Whether, after receiving such catchings, they would not be bound to stop any charges for interest on advances to the seamen, quaere?

{This was a libel for wages by John Frates and others against Edward W. Howland.}

The thirteen libellants were part of the crew of the ship Cornelius Howland, on a whaling voyage, which was prosecuted mainly in the Arctic Ocean. The ship left New Bedford in November, 1867, and returned in May, 1871, having shipped home by other vessels the oil and bone taken in the seasons of 1868 and 1869, most of which remained unsold at the return of the vessel. The shipping papers contained an article which was introduced into these contracts about fifteen years ago, and is now printed in all of them, as follows: "It is understood and agreed that the master shall have the right to ship catchings home or elsewhere at any time during the voyage, and that the net proceeds, after deducting freight, insurance, and expenses incident to the sale and settlement of the same, shall bear interest from and after the sale until the termination and making up the settlement of the voyage." And that if the ship herself earns freight, it shall be divided proportionately in like manner with the catchings. It was proved that the season in the Arctic Ocean was so I short, and the distance from New Bedford so great, that this kind of whaling could not be prosecuted to advantage from that port without the power of shipping home the catchings, which enabled the vessel to follow the business for several successive seasons before returning home. Upon the articles, the lay of each seaman below the rank of boat-steerer was entered as the three hundred and fiftieth; but the pleadings set up, and it was admitted to be true, that every one signed an additional paper, which was annexed to the articles, by which it was agreed that if he should satisfactorily perform his duties on board the ship, and return in her to New Bedford, there should be paid to him, after deducting seventy-five dollars, but not deducting any charge for fitting, discharging, or interest on the home bill, the difference between the lay mentioned in the articles, and a much better one mentioned in this contract The questions argued at this time were, whether the owners were bound to account for the catchings which had been sent home at their value when

they arrived, which was much greater than it was at the return of the ship; and whether the crew were bound to submit to the deduction of seventy-five dollars, in accordance with the special contracts. The catchings had been kept on hand for a rise in price.

!G. H. Palmer and C. T. Bonney, for libellants.

The catchings were sent home for sale, and should have been sold within a reasonable time, or at all events credited within a reasonable time, so that they might bear interest.

The stipulation that seventy-five dollars shall be deducted from the agreed lay is void.

E. L. Barney, for respondent.

The owners of the ship may exercise their best judgment in deciding upon a sale. The object of the shipment is not so much for sale, as for enabling the vessel to continue her voyage in the best manner. The owners may be likened to trustees, who are bound to exercise their best discretion. The seventy-five dollars is instead of the usual charges.

LOWELL, District Judge. I am not aware of any law which requires the original contract of seamen in the whaling service to be in writing; because the voyage is not "foreign" within the act of 1790 [1 Stat 143]; Taber v. U. S. [Case No. 13,722]; The Atlantic [Id. 620]; Curt Merch. Seam. 60. But the statutes of April 4, 1840 [5 Stat. 370], and July 20, 1840[5 Stat 394], which concern the treatment of seamen on a voyage, and their discharge, and even the shipment of men in the course of the voyage, as well as the return of seamen to the home port, are applicable to this branch of business. Bates v. Seabury [Case No. 1,104]; The Antelope [Id. 484]; The Louisa A. [Id. 8,530]. So that if there is a written contract, as there always is and should be, the act of 20th July, 1840, requires a true copy of it to be taken by the master; and this is, for all consular purposes, conclusive evidence of the contract, and regulates the dealings between the parties in the course of the voyage; and men shipped during the voyage, if shipped at a consular port, have the right to require a compliance with the eighth clause of the act In this case the paper signed by the foremast hands did not state their contract truly; and although there may have been no necessity that the men should sign articles, yet it was fraudulent conduct on the part of the agent to induce them to sign two different contracts, one of which only, and that the false one, was furnished to the collector and carried on the voyage. So far as the parties are concerned, the objections to such a course are many. A seaman might be disabled, or might be discharged at a foreign port by consent, and the consul could not know how the settlement should be made with him. The reason given in the argument that the owner in case of desertion would be bound to pay the forfeited wages to the United States, and wished to deceive them, does not recommend itself very strongly to the consideration of a court of justice. It was testified that owners sometimes promise a slightly increased lay, on conditions like those found in this contract, as a premium for good conduct; and I do not know that there is any objection to this, if done in good faith, and if the original lay is a fair and honest one agreed to by the parties. But the same intelligent witness who spoke of this custom, had never heard of any such difference as that between one three hundred and fiftieth and one two hundred and tenth, nor of any real lay as small as the former. It is plain that the shipping articles are a mere fiction in this particular.

Under these circumstances, I must of course, construe these special contracts, made for the exclusive benefit of the owners, most strongly against them, and set aside any conditions that may be oppressive.

Both parties have agreed, that for the purposes of this case, the lays mentioned in the special contracts are to be the basis of settlement; but the men dispute the deduction of seventy-five dollars. It appears that this was in lieu of certain charges, which are said to be usual; namely, for fitting and discharging the vessel, and for interest and insurance on the advances. Judge Sprague has repeatedly disallowed all of these charges excepting interest; and I do not see how I can allow them, unless it shall appear that some changes in the

shipping articles or in the course of trade have changed the aspects of the question, which I neither affirm nor deny, for I am not informed upon the matter. I should be glad to have all question of charges carefully examined before the assessor, if the parties are willing to assume the burden. See Lovrein v. Thompson {Case No. 8,557}; Bates v. Seabury {Id. 1,104}.

The other question is one of great importance and of some difficulty. The evidence shows, and the libellants admit that what is now article 9 of the ordinary contract authorizing the master to ship home oil and bone, is useful and advantageous to all parties, if, indeed, it is not essential to the prosecution of the particular sort of enterprise undertaken in this case; and I have recognized its validity in former cases. The decision of Judge Sprague, that under the older form of contract all such shipments were at the risk and expense of the owners, may have led to the change. But the question now arises for the first time, whether the owners are bound to sell the oil and bone on its arrival. It has been repeatedly decided by my predecessor, and by me, that the owners must account for the oil brought home, on its arrival, and cannot wait for changes of market. The main reason for this decision is, that the seamen cannot wait the issue of the mercantile enterprise after their own part in it is ended. Their right is to wages regulated by the catch, and these wages are payable on the return of the vessel. The owners retain the property in the oil, and need not sell it if they account for it at the cash value. Under the ninth clause, the oil and bone are to be shipped home for sale; but is there any time at which the sale must be made short of the return of the vessel or other termination of the voyage? Upon reflection, I am not able to fix any time short of that The main purpose of this clause appears to be to exclude the conclusion that the Owners are bound to get the oil home at their own expense; for there is coupled with the agreement that they may ship oil on freight, the further stipulation, that if their vessel earns freight in a similar way the seamen shall share it The owners have a certain quantity of oil which they might perhaps, bring home, but which it is convenient to send home. I should probably hold that they were bound to insure it and that if lost, they must account for its value. But when it reaches home, it seems to me they may hold it as part of the proceeds of the

voyage, if in good faith and in the exercise of their own best judgment they deem it wise for all parties to do so. It is not a consignment; and the seamen would, perhaps, have no right to order the owners to sell or not to sell; though this I do not decide. If instructions were sent on, the owners would be likely to follow them, because the seamen could not then complain of the result. When the market is falling, as has now been the case for five years, the result of holding is most unfortunate. But on a rising market it would be different, and I must fix some definite and absolute rule. Either they must always sell, or they may always control the latter. I cannot see my way to the decision that they must do the former. The argument was much pressed, that one consideration operating with the seamen to accept article 9 as part of their contract was, that a fund was thus put into the owners' hands to stop the charges of interest and insurance upon the advances. I admit that there is force in this argument; and it may be that the interest and insurance on advances, if otherwise valid, ought to cease from the time that the owners have in their hands any oil or bone from which they might have reimbursed themselves, if they had chosen to do so. This is one of the points which may come up hereafter. Interlocutory decree for libellants. Wages to be assessed.

[2] {Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.}