

Case No. 7,044.

INGRAHAM v. ALBEE.

{1 Blatchf. & H. 289.}¹

District Court, S. D. New York.

March 19, 1832.

SEAMEN'S WAGES—WAIVER OF FORFEITURE—ABSENCE—PROOF.

1. A master who receives back into his service a seaman who has deserted, will be *held* to have waived the forfeiture of the seaman's wages.
2. An allowance may, in such a case, be decreed to the owner, for the time of the seaman's absence.
3. Semble, that a deviation from the voyage named in the shipping articles excuses a seaman for leaving the vessel, and bars the charge of forfeiture of wages.
4. Where, in a suit in personam for wages, the answer alleged, by way of set-off, payment of a board bill during the absence of the libellant from the vessel, and the evidence offered raised a strong presumption that such payment had been made: *Held*, that if the libellant would not admit the payment the respondent might, on filing an affidavit that such payment had been made at the libellant's request, have time to procure proof thereof, and to sue out a commission or a dedimus potestatem for that purpose.

This was a libel in personam, by a seaman [Robert Ingraham] against a master [Stephen Albee], for wages, and for an extra allowance for services as cook. The answer set up a forfeiture by desertion, and also claimed to set off the amount of a board bill of the libellant's, paid, during his absence from the ship, by the respondent. It appeared on the hearing, that the libellant was absent from the vessel, in Havana, for some time. The evidence was contradictory as to the period of his absence, but it was proved that he boarded during the time for one dollar a day, and that the amount of his board bill was \$21 62. The respondent met the libellant during his absence, and asked him if he had had his spree out yet, and, on his return, received him back into service. The libellant also proved that the vessel had, before he left her, made a deviation, and proceeded upon a voyage not named in the shipping articles. The respondent offered evidence to show that the libellant was ignorant of his duties; that he could not steer in a blow, nor reef, nor heave the lead; and that, though he had rendered occasional services as cook, yet he knew little of cooking. The respondent also gave evidence going to show payment of the board bill, as set up in the answer, which is more particularly stated in the opinion of the court.

Edwin Burr and Erastus C. Benedict, for libellant.

John Cleaveland and William W. Campbell, for respondent.

INGRAHAM v. ALBEE.

BETTS, District Judge. If the libellant has forfeited his wages by leaving the vessel, and continuing absent in Havana, such forfeiture would have been remitted by the consent of the master to receive him on board and overlook his conduct. Or, even if no condonation of that offence had been shown, it is very questionable whether the previous deviation of the vessel, and her performing a voyage not named in the articles, would not have excused the libellant in leaving her on arriving at Havana. As the case stands, no forfeiture of wages is established. The evidence offered by the respondent shows clearly that the libellant was not an able seaman, nor a competent cook; and, had the respondent refused to receive him back into his service, and defended this action upon the ground of the libellant's incapacity to perform the duty he contracted to do, I should have thought it a fair case for a reduction of wages, and should not have been willing to allow the rate stipulated by the articles, for any portion of the time. The master was a better judge of the value of the libellant's services to the vessel than any of the witnesses the latter has called; and the master's acts in reinstating the libellant counteract this branch of the defence, at least when set up by himself. His taking the libellant back, in Havana, under the original contract, without any stipulation for a change of wages, must now be deemed conclusive, as against him, that he was satisfied with the libellant's services, and was to allow him the same rate of compensation, to the completion of the voyage. I do not think, however, on the whole evidence, that the libellant is entitled to more than the agreed wages. His occasional services as cook were not of a character to raise an equity to increased pay. Wages are accordingly decreed at fifteen dollars a month for the voyage (four months and three days), deducting the period of twenty-two days for the libellant's absence in Havana. The answer alleges, that the libellant's absence continued from the 16th of September to the 11th of October, a period of twenty-five days; but no evidence is furnished fixing the dates with certainty. The master claims a credit of \$21 62, the amount charged the libellant for board in Havana. The proof being that the price at the house where he boarded was usually one dollar per day, that is sufficient evidence of an absence correspondent to that charge; and, without noticing the fraction, I shall allow a deduction of wages for twenty-two days. The master claims the amount of this board bill as having been paid by him. The fact is stated in the answer, but the allegation is not responsive to the libel in a way to render it, of itself, evidence in the respondent's favor; and there is no direct proof that he paid the bill. There are circumstances, however, raising so strong a presumption in the master's favor, that if the payment is not admitted by the libellant, I shall allow the respondent a reasonable time to furnish further proof of the fact. It is proved that the libellant offered to ship on board of another vessel, for the purpose of having his bill satisfied; that it is usual for masters of vessels to advance the board bills of seamen on such occasions; that the respondent did so with reference to two of his seamen; and that the libellant said he did not know whether it had been done for him or not. That declaration

YesWeScan: The FEDERAL CASES

is a plain admission that he had not paid it himself, and would probably justify my making the allowance at once, but for a declaration of the master in Havana, proved by one of the seamen, "that he would not pay for the libellant, and, if his landlord said anything about it, he would put him in prison for harboring the libellant." This leaves the point in so questionable a state, that I think it proper to demand further proofs. The master will be allowed ninety days to prove this payment, on his filing an affidavit that he has actually made it at the libellant's request, and, at the same time, taking out a commission or a dedimus potestatem to obtain the testimony. Decree accordingly.

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