

have mistaken in recalling several hours afterwards which of several vessels that had been there that morning it was. I refer to this as only a possible way in which a mistake might have arisen, because there are additional circumstances which seem strongly to confirm the several witnesses for the claimants, who assert that they did not go inside of the slip at all; that after laying about five minutes near the end of pier 46 she turned about under a starboard wheel, and went across the river without touching the wharf or entering the slip. Three of the witnesses for the libelants fix the time when the Wade was struck with such particularity of circumstance and detail that it cannot be held immaterial or be disregarded in considering the identity of the colliding vessel. The time as thus fixed by the three witnesses, all in different ways, cannot have been earlier than about half past 9 A. M. But the City of Chester kept an hourly log of her movements, made up at the time, and filed daily. The log of March 11, 1881, was produced, and it showed that the trip of the City of Chester from Jersey City to pier 47 was the first that she made that day, and was between 8 and 9 A. M., and that between 9 and 10 she was towing another vessel at Jersey City.

The burden of proof is upon the libelants to make out their case by a fair preponderance of evidence. *The Albert Mason*, 2 FED. REP. 821; 8 FED. REP. 768. The claimants' witnesses, as I have said, are in no way discredited. There are no other material circumstances about the transaction in which they are shown by other evidence to be grossly inaccurate or untrustworthy, so that the court has no satisfactory ground for preferring the testimony of the libelants to that of the claimants, as in the case of *The Florence P. Hall*, 14 FED. REP. 408.

Without being able, therefore, to answer satisfactorily the questions which arise upon the testimony on either side, I am compelled to find that there is no such preponderance of proof as entitles the libelant to recover.

The libel must therefore be dismissed, with costs.

BRINK v. LYONS

[*District Court. S. D. New York. November 24, 1883.*]

1. SEAMAN'S WAGES—DESERTION—SECTION 4596—UNREASONABLE ABSENCE—PUNISHMENT.

Where the assistant engineer of a steamer, knowing that she was on the eve of departure, being sent ashore upon an errand, absented himself for an unreasonable period, and the master, after spending a couple of hours in searching through the place and being unable to find him, departed on his voyage, leaving the assistant engineer behind, *held*, that the master was justified in his departure, and was not liable for the subsequent expenses of the seaman. *Held, also*, that the case was not one of desertion under the maritime law, . e.

leaving the ship with the intention not to return, but was an absence from duty without sufficient excuse, the punishment of which, under section 4596 of the Revised Statutes, subd. 2, is in the discretion of the court. *Held, also*, that a sufficient punishment of the seaman in this case was the expenses to which he was subjected, and that he should have wages *pro rata* up to the time of the departure of the vessel.

2. SAME—MEMORANDUM BOOK NOT A LOG-BOOK.

Written entries by the captain in a memorandum book, made a month afterwards from alleged contemporaneous entries in pencil, erased, are not entitled as evidence to the weight of a log-book properly kept, or of written contemporaneous entries.

In Admiralty. Action for seaman's wages.

Alexander & Ash, for libellant.

Beebe & Wilcox, for respondent.

Brown, J. The libellant shipped at New York as assistant engineer on the steamer *Armsmear*, and signed shipping articles on October 30, 1882, to be paid \$40 for the run to Jacksonville, Florida. The steamer sailed on October 31st, was obliged to put in at Norfolk, and, after remaining there two or three days, sailed on Sunday, November 12th, at about 3 P. M., the libellant being then ashore and left behind. The respondent claims that he deserted. The libellant denies this, and demands full wages to the end of the voyage, and the value of his effects and expenses of return. The testimony is very conflicting and irreconcilable. The libellant was addicted to liquor; was intoxicated the day before; and, according to part of the evidence, was somewhat intoxicated on Sunday. He says he was ordered by the captain to go ashore at about 11 A. M. to obtain a pipe-fitter to repair a burst, the person previously sent having been unable to obtain one; that the shops were closed, it being Sunday; that he lost no time in trying to find a pipe-fitter, and returning after about a couple of hours, found the ship had left.

The captain testified that he did not send the libellant ashore, except early in the morning, when he went and came back; that after that he had forbidden his going ashore again, as the vessel was about to sail. The libellant denies his being sent early in the morning, and states that it was another seaman who had gone earlier for the pipe-fitter. The narrative of the libellant is so circumstantial that I am inclined to credit his statement that he was directed to go for the pipe-fitter at about 11 o'clock, and that the captain is probably mistaken in regard to the person whom he had previously ordered to go.

Taking all the evidence together, however, I am convinced that the assistant engineer's stay ashore was far beyond all reasonable limits warranted by the errand on which he had been sent. He knew that the steamer was on the eve of departing; he had been ordered to get up the fires at 7 in the morning and had done so. If the libellant went on this errand at 11 A. M., as he states, it was more than four hours before the steamer's departure. In the mean time the captain had scoured the town in search of him, driving in a carriage and calling at numerous places where he thought the libellant might be

found, without success; and, not finding him, the steamer departed on her voyage, somewhat after 3 o'clock.

There are various circumstances, which I need not detail, which satisfy me that the libelant did not intend to desert the ship,—that is, depart with the intention not to return,—but his absence was most unreasonably prolonged. The captain made all reasonable efforts to find him, and he was not required, in my judgment, to wait for him longer. The captain's entries in his memorandum book, a month afterwards, from previous pencil *memoranda*, are not entitled to the weight of evidence of a log-book with proper contemporaneous entries. As the master was justified in his departure, the respondent is not liable for the board or expenses of return incurred by the libelant. Under section 4596 of the Revised Statutes, subd. 2, which it has been held supersedes the provisions of the act of 1790, § 5, (*Scott v. Rose*, 2 Low. 381, 382,) it is in the discretion of the court to determine what punishment should be imposed upon seamen for any absence from duty without leave and without sufficient excuse. Absence prolonged after a reasonable time comes within this provision. I have no doubt that the intemperate habits of the libelant were at the bottom of the difficulty. It does not appear that the vessel incurred any increased expense, and I think a sufficient punishment will be inflicted on the libelant by charging him with his own expenses of board and return, and allowing him wages to and including November 11th, amounting to \$20. To this should be added \$7 for his valise and contents, and \$6.50 deducted for advance pay.

A decree may be entered for \$20.50, with one year's interest, making, in all, \$21.95, without costs. *Johnson v. Blanchard*, 7 FED. REP. 597.

In re TRUNDY and another.

(*District Court, S. D. New York. November 24, 1883.*)

ADMIRALTY—COSTS—DOCKET FEE—PETITION.

Where a petition is filed by persons claiming a lien on the proceeds of a vessel in the registry, and it is referred to a commissioner to take proof of the facts, and exceptions are taken to his report, *held*, that only one docket fee can be charged.

Taxation of Costs.

Henry D. Hotchkiss, for petitioner.

Henry N. Tift, for respondent.

BROWN, J. A libel having been filed in this case for the sale and partition of the tug John E. Mulford, and a monition having been issued for all persons interested, as well as the owners, to appear, various claimants having liens on the tug appeared upon the return—