## STARK and others *v.* MUELLER and others.

(*District Court, N. D. Illinois.* December 8, 1884.)

SEAMEN'S WAGES—CONTRACT—QUANTUM MERUIT.

Where seamen ship for a voyage at a stated sum as compensation, and the voyage is broken up by disaster or peril of the sea, and no cargo is carried or freight earned, no recovery can be had for the time services were rendered by the seamen. The court cannot override the contract and award compensation to the seamen upon the *quantum meruit*.

In Admiralty.

*Wm. L. Mitchell*, for libelants.

*Schuyler & Kremer*, for respondents.

BLODGETT, J. This is a libel for wages. The libelants shipped as seamen on the schooner Ketchum, of which respondents were owners, on the twenty-sixth day of October, 1883, for a voyage from Milwaukee to Gill's pier, and from thence with a cargo of lumber to Chicago. The schooner arrived at the pier on the twenty-eighth day of October, and commenced loading, but, rough weather setting in, she hauled off from the dock, intending to ride out the storm at anchor. The storm, however, increased, and she was driven ashore on the morning of the thirty-first of October, where she afterwards became a total wreck. Libelants, by their contract, were to have $20 for the entire voyage, or round trip, from Milwaukee to Chicago. At the request of the captain of the schooner, after she had gone aground, the seamen remained at a boarding-house on shore until the underwriters sent a wrecking-tug, for the purpose of endeavoring to get her off, as the captain anticipated that their services might be wanted by the wrecking party, and they so remained in waiting at the captain's request. After the wrecking party arrived, which was about the third of November, attempts were made to get the vessel off, which proved unavailing, and it appearing from investigation that the bottom of the vessel was substantially gone, the libelants, under the direction of the wreckers, assisted in stripping her sails and other removable property from her, and when that was done they were furnished with transportation to Chicago or Milwaukee, whichever port they wished to return to, and, excepting a small amount, received no further or other compensation at the time of their discharge.

The original libel claimed pay of the owners of the schooner for the proportion of time they served before the wreck, and from the insurance company who had issued the policy on the schooner for the time they were employed in helping the wreckers. The insurance company, after the proof was taken in the case, paid the libelants for their time from the first day of November up to the time they were discharged, when the wreck was abandoned, together with the costs of this suit up to that time; and the only question now remaining is whether anything is due libelants from the owners of the

schooner for services rendered up to the time she went ashore. The contract, as I have said, was a contract for the entire voyage, and the principle invoked by respondents is that it was a complete contract, and the court cannot divide it and give libelants any proportion of the amount they would have earned if the voyage had been consummated.

I had occasion to very fully examine this question in *Thorson* v. *Peterson*, 10 Biss. 530, S. C. 9 FED. REP. 517, and there held that in a round-trip contract by seamen nothing was earned if the voyage was broken up by peril of the sea, so that it could not be completed. This case was affirmed by his honor, Judge DRUMMOND, and is reported in 11 Biss. 497, S. C. 14 FED. REP. 742; but in his report in this case the commissioner seems to be of the opinion that the learned circuit judge did not take the same view as I did, as to whether the seamen were entitled to part pay on an unperformed voyage. I have examined Judge DRUMMOND'S opinion very carefully. He does not criticise the conclusion of the district court in any particular, and I cannot see how he could have affirmed the decree of the district court without substantially agreeing with the law as applied by the district court in reference to this class of contracts.

In ordinary contracts for personal services, where the compensation is a round sum for a fixed time of employment, and the employe performs some part of his contract, works part of the time, so that the employer has the benefit of his labor, so far as it goes, it is held that the employe may recover what the service performed was reasonably worth to the employer. But I do not think this rule applicable to a contract of this character, where the completion of the contract is prevented by a peril of the sea, and through no fault of the owner of the vessel. Here the employer risked his ship, and the seamen risked their wages, for the purpose of accomplishing a given voyage. The ship encountered disaster and was lost. The voyage was broken up, and the seamen, though they have acted in entire good faith, and performed their duty as seamen up to the time the disaster intervened, cannot say they have performed their contracts so as to be entitled to their pay on any part of it. The court cannot say how long it would have taken to complete the voyage, nor how much of it was completed, nor that any benefit resulted to the owner of the vessel from their services.

The ground on which compensation is allowed for services, even where the contract is not fully performed, is that the employer has had the benefit of the work done by the employe, and should pay what it is reasonably worth to him. But this reason does not apply to a contract of this kind, where the employer has not profited by the work of the seamen. By the intervention of a cause beyond the control of either, the voyage has proved only a loss to the ship-owner, and I can, therefore, see no reason on which he should be compelled to pay for services on a contract which has not been completed, and from

which he has derived no profit. If the schooner had carried a cargo to Gill's pier, and thereby earned a freight on her outward voyage, it could then properly be said that the entire voyage was not broken up, and in such a case a court could undoubtedly award compensation to the seamen, even where their contract was for the entire voyage, out and return, on some just and equitable basis, such as the facts might require.

I therefore adhere to the rule of the district court, as stated in *Thorson* v. *Peterson*, that where seamen shipped for a voyage at a stated sum as compensation, and the voyage is broken up by disaster or peril of the sea, and no cargo is carried nor freight earned, no recovery can be had for the time services were rendered by the seamen. In other words, the court cannot override the contract and award compensation to the seamen upon the *quantum meruit*. The exceptions to the commissioner's report are therefore sustained, and the libel dismissed at the cost of libelant.

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## THE ALABAMA and two SCOWS.[1]

(*Circuit Court, S. D. Alabama.* November, 1884.)

1. MARITIME SERVICES—TOWAGE.
   The towage of a steam dredge-boat and her two scows from Mobile to Tampa bay was a maritime service.
2. DREDGE-BOAT AND SCOWS WITHIN ADMIRALTY JURISDICTION.
   Where it is the business of a dredge-boat to dig the earth out under the water in the channel to be deepened, and deposit the earth in her scows, which are then towed to the dumping-ground and unloaded, and then towed back for the operation to be repeated,—such dredge-boat and scows are to be treated as one thing or craft, and, as such, their business is largely navigation and water transportation, and they are within the admiralty jurisdiction. *The Hezekiah Baldwin*, 8 Ben. 556, followed.
3. WAIVER OF LIEN.
   "By the principles of the maritime law a lien is not lost by the acceptance of notes unless the claimant can show that the lienholder agreed to receive the notes in lieu of the original claim." *The St. Lawrence*, 1 Black, 522.
4. SAME.
   The fact that the libelant receipted his account as being paid by note is not, of itself, sufficient to warrant the inference that receiving the note was intended to waive the lien. *The Pride of America*, 19 FED. REP. 607, followed.

Admiralty Appeal.

*L. H. Faith*, for libelants.

*I. L. & G. L. Smith*, for claimants.

PARDEE, J. Under the agreed statement of facts in this case, the contract to tow the steam dredge-boat Alabama and the two scows from the port of Mobile to Tampa bay was a maritime contract, and

[1] Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

the services rendered by the tug-boat Mary B. Curtis in so towing the dredge-boat and scows to Tampa bay were, without doubt, maritime services. From these maritime services resulted a lien, the character of which depends upon the question whether or not the dredge-boat and scows should be classed as a ship or ships. If they were not a ship or ships, but only movable property, then only the carrier's lien resulted, and that was lost with the voluntary delivery of the goods to the owner after the carriage was completed. If they were a ship or ships then the lien was a strictly maritime lien, not dependent upon possession, and one that is within the admiralty jurisdiction to enforce by proceedings *in rem* wherever the possession of the *res* can be obtained. So that the question here is practically one of jurisdiction. As laid down by Benedict in his work on Admiralty, and which is in accord with the authoritative decisions on the subject,—

"It is not the form, the construction, the rig, the equipment, or the means of propulsion that establishes the jurisdiction, but the purpose and business of the craft as an instrument of naval transportation." Section 218.

The agreed statement of facts in this case recites:

"That the dredge-boat and scows are not engaged in, nor were they built to be used in, carrying freight or passengers *as a business;* that the sole business for which said dredge-boat and scows were built, and in which they have been used, is dredging out and deepening the water-ways of commerce, though in prosecuting that business the said dredge-boat and scows carry on them said machinery, and large quantities of coal to be used as fuel on said dredge-boat and the tow-boat in towing the dredge and scows."

From the same statement it appears further:

"That the mode of business of said dredge-boat and scows was for the dredge with its machinery to dig the earth out under the water in the channel to be deepened, deposit the earth in the scows, which were then towed to the dumping-ground, unloaded by dumping the earth through their bottoms, and then towed back for the operation to be repeated."

The parties to this case have treated the dredge and scows as one thing, one plant, built and operated as one; as one complete whole carrying on one business, and having but one purpose. If the parties are right in thus treating the dredge-boat and scows as one craft or thing, then it seems clear that the purpose and business of that craft is largely navigation and water transportation. It would be of no use to dig up the earth in the channel unless it should be transported away, and it could not be transported away unless it should be first dug out; and the whole business seems to be the transportation by water of earth and dirt from one place to another place. According to the test authorized by the supreme court in the case of *The Rock Island Bridge,* 6 Wall. 213, the dredge and scows, in this case, must be movable things engaged in navigation. The scows are movable things engaged in navigation, without doubt. The dredge-boat and scows, taken together, are in the same category. The dredge-boat by itself might not be up to the test. The adjudged cases cited by proctors are nearly unanimous in laying down the general principle that

to constitute a ship within the admiralty sense and jurisdiction there must be a water-craft engaged in commerce or in navigation, and it is not necessary to review them, as the principle is conceded.

The case of the floating elevator, *The Hezekiah Baldwin*, 8 Ben. 556, however, seems to be a case exactly parallel to the case of the dredge-boat here. The elevator in that case was capable of being, and its business required it to be, navigated from one place to another. When in place and in operation it lifted grain and placed it aboard another water-craft to be transported. Exactly the same may be said of the dredge-boat Alabama, except that it lifted mud instead of grain. Each aided commerce: the one by loading grain in transit; the other by removing obstructions in the way of commerce by water. When we consider, in addition to this, that the case here shows that in carrying on her business, the Alabama actually navigated the high seas for over 300 miles, it does not seem to be very far-fetched to hold her to be a water-craft engaged in navigation. At all events, I am of the opinion that there can be no doubt about the scows being within the rule, and that there ought not to be any doubt about the dredge-boat. If they all constitute only one thing, then there can be no doubt, for the one thing and business was transportation by water-craft.

The next point made by the claimants under the pleadings and evidence is that the maritime lien for towage was waived because notes were taken by libelants for the towage, and those notes not being paid at maturity were supplemented by other notes, which were not due at the filing of the libel, from which it is claimed that not only was the lien lost, but, if not lost, the suit is premature. In the case of the steamer *St. Lawrence*, 1 Black, 522, the supreme court lay down the rule to be "that by the principles of the maritime law a lien is not lost by the acceptance of notes unless the claimant can show that the lienholder agreed to receive the notes in lieu of the original claim." To the same effect is the rule declared in *The Kimball*, 3 Wall. 37; *The Bird of Paradise*, 5 Wall. 545.

There is nothing in the agreed state of facts in the present case to show that the libelants agreed to receive notes in place of their original claim. It is true that on receiving the original notes libelants signed the towage account presented under the words "Received payment by note, 90 days," but this fact of itself is not sufficient to warrant the inference that receiving the notes was intended to waive the lien. See *Pride of America*, 19 FED. REP. 607. As to the suit being premature, because the notes were not due, it follows that as the lien was not lost by taking the notes, whenever the lien was in danger of being lost by transfers of the craft upon which the lien rested, libelants would have a clear right to surrender the notes and insist upon their lien. The prematurity claimed in this case, as the notes are now shown to be long past due and unpaid, would at most only affect the question of costs.

On the whole case, for the reasons given by the district judge, and those outlined here, the decree of the district court will be affirmed. Proctors for libelants will draught and hand in the proper decree for entry.

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## BARRETT *v.* OREGON RY. & NAV. CO.

(*District Court, D. Oregon.* December 23, 1884.)

LIGHTERAGE—CHARTERER "TO PAY," NOT "TO PROVIDE."

The bark Carrie Winslow was chartered to carry a cargo from New York to Portland for a lump sum; the charterer "to pay" for the necessary lighterage between Astoria and the port of discharge. *Held*, that the charterer was not bound "to furnish" or "provide" the lighterage, but only "to pay" for it; that the contract of the master being to bring the vessel with her cargo to Portland, he was bound to provide and employ the means necessary and appropriate to that end.

Libel for Demurrage.

*William H. Effinger*, for libelant.

*Cyrus A. Dolph*, for defendant.

DEADY, J. This suit is brought by the master of the bark Carrie Winslow to recover $1,620 demurrage. It is alleged in the libel, that in January, 1883, the vessel was chartered by the defendant at New York to carry a cargo of railway iron and material from that port to Portland, Oregon, for the sum of $14,500, and that among other things the charter-party provided that the vessel should be discharged "at Portland" with "dispatch," and that for each day's detention thereof caused by the default of the defendant, Sundays and legal holidays excepted, it should pay $90 demurrage; and that "lighterage, if any, from Astoria to Portland, to be paid by the charterers, but no more cargo to be lightered than is necessary for the ship to proceed from said port of Astoria to Portland with safety;" that the vessel arrived at Astoria on August 5, 1884, from whence, owing to the stage of the water in the river, she could not be taken to Portland without being lightened; that the libelant applied to the defendant for lighterage, which it failed and refused to furnish for 18 days, although it had the means of doing so, whereby the vessel was detained at Astoria and prevented from discharging her cargo for that period, within the meaning and contemplation of the charter-party. In the second article of the libel it is alleged that the defendant, at the making of the charter-party, well knew that the vessel "would require lighterage at Astoria in order to enable her to make the port of Portland;" that it was then and ever since "engaged in the towage and lighterage service between the ports of Astoria and Portland, and controlled and regulated the same almost exclusively;" and that said charter-party was entered into by the parties with the understanding

that "the facts" in said article stated were "the real facts," and that it was made with reference thereto. The defendant excepts to the libel, for that it does not appear therefrom that the libelant is entitled to the relief sought thereby; and that the second article thereof is impertinent.

On the argument of the exceptions counsel for libelant contended that it was the duty of the defendant, under the circumstances, "to furnish" the lighterage, and that the delay caused by its neglect or refusal to do so is in effect a delay or detention in discharging the cargo that entitles the libelant to demurrage therefor at the agreed rate; citing Abb. Shipp. (12th Ed.) 241, 243; Macl. Law Shipp. (1st Ed.) 522, 526; *Capper* v. *Wallace*, L. R. 5 Q. B. Div. 163, 166. But there is nothing in these authorities or the circumstances to warrant such a construction of the charter-party.

The defendant did not agree to pay for any detention of the vessel, however caused, after she left the port of New York until she reached Portland, the port of discharge. To this point the libelant undertook to bring his vessel and her cargo, with a full knowledge, as he alleges, of the character and means of the navigation on this side of Astoria. Neither did the defendant agree "to provide" or "furnish" lighterage, but only "to pay" for it if necessary. When he contracted to bring his vessel and cargo to Portland, the libelant thereby undertook to provide all the means necessary and appropriate to that end, and also to bear the expense of so doing, except as otherwise specially provided in the contract. Upon this point—that the defendant was only "to pay" for the necessary lighterage, and therefore the libelant was not excused from furnishing it—the language of the charter-party is plain, and the meaning and purport apparent. But the instrument also furnishes very strong confirmatory evidence of the correctness of this conclusion, in the special provision therein, that "no more cargo is to be lightered than necessary" to enable the vessel to proceed to Portland. Now, if the defendant was to furnish the means as well as "pay" for the lightening of the vessel, there was no conceivable necessity for this provision. For it goes without saying that it would not furnish any more lighterage than was necessary, and that if it did the libelant could not be injured thereby. But if the libelant was "to furnish" or "provide" the lighterage at the expense of the defendant, the latter might well seek to protect itself against imposition in this respect by the insertion of some such clause in the contract.

It may be admitted that the law would have construed the contract without this clause as only binding the defendant to pay for necessary lighterage; but, nevertheless, the insertion of it puts beyond question, what is otherwise not in doubt, that the parties contemplated that the libelant would furnish or provide, at the expense of the defendant, the lighterage necessary to enable him to perform his undertaking to bring the vessel to Portland for the discharge of her cargo. If the defendant had agreed "to pay" all pilotage incurred

by the vessel on the voyage, it might as well be held "to furnish" it also, as to furnish lighterage under this charter-party. Nor is it likely or reasonable that if the parties to this contract ever contemplated that the defendant was to provide or furnish the lighterage under any circumstances, as well as to pay for it, they would have omitted to say it. An agreement to "furnish" lighterage may, under ordinary circumstances, be construed to include the necessary expense of so doing. But an agreement "to pay" for lighterage, in terms, no more includes the physical act of furnishing or providing the same, than the less does the greater or a part the whole.

*Keen* v. *Audenried*, 5 Ben. 535, is a case on all fours with this. A schooner was chartered to carry coals from Baltimore to Pawtucket, Rhode Island, the charterer to pay freight at a certain rate per ton, "with towage from Providence to Pawtucket." There was a delay in procuring towage at Providence, and the master of the schooner sued the charterer for demurrage, alleging that he was bound to furnish the towage, and was therefore responsible for the delay. But Mr. Justice BLATCHFORD, before whom the case was tried, construed the somewhat ambiguous phrase "with towage," as used in connection with the stipulation for the payment of freight, as binding the charterer "to pay" the cost of the towage, but not "to provide" it.

If the defendant, by reason of its employment, was under any legal obligation to furnish the libelant lighterage, which it failed to comply with, the libelant may sue it for the damage actually sustained in consequence of such breach of duty. But such suit, if maintainable, would have to be brought, not upon the charter-party or for the demurrage provided for therein, but on this legal obligation of the defendant to furnish lighterage to any vessel under like circumstances, and its failure to do so in this instance.

The exceptions to the libel are sustained, and the same dismissed.

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## THE GLADIOLUS.[1]

*(Circuit Court, S. D. Georgia.* December, 1884.)

INJURIES TO STEVEDORE—NEGLIGENCE.

The steam-ship employed a firm of stevedores to prepare the ship for cargo, and to stow cargo. They sent a gang of men on board, who found the upper hatches closed and certain of the lower ones open. They prepared the ship to receive cargo, and left her in the same condition, as to the hatches, that they had found her in. The next day another gang of men, of which the husband of the libelant was one, was sent by the stevedores into the hold to receive and stow cargo. While doing so, the husband of the libelant, while searching for some dunnage, fell or stepped through one of the open lower hatches into the hold, and received injuries from which he afterwards died. *Held*, there was no duty on the part of the master and crew of the steam-ship to look to the hatches and

[1] Reported by Joseph P. Hornor, Esq., of the New Orleans bar.