

DAVIS v. ADAMS.

(District Court, N. D. California. April 29, 1899.)

No. 11,829.

PLEADING IN ADMIRALTY—ACTION BY SEAMAN—VARIANCE.

A libel for damages, on the alleged ground that libelant was induced to visit a vessel by fraudulent pretenses, and there detained, and compelled to go on a voyage, sounds in tort, and a recovery cannot be had thereunder for wages due the libelant for his services as seaman rendered under shipping articles, which he signed.

In Admiralty.

Libel for damages. The libel alleges that the libelant was induced by fraudulent pretenses and assurances to go on board the bark Retriever, then lying in the harbor of San Francisco, for the purpose of visiting said vessel, and when on board "was unable to escape from said vessel, and was threatened, under penalty of being placed in irons, if he attempted to escape or make an outcry," and was thus compelled to go upon the voyage referred to in the opinion of the court.

P. C. Dormitzer, for libelant.

Charles E. Naylor, for respondent.

DE HAVEN, District Judge. The evidence in this case shows that the libelant, on or about the 11th day of May, 1895, signed shipping articles by which he agreed to go as a seaman on board the bark Retriever, on a voyage from San Francisco to Port Hadlock and return. In pursuance of this agreement, the libelant proceeded on the bark to Port Hadlock, and there left the vessel. In my opinion, the evidence shows that he was justified in leaving. The evidence also shows that the libelant has not been paid the wages earned by him. The libel will, however, have to be dismissed, as there is a fatal variance between the case proven and the cause of action alleged in the libel. The cause of action set forth in the libel is for a tort in the nature of false imprisonment, and not upon the contract established by the evidence. Libel dismissed, the respondent to recover costs.

 HALL et al. v. WITTER.

(District Court, N. D. New York. May 8, 1899.)

ADMIRALTY—ACTION FOR REPAIRS AND SUPPLIES—COSTS.

The record owner of a vessel during the time repairs were made and supplies furnished to her is not entitled to recover his costs in an action brought against him to recover for such repairs and supplies, though he is successful in defeating recovery by showing that he was not in fact the owner.

In Admiralty.

Ingram, Mitchell & Williams, for libelants.

Josiah Cook, for respondent.

COXE, District Judge. This is a libel in personam, filed November 16, 1898, against the respondent as the owner of the steam canal boat Hugo Keller, to recover for supplies furnished to the said boat and repairs made thereon during the years 1895, 1896, and 1897. It is agreed by both parties that the only question is one of fact, namely, was the respondent the owner of the Keller during the period in question? The testimony is exceedingly conflicting and it is difficult to explain some of the transactions upon any rational business principle, but after considering the entire evidence, oral and documentary, the court has reached the conclusion that the respondent was not the owner. The respondent testifies that in 1893 he sold the Keller for \$6,000 to Edward Wildey, who continued to own and hold the uninterrupted possession of her until December, 1897. At the time of the sale Wildey paid the respondent \$2,500. The testimony as to this payment is not denied by Wildey. Wildey had the entire management of the boat, made purchases and ordered repairs, including those in controversy, and exercised all the rights of ownership. Various payments were made from time to time on account of the sale and statements of the amounts paid were rendered by the respondent to Wildey. The latter denies the sale generally, but his testimony is inconsistent with this denial and leads to the conclusion that the respondent's version of the transaction is substantially correct. For instance, he says regarding the sale in December, 1897: "He [Witter] asked me if I would sell her [the Keller] and I told him I would if he could make arrangements. * * * Finally I told him if he would give me \$2,000 * * * I would get off the boat." Subsequently he testified that although he never agreed to pay anything for the Keller and never agreed to pay a "certain sum," he did actually pay for her; that when in December, 1897, she was transferred to Fisk he received \$1,000 and later \$200; that the respondent credited him from time to time with sums paid by him on the purchase money of the boat and that he expected that he would get a bill of sale when he "got the boat paid for." There is no escape from the conclusion that there was a sale; as to this fact both vendor and purchaser agree. There was no record of the conveyance and many of the respondent's acts are entirely inconsistent with his present contention, but it is thought that the presumptions arising from these acts are insufficient to overcome the positive and uncontradicted testimony establishing a sale. The libel is dismissed, but as the libelants were justified in bringing the suit against the record owner, the dismissal should be without costs.

THE CARRIER DOVE.

(District Court, D. Massachusetts. May 9, 1899.)

No. 993.

SEAMEN—VOYAGE ON LAYS—RIGHT TO LIEN ON VESSEL.

An agreement by seamen to serve on lays on a fishing voyage, made with the master, who had made an oral agreement with the owners of the vessel to ship the crew and to pay to the owners a specified portion of the proceeds of the catch, does not change their character as seamen,