

with sureties have recently come into existence to supply a demand for their existence. In the past, litigants were obliged to suffer deprivation of the use of their property and interruption of their business, unless they could prevail upon wealthy persons to aid them by becoming liable as sureties for the demands of adverse parties. The practice of importuning persons of financial ability to become sureties was annoying, but necessary. Since the modern surety companies have established agencies in all important commercial cities, litigants are no longer compelled to call upon individuals to assume such liabilities, and it has become more difficult, and impossible in many cases, to furnish security, without going to these agencies and paying for the accommodation. In communities where business methods conform to modern customs, such expenditures as are the subject of dispute on this hearing, are in fact necessary, and every reason for allowing the prevailing party to recover other necessary expenditures in maintaining his rights in a litigated case applies with equal force in favor of exercising the discretion vested in courts of admiralty by awarding to the prevailing party, as part of his taxable costs, the amounts actually paid to surety companies for giving bonds and stipulations exacted by the defeated party. I do not consider that the release of the vessel, by substituting in her place a bond to secure the payment of any judgment which might be rendered in favor of the intervening libellant, is to be regarded as a mere accommodation to the claimant. The detention of the vessel in the custody of the marshal would have been a burden upon the litigants, as well as an inconvenience to her owners. In this case, if the vessel had not been released, the marshal's expenses for keeping her while the case was pending and undetermined would have been largely in excess of the items now in dispute, and this intervening libellant would have been mulcted for that expense, however large the sum. The award of costs in admiralty proceedings is always a matter in the discretion of the court (1 Enc. Pl. & Prac. 290), and I shall always be disposed to encourage owners to take their vessels into their own control, instead of leaving them in the marshal's custody, to be consumed by the necessary expense of keeping them in idleness. The motion to retax and objections to the cost bill are denied and overruled.

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SCHROEDER v. CALIFORNIA YUKON TRADING CO.

(District Court, N. D. California. May 22, 1899.)

No. 11,486.

1. DAMAGES—BREACH OF CONTRACT—LIQUIDATION OF AMOUNT.

Where the subject-matter of a contract is of such a nature that it would be impracticable or extremely difficult to fix the damages for a breach by evidence, they may be liquidated by the parties, and the agreement will be enforced; but, in the absence of such difficulty, a stipulation for damages much beyond what would otherwise be allowed by law will be construed as a penalty, and the aggrieved party will be limited in his recovery to the loss actually sustained.

**2. SAME—WRONGFUL DISCHARGE OF EMPLOYE.**

The amount of damages recoverable by an employé for his wrongful discharge before the expiration of his term of service, when an action therefor is tried before the expiration of such term, is the salary or wages he would have received under the contract to the time of trial, less such sum as he actually earned and received if employed during the time, or might by reasonable diligence have earned by accepting employment of the same nature; and when he is shown to have been employed during a portion of the time in the same capacity, in the absence of evidence on the subject, it will be presumed that his earnings were the same as under the contract.

This was a suit in admiralty to recover damages for breach of a contract of employment as master of a vessel.

H. W. Hutton, for libelant.  
Fitzgerald & Abbott, for respondent.

DE HAVEN, District Judge. This is a libel in personam to recover the sum of \$885.50, which the libelant claims is due to him from the defendant by reason of the alleged breach of a certain agreement entered into between the parties on March 10, 1898. By this agreement, the libelant was employed by the defendant for the term of one year, at a salary of \$85 per month, payable monthly, to perform the duties of master of the schooner *Volante*, or of any other vessel to which he might be assigned. The agreement contained a clause which in effect provided that, in case the libelant was discharged by the defendant for any other reason than incompetency, he was to be furnished with free transportation to San Francisco, and the remainder of the year's salary was to be paid to him. The libelant alleges that he entered upon the discharge of his duties at the date of the contract, and was discharged by the defendant without cause and against his consent on May 25, 1898; that he has only been paid \$160 on account of his services; and that he was compelled to expend \$25.10 for necessary expenses in returning from the place of discharge to the port of San Francisco. The answer denies that the libelant was discharged by the defendant, but in this connection alleges that, if he was, it was because of intemperance, which rendered him incompetent to perform his duties as master. The libel was filed on June 24, 1898, and the action tried on the 22d of August following. It very clearly appears from the evidence that the libelant was without cause and against his consent discharged by the defendant on or about May 25, 1898. It was also shown that from June 15, 1898, up to the trial of the action, the libelant was constantly employed in the capacity of master, but not by the defendant. It may also be added that the amount of wages earned by the libelant during this period was not stated by any of the witnesses.

1. The libelant, while not disputing the general principle of law that the measure of damages for the breach of a contract is such sum only as will compensate the innocent party for the loss sustained by him, nevertheless contends that by the express terms of his contract he is entitled to recover a sum equal to the wages he would have earned during the remainder of the year for which he was employed. This contention cannot be sustained. One who has been wrongfully dismissed from service is entitled prima

facie to recover as damages therefor an amount equal to what he would have earned for the entire term of his employment if he had been permitted to perform his contract; but the defendant may show, for the purpose of reducing this sum, that the plaintiff earned and received wages in some other employment during the period of time covered by the contract, or that with reasonable diligence on his part he might have earned something by accepting from others work of the same general character as that which he was employed by the defendant to perform. *Costigan v. Railroad Co.*, 2 Denio, 609; *Howard v. Daly*, 61 N. Y. 362; *Barker v. Insurance Co.*, 24 Wis. 630; *Utter v. Chapman*, 38 Cal. 659. This general rule, with a modification which will be hereafter stated, is applicable to this case, notwithstanding the stipulation for a different measure of damages contained in the contract upon which the libelant relies. That stipulation, if enforced according to its letter, would result in giving to the libelant more than compensation for the actual loss which he has sustained on account of defendant's breach of contract; that is, he would recover in this action, by way of damages, a sum equal to what he would have earned if he had fully performed his contract, and at the same time he would be permitted to retain all he has earned since he was wrongfully discharged and all that he may earn subsequent to the trial and during the remainder of the year for which he was employed by the defendant. When the subject-matter of a contract is of such a nature that it would be impracticable or extremely difficult to fix the actual damages by evidence, the parties thereto may agree upon, or liquidate, the damages to be recovered upon a breach thereof, and such agreement will be enforced; but, when no such difficulty is presented, a stipulation in a contract, to the effect that damages for its breach shall be recovered in an amount much greater than that which otherwise would be allowed by law, will be construed as a penalty, and the aggrieved party will be limited in his recovery of damages to the actual loss sustained by him; and the contract upon which this action is based belongs to this latter class.

2. What, then, is the amount of damages which the libelant is entitled to recover? In my opinion, a sum equal to what would have been earned by him under his contract up to the date of the trial and the amount expended by him in returning to San Francisco, less what he has been paid by defendant and what he earned and received from other employment after his discharge from the service of defendant and before the trial of this action. This would be in accordance with the rule adopted in *Gordon v. Brewster*, 7 Wis. 355, and seems to me reasonable and just. In that case the court said:

"Had the respondent seen fit to wait before bringing his action until the period had elapsed for the complete performance of the agreement, the measure of compensation could then have been easily arrived at. We suppose he would then have been entitled to the entire amount of his salary, less what he would have reasonably earned during the time covered by the remainder of the contract in laboring elsewhere. But, as the case now stands, we think he was only entitled to recover his salary on the contract down to the day of trial, deducting therefrom any wages which he might have received, or might have reasonably earned in the meantime. This rule appears to us to be the most equitable

and safe of any that occurs to our minds, and the one most likely to effect substantial justice between the parties."

As before stated, the evidence shows that the libelant was constantly employed as master of a vessel from June 15, 1898, until the date of trial. The amount of wages he was to receive was not stated by any of the witnesses, but there can be no presumption that it was less than what defendant was to pay him for similar services under the contract sued on; and, if he received more, the burden was upon the defendant to show it. It follows, from what has been said, that libelant is entitled to recover at the rate of \$85 per month from March 10, 1898, to the date of the trial of this action, a period of 5 months and 12 days, amounting to the sum of \$459; add to this \$25.10 expended by him in returning to San Francisco,—a total of \$484.10. From this must be deducted the sum of \$160, which the libelant admits has been paid to him by the defendant, and the further sum of \$189.83, the amount earned by him at the rate of \$85 per month between June 15, 1898, and the date of this action,—leaving a balance due from the defendant of \$134.27. Let a decree be entered in favor of the libelant for \$134.27 and costs.

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In re RAMSAY et al'

(District Court, E. D. New York. June 10, 1899.)

1. TOWAGE—NEGLIGENCE IN LANDING—EVIDENCE.

On a question whether a tug negligently swung the starboard corner of the bow of a scow against a pier with great force, the master of the scow testified that the contact broke a stringpiece in the pier, that he heard the wood cracking and breaking, and that a day or so later he visited the place, and found the timber broken and apparently sound within. *Held*, that the breakage of the timber by reason of the contact was not shown.

2. SAME.

Nor was negligence shown by the fact that the assistant master of the scow, who was standing on the bow, about a foot from the edge, lost his equilibrium upon the contact.

3. SAME.

The scow was fastened at her stern, and was swinging around the end of some tugs lying at the end of the pier, lashed together. When her starboard bow was some 16 feet from the pier, she was stopped. She then started and swung against the pier. *Held*, that in such space she could not have gained sufficient headway to come into such violent contact with the pier as would show negligent operation by the tug.

4. SAME.

In any event, the captain of the tug was not bound to anticipate the assistant master's presence on the bow of the scow, the plan for making the landing not requiring the assistant to be there.

Carpenter & Park, for petitioners.

Charles J. Patterson and Mr. Cropsey, for claimant.

THOMAS, District Judge. The petitioners' tug, Grace S. Ramsay, on December 4, 1895, towed a dumping scow in the East river, from Stanton street, and landed the same on the lower side of the pier at Rutgers street. The tide was flood, the night was clear, and at