

"freight" in the bill of lading, for the purposes of collection from the consignees on delivery, this did not give the charterer the slightest claim to have such advances included in the bill to be drawn in the settlement of differences. The charter expressly provides that the bills of lading, signed as presented, should be "without prejudice to the charter." It is unnecessary to consider here whether any such settlement under clauses of this character should be deemed other than provisional, as treated by the parties in the cases of *Eisenhauer v. De Belauzaran*, 26 Fed. Rep. 784, 790; *Naval Reserve*, 5 Fed. Rep. 209; for no fraudulent settlement can be upheld; and this whole transaction was plainly fraudulent as against the ship and her owners. Under the guise of a settlement of differences of freight, pursuant to the charter, the master was induced by Tassi to include under the name of "freight" alleged advances on the goods, exceeding their value; and the ship and owners, instead of being mere carriers, were thus sought to be turned into purchasers of the cargo. On arrival, no consignees appeared to claim the goods under the bills of lading. The unavoidable inference is that Tassi did not expect that anybody would appear. No such "settlement" can stand. The goods having been entered and sold by the collector in default of anyone appearing to claim them, the vessel is entitled to be paid out of the net proceeds her full freight, according to the usual market rate. The libellant, as indorsee of the draft, is entitled only to the residue, and as this amount, \$462.96, has been tendered and paid into court without objection, judgment may be entered for that sum less the defendant's costs.

### THE BRUCKLAY CASTLE.

#### LUTTKE v. THE BRUCKLAY CASTLE.

(*District Court, S. D. California.* November 5, 1888.)

##### 1. ADMIRALTY—OBJECTION TO JURISDICTION—WAIVER.

On a libel for wages, after the claimant has pleaded to the merits, and testimony has been taken on the issues made by the pleadings, it is too late to object to the jurisdiction of the court, on the ground that the wages were earned by a foreign seaman on board a foreign vessel.

##### 2. SEAMEN—THE CONTRACT—EVIDENCE.

Where the allegations of the libel and the testimony of libellant as to the length of the voyage are contradictory, and libellant's explanations of his reasons for not leaving the vessel at the end of his alleged voyage also contradictory, the court is not justified in disregarding the written articles.

In Admiralty. Libel by August Luttké against the British bark *Brucklay Castle* for wages as seaman.

*W. J. Hunsaker*, for libellant.

*Anderson & Story*, for claimant.

Ross, J. The libellant, an ordinary seaman, signed articles for a voyage from "Penarth (Cardiff) to Montevideo, <sup>and</sup> <sub>or</sub> any ports or places within

the limits of 75 degrees north and 60 degrees south latitude, the maximum time to be three years, trading in any rotation, and to end in the United Kingdom or on the continent of Europe, between the Elbe and Brest, at master's option, calling for orders if required." On the part of the claimant it is objected that, the suit being for wages earned by a foreign seaman on board a foreign vessel, the court should decline to take jurisdiction, and remit the libelant to the tribunals of his own country. But this objection was not raised until after claimant had pleaded to the merits, and until after testimony had been taken on the issues made by the pleadings. Under such circumstances the objection will not be regarded. Apart from this objection, the only defense set up is that the libelant deserted the vessel at the port of San Diego, without cause, and in violation of the shipping articles. The case has been submitted upon these articles and the testimony of the libelant. The libel, which is sworn to by the libelant, charges that libelant shipped on or about December 21, 1887, at the port of Montevideo, South America, for a voyage to the port of New Castle, New Zealand, and thence to San Diego, in the state of California, United States of America, at the agreed wages of three pounds per month, or its equivalent in lawful money of the United States, and that for the due performance of said voyage libelant signed the articles already referred to; that the bark arrived at the port of San Diego on the 27th of July, 1888, and was there safely moored; and that, the term of libelant having expired, the master discharged him from the service of the said vessel without payment, after demand made, of the wages due him for the voyage.

In his testimony libelant states that he shipped for a voyage from Montevideo to New Castle only, and that the understanding between himself and the captain was that the voyage was to end at that port; that he signed the articles, but that they were not read or explained to him; and that the consul at Montevideo simply asked him his age, and where he was born, and told him to sign, which he did. Although the shipping articles are by no means conclusive as to the contract between the parties, it will not do to disregard them upon such testimony as that of the libelant in this case. When he verified the libel he swore that he shipped from Montevideo to New Castle, and thence to San Diego. In his testimony he swears that the contract was that the voyage should end at New Castle. In his direct examination he states that the reason he did not leave the vessel at New Castle, he was sick; and added: "The captain called me aft when we were two days out at sea, and said he made a mistake in taking me out of the harbor." On cross-examination, when asked why he did not go ashore at New Castle, he answered: "The captain would [not] discharge me. He said I signed three years' shipping articles." Such contradictory statements as these show that but little reliance can be placed upon the testimony of the libelant in his own favor. And that it was not his understanding that the voyage was to end at New Castle is very clearly shown by the fact, admitted by him, that, after reaching the port of San Diego, he sought to be discharged upon the ground that the condition of his health was such as not to permit him to

continue further on the voyage. The testimony is clearly insufficient to justify the court in disregarding the written articles. That libelant deserted the bark at San Diego without any valid excuse, and was not discharged as sworn in the libel, abundantly appears from his own testimony. There should be a decree dismissing the libel at libelant's cost; and it is so ordered.

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NESBIT *et al.* v. THE AMBOY AND THE TRANSFER NO. 2.<sup>1</sup>

(District Court. S. D. New York. November 27, 1888.)

1. LIMITATION OF ACTIONS—COMMON-LAW PERIOD—ADMIRALTY—DISCRETION OF COURT.

The period of limitation fixed by statute in common-law actions should not be extended by discretion in admiralty cases, except for some cause of practical inability to sue, or for some peculiarity of a maritime nature that demands recognition in a court of admiralty, and makes it plainly a matter of justice that this discretion should be applied.

2. SAME—VOLUNTARY DELAY—SIX AND A HALF YEARS.

Libelant, owner of cargo on a vessel lost by collision, did not bring suit for six and a half years after his loss, waiting, by advice of counsel, until the litigation as to the fault of the vessels had been decided in a suit by the owner of the lost vessel; but nothing prevented him or his assigns from suing at any time during that period. *Head*, that the claim was barred.

In Admiralty. Action for damages through loss of cargo in collision. *Hyland & Zabriskie*, for libelants.  
*Biddle & Ward*, for the Amboy.  
*Page & Taft*, for the Transfer No. 2.

BROWN, J. The above libelants were the owners of a cargo of brick on board the canal-boat *Idle Hope*, which was sunk on the 23d November, 1881, while in tow of the *Amboy*, by a collision with the *Transfer No. 2*, in going up the East river, to the westward of Blackwell's island. Upon a previous action against the defendant vessels, brought by the owner of the *Idle Hope*, both tugs were found in fault, and a decree entered against both in December, 1884, which, upon appeal, was affirmed in the circuit on July 14, 1886. *The Amboy*, 22 Fed. Rep. 555. The libel in the present case was filed July 6, 1888. The claimants plead the statute of limitations; and, under the recent decision in the case of *Southard v. Brady*, *ante*, 560, I feel bound to sustain the plea. There has been no time since the collision during six and a half years when an action could not have been brought by the libelants or their representatives or assigns to recover their damages. It appears, however, that the claim was early placed in the hands of competent counsel, who advised waiting until the previous case was decided, in the expectation that, if the tugs were held liable, payment would be made without further legal

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.