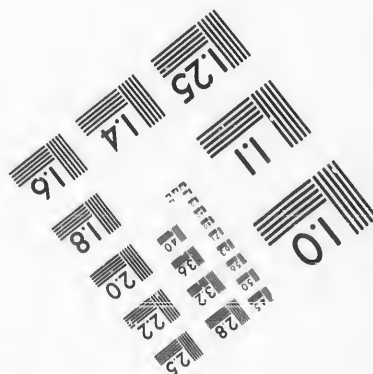
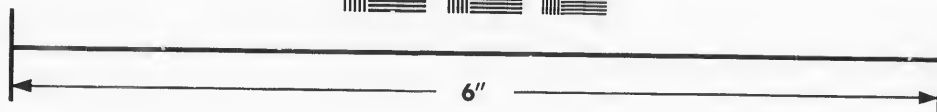
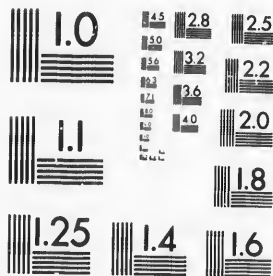


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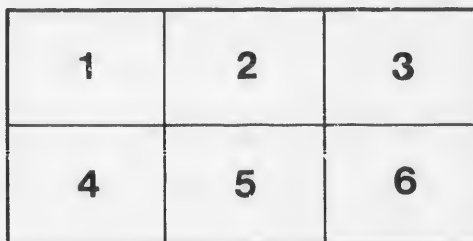
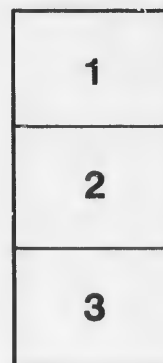
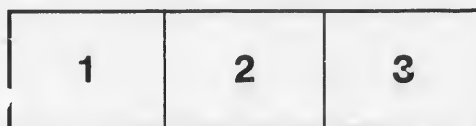
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PROVINCE HOUSE

IN THE HIGH COURT OF ADMIRALTY
OF IRELAND.

BEFORE THE HONORABLE JOHN FITZHENRY TOWNSEND, LL. D., THE
JUDGE OF THE COURT.

No. 76.

CAUSE—*The "Joseph Dexter" and Cargo, Lewis P.
Fairbanks, Master.*

In the matter of—FAIRBANKS, Petitioner.
BURCHARDT, Respondent.

Mr. Fairbanks appeared in person, unaided by Counsel or Solicitor.

John T. Hamerton, Esq., the Queen's Proctor, with Messieurs Elrington, LL. D., and Boyd, Q. C., acted on the part of the Defendant, who is a member of a firm of John W. Cater & Co., of Liverpool.

The "Joseph Dexter," a brigantine of 203 tons, owned at Halifax, Nova Scotia, in equal shares, by Lewis P. Fairbanks and the late firm of Salter & Twining, was loaded at Halifax with timber and deals by the owners on their joint account, and sailed for Queenstown, Ireland, on the 28th November, 1868, where she arrived on December 24th. Soon after her arrival at Queenstown, Mr. Fairbanks ascertained that Salter & Twining had fraudulently made over to the firm of Cater & Co., of Liverpool, all his (Fairbanks') interest in the ship and cargo. They (Salter & Twining) obtaining advances from Cater & Co. The sum drawn by Salter & Twining against the vessel and cargo amounting to £1700 (seventeen hundred pounds) sterling. Mr. Fairbanks would not recognise

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any right of Salter & Twining to pledge his property, and therefore Cater & Co. did not get possession.

The vessel and cargo was, however, arrested by a Warrant of the High Court of Admiralty of Ireland for an alleged breach of Contract, in not delivering the cargo to the holder of the Bill of Lading. Mr. Fairbanks then petitioned the Court to order the appraisement and sale of both ship and cargo. This petition was opposed by Cater & Co., who claimed to be the sole owners. But the Court ordered the sale. When the proceeds were paid into Court Mr. Fairbanks, with a view to bring the case to a hearing, instituted this claim for wages. The Judgment of the Court is very important in relation to the rights of masters, and the liability of the ship to answer claims for wages, and is here given in full, having been carefully compared with the Stamped Official copy of the Judgment.

After this decree the cause for Breach of Contract was abandoned by Cater & Co., they thinking it best to settle; Mr. Fairbanks receiving the Policies of Insurance, upon which a considerable sum is payable in respect of damage sustained on the voyage; also the sum of one hundred and seventy-five pounds in cash. By consent this arrangement was made a Rule of Court at the Four Courts, Dublin, on May 15th, 1869.

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JUDGMENT.

No. 76.

HIGH COURT OF ADMIRALTY OF IRELAND.

The 12th day of May, 1869.

The "JOSEPH DEXTER,"

FAIRBANKS, Master. }

The "Joseph Dexter," of Halifax, was arrested on the 25th of January last, at Queenstown, on a Warrant issued in a cause of breach of Contract by non-delivery of the cargo to the holder of the Bill of Lading. The master, Mr. Lewis P. Fairbanks, took defence in that cause. By an order subsequently made by this Court, a commission was issued, by the consent of all parties, for the sale, not only of the vessel but also of the cargo. The sale took place, the ship produced £590 and the cargo about £480, and the proceeds of the sale, amounting to about £980, are now in Court. The pleadings in the original cause are concluded, but no further steps have been taken to bring it to a hearing, and it is still undetermined. On 14th April last, Capt. Fairbanks filed a petition claiming £196 for wages, subsistence, travelling expenses, and disbursements. That claim was opposed by Mr. Otto Burchardt by an answer, in which he alleges himself to be the sole owner of the entire of the ship, and assignee of a mortgage, dated 21st September, 1868, of 32-64th shares thereof, executed by Captain Fairbanks, who then was owner of them, to Messrs. Salter & Twinning, of Halifax, N. S., then owners of the remaining shares; and Mr. Burchardt resists the Master's claim,—first, because under the special agreement for his employment he was bound to give his services as Master gratuitously; secondly, because the sum claimed is excessive; and, thirdly, because Captain Fairbanks having wrongfully, improperly, and in breach of duty, refused to deliver the cargo to the holder of the Bill of Lading, and improperly claimed to retain it on his own behalf, has occasioned great and unnecessary "delay, and expense," that the holders of the Bill of Lading were obliged to institute, and did institute, the suit in which the vessel was arrest-

ed, and that, by such misconduct and breach of duty, the Master has forfeited his right (if any) to wages altogether.

This answer renders it necessary to ascertain what was the agreement under which Mr. Fairbanks has acted as Master, and what was the effect of his refusal (which he admits) to deliver the cargo to the holder of the Bill of Lading as regards his personal claim.

There are two facts which are not and cannot be questioned, to which Mr. Burchardt's answer has not adverted: one is, that the ship, of which he claims to be the sole owner, was sold by this Court more than a month before his answer was filed; another is, that he is himself a member of the firm of Messrs. Cater & Co., of Liverpool, who have been prominent actors in the transaction relating to the non-delivery of the cargo.

It has been proved that Captain Fairbanks was sole owner of the "Joseph Dexter," until the 19th September, 1868, he agreed with Messrs. Salter & Twining to sell to them 32-64ths of that vessel on the terms that they were to advance the money requisite for her outfit, Captain Fairbanks being accountable to them for his share of it, and that he was to superintend the outfit, command the vessel, and navigate her to Ireland with a cargo of timber, which Salter & Twining were to furnish. The vessel and cargo were to be sold in Great Britain, and a certificate of sale was to be given to Messrs. Cater & Co., or one of their firm, to enable them to make title to the purchaser of the ship, the accounts were then to be settled by the respective part owners, and the expected profits of the adventure divided accordingly.

The 32-64ths were consequently assigned to Salter & Twining on 21st September last; the vessel was fitted out; they paid part of the expenditure in cash, and gave their notes of hand for the remainder, and they furnished part of the timber for the cargo; the rest of it was furnished by Captain Fairbanks himself, (it does not appear how much,) and it is admitted by Salter & Twining, in their letter to Cater & Co. of the 24th November last, (to which I shall hereafter revert,) that Capt. Fairbanks was jointly interested in it with themselves.

The answer asserts that Captain Fairbanks did not commence work in the vessel on the 21st September, nor until he joined her on the 10th November, but he has shewn that he superintended the outfit from the former date, and that is the proper duty of a Master. (The Chieftain, Brown, 1 L., p. 104.) So that if entitled to wages at all he will be entitled from the 21st September. He states that in order to secure Salter & Twining in his share of the outfit, he executed the mortgage since assigned to Mr. Burchardt. But he asserts that the amount of his liability for the outfit has never been ascertained; that when he signed the mortgage a blank

was left for the sum to be secured; that when he afterwards asked Salter & Twining for the mortgage, in order to fix his liability thereby, he was told it was destroyed as useless; and the next he heard of it was when it was produced to him at Liverpool by Cater & Co. with the blank filled up with the words "two thousand dollars," and this was done without his knowledge or assent; he therefore repudiates the mortgage as a fraud. Salter & Twining, in their letters to Cater & Co., of 10th and 25th February, 1869, rely on the mortgage as a virtual transfer to them of Captain Fairbanks' interest in the vessel. But he is not bound by their statements; nor am I called upon to pronounce either for or against the validity of the mortgage, for it is not even contended that it is a bar to the claim for wages, whatever effect (if any) it may have on Captain Fairbanks' share of the vessel.

Before leaving Halifax he executed a Certificate of Sale, but that being a mere power to sell the ship, could not affect his claim (if any) on his co-owner's share of her.

Captain Fairbanks acted as Master not only in the outfit but the loading. He signed a Bill of Lading for the cargo as *shipped by Salter & Twining and deliverable to order without freight, being owner's property.* Though not a professional seaman, he started on his rather perilous voyage at a dangerous season, and had the good fortune and skill to navigate the vessel safely to Queenstown. He admits that no specific agreement was ever made about his wages, that they were not even mentioned, and that had the adventure turned out prosperously, he would not have demanded them. Both parties have referred to a letter dated 24th November, 1868, written by Salter & Twining to Cater & Co., which was read by Captain Fairbanks before he left Halifax, and to which he assented. That letter is as follows:—

HALIFAX, 24th November, 1868.

Messrs. J. W. Cater & Co., Liverpool, G. B.

DEAR SIRS,—

We have instructed Captain Fairbanks, who will hand this to you, to proceed to Queenstown in the "Joseph Dexter," and as soon as the ship is safely moored, to go on to Liverpool, and call upon you and consult as to the best course to pursue to realize both vessel and cargo to the utmost advantage. It is perfectly understood between Captain Fairbanks and ourselves that both are to be sold without reserve at the same time, as Capt. F. is jointly interested in the result. We are desirous that he should be as fully and as freely consulted as we would be if present; and this is the more desirable as Capt. F. is well posted in such matters,

having sold similar vessels on your side before, and being a thoroughly practical man, can give every information as to build, character and equipment of vessel and cargo: We have advanced the amount necessary to fit out the "Joseph Dexter." Everything is new and good. The proceeds, therefore, after the necessary disbursements are paid, and also what Captain Fairbanks may wish to have for strictly personal expenses, are to be held subject to our order.

We are yours, faithfully,

(Signed)

SALTER & TWINING.

It is plain the statements of Salter & Twining, in their subsequent letters to Cater & Co., cannot bind Captain Fairbanks, namely, that he was bound to give his time to fit out the vessel free of charge. They refer, in those letters, to the above mentioned letter of 24th November, as containing their understanding with him; and, as a matter of evidence, I give more credit to his statements on oath, than their assertions made after the dispute had arisen. But Mr Burchardt contends that by this agreement Capt. Fairbanks precluded himself from claiming any sum beyond his strictly personal expenses and disbursements. If a professional man, or one whose services are accepted as such, performs professional work, he is *prima facie* entitled to a fair remuneration for them; but if the *prima facie* presumption be disputed, he is bound to make out his case, and it is then a question whether, taking all the evidence together, he has done so. (Hurgeston & Kelly, Lib. Ex. 360.) If he has declared or admitted that he gave them on the understanding that he was not to be paid for them, he certainly cannot recover, but the expectation of his being otherwise remunerated will not prevent his recovering the fair value of his work and labor if that expectation had failed him. Thus, in *Baxter vs. Gray*, 3 Man. & G. 761, a surgeon was allowed to recover for his professional services and medicines against the executors of his patient during whose life the plaintiff had made no claim for them, hoping to be re-paid by a legacy, in which expectation he was disappointed. Now, looking to the language of the letter of the 24th November, it surely could not be successfully contended that the wages of a mere stranger, if employed as master, would not be necessary disbursements; and when I am asked to imply that Captain Fairbanks' wages should be excluded from the category of necessary disbursements, merely because nothing had been specially said about them, I should expect some authority for such a strained construction.

It was likely enough that they should not have been specially mentioned, as he was a part owner, and the parties appear to have been long on very intimate and confidential terms, and all expected

a profit, not a loss, on the adventure. On the whole, I do not think that there is evidence that the plaintiff undertook to give his services in any event gratuitously, and as his former expectations have been disappointed, I hold that he is remitted to his original rights.

But it is further contended, that even if that be so, his misconduct has forfeited his claim. Now, the facts are these: He arrived on the 21st December at Queenstown, where he left the ship, and travelled on to Liverpool where he was told by Mr. Burchardt, on the 28th, that nothing could be done till the holidays were over. He therefore returned directly to Queenstown, but was never consulted by Cater & Co. as directed by the letter of Salter & Twining. On the contrary, Cater & Co., insisting on their alleged rights under the bill of lading and certificate of sale, treated him, not as jointly interested in the ship and cargo, but merely as an ordinary master, ordering him to obey their directions about the ship and cargo. I have read Captain Fairbanks' letters to them carefully, but am quite unable to see anything improper in them, he only asserts his own rights, refers to Salter & Twining's letters, and denies their power to pledge his property for their own engagements.

However, Cater & Co. having endorsed the bill of lading to Mr. Barker, he demanded the cargo, which Captain Fairbanks refused to deliver. Whether the refusal was in point of law justifiable or not, is a matter on which it would be premature to express an opinion. But he is entitled to shew what reasons he alleged for not delivering it; and he accordingly wrote to Cater & Co. a letter dated 21st January, stating that Mr. Barker had demanded the cargo, and threatened, on his refusal to deliver it, to have Mr. Fairbanks put in prison and the ship arrested. None of the statements of that letter as to Mr. Barker's conduct are denied, though that gentleman was in Court at the hearing. I have no doubt that Mr. Fairbanks was treated, to say the best, with a high hand, and there was some provocation given for the harsh epithet fraudulent which he used respecting the manner in which he had been treated. It does not appear to have been ever stated to him by Cater & Co., who yet knew very well that he was interested in the cargo, that any property had passed under the endorsement of the bill of lading, or that Barker was more than a nude assignee, who would as such not be entitled to sue on it either at Common Law or in this Court, as was decided by the "*St. Cloud*" (Brown & L. 18.) No doubt the consignee named in a bill of lading, or his assignee under a proper endorsement of it, is in general the person entitled to receive the cargo, and Captain Fairbanks would have been quite justified in delivering the cargo to the holder of the bill of lading. But then he may have fairly expected that Cater & Co. knew the

true state of affairs, and though there is reason to believe that Salter & Twining were indebted to them in a considerable sum, there is nothing to shew that Captain Fairbanks knew anything of the dealings between the firms or ever authorized Salter & Twining to pledge any property of his to Cater & Co. His refusal to deliver the cargo is, however, treated as an act of such misconduct as would justify this Court in holding that his wages are forfeited altogether. In support of that proposition, the "Thomas Worthington," 6, Notes of Cases, 570, has been cited; this was a case in which the master of a ship, in contravention of his owners order to keep their interests in view, executed a charter party at Bahia for a voyage to Europe, and in anticipation of the voyage received £600 on account of the freight, which he paid over to the agents of the owners. The owners having become bankrupt, their assignee relied on this payment as a forfeiture, as amounting to collusion and fraud. But the Court did not deem it a forfeiture. Dr. Lushington, in his judgment, said it was a serious question how far any conduct merely erroneous, and not tainted with guilty intention, could entail upon the master a forfeiture of his whole wages, and said he was not aware of any authority in any Court, or of any case, to that effect. It is a difficult question how far a master ought or ought not to follow the directions of his owners' agents. But Cater & Co. were not merely agents of Salter & Twining. They were as distinctly apprised of Mr. Fairbanks' position as an owner as were Salter & Twining themselves. Grant that Mr. Fairbanks would have shewn greater discretion had he trusted Cater & Co., and submitted to their directions; am I to visit him with the consequence of that want of discretion when there was neither *mala fides* collusion, negligence, or incapacity. It is unquestionable that certain misconduct may operate as a forfeiture of wages, whether of a mere seaman or a master; but in the "Camilla," Swabey, 314, Dr. Lushington states his opinion that neither error, nor want of seamanship, nor improper refusal to sign a bottoming bond, could be admitted as evidence in bar or even in reduction of a master's claim for wages. And the same principal or mere error of judgment on the master's part would not work a forfeiture of his wages, was recognized in the "Atlantic." (Lush. 566.) I cannot, therefore, hold that there has been any forfeiture of the wages to which Captain Fairbanks may be entitled, even assuming that he acted without reason, and in utter mistake, in refusing to give up the cargo; a question which I am not at present called on to decide, and on which I offer no opinion.

I am, therefore, bound to say, that whether Mr. Burchardt is to be deemed merely an agent of Salter & Twining, or beneficially entitled to their share of the proceeds, or to any part of it, that share is liable to one-half the master's wages from 21st September,

1868, to 25th January, 1869, when the vessel was arrested. But I cannot allow those wages at the rate claimed, nor at a higher rate than £12 a month, which is the rate fixed by the only witness examined for the Respondent; any sums paid by Mr. Fairbanks to the ship keepers for wages, between 5th January and 29th January must also be allowed, unless already charged in the Marshal's account of expenses. I shall refer it to the Registrar to calculate these sums, unless they are agreed on by the parties. I cannot allow Mr. Fairbanks any travelling expenses, except as a witness in the matter of his own petition; but I shall allow him subsistence money at the usual rate, half the amount of it must, however, be deducted in respect of his own liability. I would willingly pay him, if I could, something out of his own share of the proceeds of the ship, but as the mortgage vested in Mr. Burchardt may possibly operate as a charge on those proceeds, which, as in the case of a bottomry bond by which the master is bound, may give priority to the mortgage for the amount, whatever it may prove to be, for which Mr. Fairbanks is liable for his share of the outfit, I cannot do so. There is, moreover, the pending suit, so that I cannot say there is any surplus at my disposal or as yet ascertained.

I regret that my decree will be of little substantial benefit to him, but that is a matter beyond my power to remedy. I had hoped that an arrangement between the parties would prevent the necessity as well of this decision as of any further litigation in this unfortunate matter, the ill-success of which might I think have been easily averted by a little more consideration for the position and acknowledged rights of Mr. Fairbanks, but I have only to deal with the legal question, and as I deem him entitled to a decree, and as he has to a considerable extent established his claim against a very rigid opposition. The Respondent must pay the costs of this petition and the subsequent proceedings. The costs in which Mr. Fairbanks employed his solicitor will be taxed as usual. The only costs to be allowed him since he has acted for himself will be the costs out of pocket.

I certify the foregoing to be a true copy.

Dated this 23th day of May.

(Signed)

A. H. BARTON,
Registrar.

THE DECREE.

The 12th day of May, 1869. In Court.

No. 76.

THE "JOSEPH DEXTER."

In the matter of—FAIRBANKS, Petitioner.
BURCHARDT, Defendant.

The matter of this Petition having been assigned for Judgment on this day, the Judge in the presence of the Petitioner in person, and of the Counsel and Proctor for the Respondent, delivered Judgment, and pronounced for the Petitioner's claim to the following extent—That is to say,—He decreed the Petitioner to be entitled to be paid his wages as Master of the "Joseph Dexter," at the rate of £12 per month, from the 21st day of September, 1868, to the 28th day of January, 1869, when said ship was arrested, and also to be entitled to be repaid such payments, if any, as shall appear to have been made by him to Peter Morash and William Walsh, or either of them for wages and subsistence money, from the 5th day of January, 1869, to the 28th day of January, 1869, not already charged by the Marshal as part of his expenses in the cause, and also kettle money at the usual rate for masters of ships from the 28th day of January, aforesaid, and he referred it to the registrar to ascertain the amount of such payments and subsistence and kettle money respectively. And he decreed that one moiety only of the said wages and subsistence and kettle money, "when ascertained," shall be chargeable against the proceeds of the sale of this vessel now in court, the other moiety being chargeable to the Petitioner himself, as owner of 32-64th shares of this vessel and of the nett proceeds of said sale; and he condemned the Respondent in the costs of the petition in this matter, and the subsequent proceedings herein, including the expenses of the Petitioner's journey from

Queenstown to Dublin, and referred it to the Registrar to tax and ascertain such costs, with a special direction to allow in such taxation from the time when the Petitioner commenced to act for himself in person therein, only the actual costs out of pocket. And he reserved all further directions.

The *Petitioner* in person.

The *Queen's Proctor* for Respondent.

(A true copy.)

(Signed)

A. H. BARTON,
Registrar.

NOTICE. — The evidence taken at the trial, with all letters having reference to this case, showing very plainly the frauds, and who committed them, is now ready for the press, and will be published in a few days.

LEWIS P. FAIRBANKS.

WOODBOURNE, DARTMOUTH,
August 2nd, 1869.

