

in all such cases the master and crew are entitled to share in the compensation. I think the proper practice is to determine the amount to be awarded as the entire compensation, and to apportion it as between the vessel, master, and crew; and that portion awarded to master and crew will be paid into the registry to await their application for it. *The Adirondack*, 2 FED. REP. 872.

Of the sum so awarded three-fifths will go to the owners of the steamer, and two-fifths to her master and crew—the master receiving one-tenth of the two-fifths, and the officers and crew, including the master, the remainder in proportion to the respective rates of their wages.

As the claimants have made no tender they will be charged with the costs.

Decrees accordingly.

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### THE SWEDISH BARK ADOLPH.

(*District Court, S. D. New York.* November, 1880.)

1. APPEAL—RELEASING VESSEL FROM ARREST—PRACTICE—ADMIRALTY RULE 11.—On appeal to the circuit court from a decree of the district court dismissing the libel, the claimant of the vessel which was attached on service of the monition is not entitled to have her released, or to a bond from the libellants to pay such damages as the claimant may sustain by reason of her detention pending the appeal, in case the libel shall be dismissed in the appellate court. To hold otherwise would be inconsistent with Admiralty Rule 11. Unless the attachment was *mala fide*, or there was gross negligence amounting to bad faith, no damages for her detention caused by such arrest can be recovered.

*The Evangelisimos*, Swabey, 378, etc.

The English cases, if not consistent with this rule, cannot now be sustained.

*The Victor*, Lush. 72, etc.

Suits for possession stand on a different ground.

*The John*, 2 Hagg. 317.

*Henry T. Winj* and *E. L. Gove*, for claimants.

*W. Mynders*, for libellants.

CHOATE, D. J. In this, which is a suit of damage by collision, the claimant of the bark Adolph has had a decree dismissing the libel, with costs, and the libellant has given notice of appeal to the circuit court. Before the expiration of the 10 days allowed by the practice of the court for the marshal to retain the vessel in his custody, the claimant, on affidavit by his proctor that he is unable to give bond for the value of the vessel, has applied to the court for an order directing the marshal to release the vessel, or in the alternative for an order directing such release, unless the libellants shall give bonds to pay such damages as may be sustained by the claimant by reason of her detention pending the appeal, in case the libel shall be dismissed in the appellate court. The application cannot be granted consistently with the rights of the libellants and the practice of the court.

The arrest of a vessel in a cause of damage which is allowed to a libellant on giving the usual security for costs, is an inconvenience to which the owners must submit as one caused by the exercise of a legal right on the part of the plaintiff, and unless the attachment is *mala fide*, or by such gross negligence as to amount to bad faith, no damages can be recovered for her detention caused by such arrest. *The Evangelisimos*, Swabey, 378; S. C. 12 Moore's, P. C. C. 358; *The D. S. & Peri*, Lush. 543; *The Strathnaver*, L. R. 1 Ap. Cases, 58; *The Active*, 5 Law Times, (N. S.) 773; *The Amelia*, Moore's, P. C. C. The English cases in which damages for detention have in similar suits been allowed, are consistent with this rule, or if not cannot now be sustained. *The Victor*, Lush. 72; *The Margaret Jane*, L. R. 2 Adm. & Ec. 345; *The Cheshire*, Wetch, Bro. & Lush. 362. Suits for possession stand on a different ground. They are brought to recover the possession and use of the vessel. *The John*, 2 Hagg. 317; *The Eliza*, 2 Spinks, 34.

I see no reason why the same principle does not apply to a libellant prosecuting an appeal in the circuit court in good faith. The decision of the court below is not of that conclusive character that his suit thereafter ceases to be one prosecuted in good faith; he has simply failed to produce evidence

enough to sustain his claim in the judgment of the court, and the law gives him a new trial in an appellate court, and he may there introduce more evidence. This right of appeal would be of no value whatever if the vessel were released because the libel was dismissed below, and the long-accepted practice in the admiralty courts of detaining the vessel in such case, if an appeal is taken, shows clearly that his right to secure his alleged demand by her continued arrest has been always recognized. It seems to me, also, that the Admiralty Rule 11, which secures to a claimant the right to bond a vessel under arrest, and to either party, in proper cases, her sale pending the suit, was designed by the supreme court as giving to the owners of vessels sued for damages all practicable relief against the hardship arising from the exercise of this right of arrest on the part of a libellant proceeding in good faith. And it seems to me that the granting of the relief here asked would, in such a case, be inconsistent with that rule.

In the present case I cannot doubt the good faith of the libellant. The case was by no means so clearly for the claimant on the proofs that the libellant's suit or his appeal can be pronounced frivolous or one prosecuted *mala fide*. If such should appear to be the case, it is unnecessary to determine what relief the court could give the claimant. As it is, this claimant is suffering only the inconvenience and hardship to which all owners of property are liable from the attachment of their goods by due process of law in a suit in which such attachment is permitted. It is unnecessary to consider whether the proof of claimant's alleged inability to bond the vessel is sufficiently made out for any purpose.

MINTURN and others *v.* ALEXANDRE and others.*(District Court, S. D. New York. ———, 1880.,*

## 1. COLLISION—DAMAGE TO CARGO—LIBEL—AVERMENT OF—TITLE—PLEADING—PROOF.

A libel, filed to recover damages for collision to a cargo, should contain averments showing unequivocally, and with reasonable certainty, that the libellants had such a special or general right of property in the cargo that by its loss or injury they had suffered damage.

Where the libel averred that certain sugars were laden on board the British bark H., "to be carried thereon to the port of New York, and thence safely delivered to your libellants, and bills of lading therefor duly signed by the master of said bark, naming the libellants as consignees of said sugars;" and also averred "that by the collision your libellants have suffered damage in the value of said cargo \$25,000."—

An exception having been filed to the libel that it did not aver what, if any, interest the libellants, as consignors, had in the property:

*Held*, that the averments of the libel did not necessarily import that the libellants had any interest in the goods, and that the exception to the libel must be sustained.

Distinction between the sufficiency of proof of facts as evidence, and the sufficiency of the averment of facts as matter of pleading, stated.

In Admiralty.

*R. D. Benedict*, for respondents.

*G. A. Black*, for libellants.

CHOATE, D. J. This is a libel for collision. The libel avers that there was laden at the port of Havana, on the British bark Helen, certain sugars, "to be carried thereon to the port of New York and there safely delivered to your libellants, and bills of lading therefor duly signed by the master of said bark, naming the libellants as consignees of said sugars." The libel then avers in proper form the facts of the collision by which the vessel was sunk upon the voyage. It also avers "that by the collision your libellants have suffered damage in the value of said cargo \$25,000." An exception is filed by the respondents because the libel does not aver "what, if any, right, title, or interest the said libellants, as consignees, had in said sugars at the times in the libel mentioned." This