

BROUGHTY *v.* FIVE THOUSAND TWO HUNDRED AND FIFTY-SIX BUNDLES
OF STAVES, etc.

(*Circuit Court, N. D. New York. January 30, 1885.*)

CARRIERS OF GOODS—LOSS OF GOODS—EVIDENCE.
Decree of district court, 21 FED. REP. 590, affirmed.

In Admiralty.

Marshall, Clinton & Wilson, for appellant.

Cook & Fitzgerald, for appellee.

WALLACE, J. Under the allegations in the libel, the libelant cannot be permitted to deny that he received on board his schooner all the cargo described in the bill of lading. But the claimant, the consignee, accepted the cargo without insisting upon a tally by the carrier, and without making one himself, to ascertain whether all was delivered that was shipped. Part of the cargo after its delivery to the consignee was permitted to remain exposed on the dock over night. After the cargo was transferred from the dock to the cars the cars were sealed, and the cargo remained in them for about six weeks when a tally was made, and it was discovered that part of the cargo described in the bill of lading was missing. The acceptance of the cargo by the claimant without objection was an acknowledgment that the carrier had performed his contract, and implied a promise to pay the freight, which the consignee was instructed to pay by the bill of lading upon delivery. The testimony for the libelant tends to show that all the cargo received was delivered as strongly as the testimony for the claimant tends to show the contrary. The affirmative of the issue is with the claimant, he having accepted delivery of the cargo. His proofs are as unsatisfactory as those of the libelant. It is as reasonable to infer that the missing part of the cargo was stolen upon the dock after it had been delivered to the consignee as that it was lost or misappropriated on the voyage. The decree of the district court is affirmed, with costs.

RAWSON and others v. LYON and others.¹

(District Court, S. D. New York. January 23, 1885.)

1. REPRESENTATIONS—FRAUD—MUTUAL MISTAKE.

The owners of the brig *D.* filed a libel against the charterer to recover a balance of charter money. The charterer answered that "at the time of the execution of the charter-party it was represented, warranted, and agreed by the master and agents of the brig that she was of 247 tons register, and would carry 2,700 barrels, or from 290 to 300 tons of logwood, on the faith of which the charter was accepted, but which agreement was by mistake inadvertently omitted from the charter;" and that the vessel brought home only about 225 tons of logwood. The written charter contained a clause that the vessel was of 247 tons register, which was true; and it was proved that she carried on her outward voyage 2,900 barrels, and on the homeward voyage brought only 225 tons of logwood, because so bulky that more weight could not be got under deck.

2. SAME—EVIDENCE.

Evidence in support of the allegation of the answer as to the representations was taken under objection to its admissibility, and contrary evidence was offered in behalf of the brig.

Held, that if the answer had charged fraud, the evidence would have been admissible under recent authorities, (*contra*, *Baker v. Ward*, 3 Ben. 499,) and so if a mutual mistake of fact were charged; that on the evidence there was no mutual mistake of fact, or any such representations as were meant or understood as a warranty that the brig would carry 290 or 300 tons of logwood.

3. SAME—EVIDENCE MUST BE SATISFACTORY.

If the rule which makes the writing the highest evidence of the contract, and excludes evidence of prior conversations to vary it, or to attach to it new conditions or obligations, is to be relaxed in cases of fraud, actual or constructive, or of mutual mistake, the evidence showing such fraud or mistake must be entirely clear and satisfactory, and in cases of doubt the writing must prevail.

In Admiralty.

Benedict, Taft & Benedict, for libelants.

Scudder & Carter and Geo. A. Black, for respondents.

BROWN, J. This libel *in personam* was filed to recover the sum of \$515.83, a part of the sum of \$2,150, agreed to be paid by the respondents for the charter from the libelants to the respondents of the brig *Dauntless*, for a voyage from New York to Port au Prince and back in November, 1882. The answer alleges that "at the time of the execution of the said charter it was represented, warranted, and agreed by the master and agents of the brig that she was of 247 tons register, and would carry 2,700 barrels, or from 290 to 300 tons, of Jamaica log-wood; on the faith of which the charter was accepted, but which agreement was, by mistake, inadvertently omitted from the charter." Upon the trial it was proved that the brig, upon her outward voyage, took 2,940 barrels; but on her return voyage, though fully loaded, she could take but 225 tons of logwood, instead of 290 or 300 tons. Considerable testimony was also offered to show that in the negotiations leading to the execution of the charter-party, the brig was represented by her captain to be able to take from 290 to 300 tons of

¹ Reported by R. D. & Edward Benedict, Esqs., of the New York bar.