

being of any practical value, and that had they so regarded it they would have adopted it and practiced it." This view respecting the value of the seventh claim is of itself conclusive. It is said the master is mistaken regarding the imputed admission. However this may be, he virtually reports the matter covered by the claim as valueless; and the proofs seem to justify this conclusion.

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STILLWELL v. THE J. D. HALL.<sup>1</sup>

(District Court, S. D. New York. April 11, 1888.)

SHIPPING—CARRIAGE OF GOODS—LIABILITY FOR LOSS.

Tin was shipped from New York to Buffalo in an open boat, contrary to custom, and, by reason of heavy rains, and some leaking of the boat, was delivered damaged, for which damage this suit was brought. The evidence indicated that there had been a complete misunderstanding between libelant and claimant as to the hatches of the boat, the libelant supposing they were to be used, the claimant supposing the libelant waived the use of them. *Held*, that both were in fault for the damage; the claimant, as common carrier, being bound to carry the goods safely, and to know what was improper to be carried without hatches; and the libelant, whose employe loaded the boat, for not seeing to it that the latter had hatches. Both were also in fault for not dunnaging such a cargo in an open boat. *Held*, that libelant should recover half his damage.

A. B. Stewart, for libelant.

Hyland & Zabriskie, for claimants.

BROWN, J. The libelant, acting as common carrier, contracted with the captain of the canal-boat J. D. Hall, in May, 1886, to carry a cargo of tin in boxes from New York to Buffalo. The Hall was a Pennsylvania open-deck boat, provided with large hatches, so that the deck could be covered. The hatches, however, were at this time in Buffalo. During the trip, through heavy rains and some leaking of the boat, a portion of the cargo sustained damages, to recover for which this action was brought. For the claimant it is contended that in the contract of carriage it was expressly stated that the boat was an open-deck boat, and would have no hatches for the trip. If the testimony warranted a finding that this was the understanding, I should have no hesitation in acquitting the boat of liability. The contract in that case would plainly put upon the libelant the risk of the weather, as in the case of a contract for shipping goods to be carried on deck. The libelant's story, however, is precisely the reverse. He testifies that in answer to his inquiries whether the boat had hatches the claimant replied that he had; that tin in cases was a kind of cargo that was never customarily shipped on deck, or in boats without hatches. Considering the fact that the tin was liable to damage from wet weather; that it is never customarily shipped on deck, or exposed in

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

open boats; and that the libelant was well acquainted with the proper handling of such goods, it is impossible to suppose that the libelant, after making the express inquiry whether the claimant had hatches or not, would have shipped these goods in an open boat had he understood that there were no hatches for this trip. Nevertheless, an additional witness for the claimant confirms the latter's testimony that in answer to the libelant's inquiries he told him that the hatches were in Buffalo. In this state of things I can see no alternative but to find that there was a direct and complete misunderstanding on each side; and that both, taking the circumstances all together, are to blame for such a shipment without a clear understanding upon so important a point. The claimant, as common carrier, was bound to carry the goods safely, and to know what was proper and improper to be carried without hatches. The very fact of the libelant's inquiry about his hatches, the nature of the articles, their liability to damage in an open boat, and the custom not to carry them in an open boat, should have put him on his guard against misunderstanding. Ordinary care and prudence, under such circumstances, required the captain, either by repetition or by a very clear statement, to take special care that no misunderstanding existed. In whatever way the misunderstanding arose,—and there are various forms of question and answer by which it might arise,—the previous conversation could not have been wholly clear and unequivocal. Even the libelant, in his protest, did not speak quite surely about it. On the other hand, the boat was loaded by the libelant's employe, who was also presumably acquainted with the custom of the business, and with the impropriety and danger of shipping tin in an open boat. There were no hatches visible; and they are so bulky as to be conspicuously present or absent. Yet no further inquiry was made on the subject. Upon both sides, as it seems to me, there were sufficient circumstances to impose upon each the necessity of more caution, and of more careful inquiry than was made. Moreover, the evidence would indicate that the damage was caused from the accumulation of water upon the bottom of the boat, on which the lower tiers of boxes rested. The claimant, knowing the liability of such cargo to be injured by water accumulating in that way in rainy weather, ought to have put dunnage beneath the lower tiers, to avoid that danger. It is not, indeed, usual to put dunnage in canal boats; but it was not usual to carry tin in open boats. In departing from the custom by taking such cargo in an open boat, the claimant was bound to take reasonable precaution to protect it from injury, by the use of dunnage, as in other cases of known necessity therefor. But in this respect, also, the libelant would seem to be chargeable with blame, since the loading was done by his own man, and no dunnage was suggested. The damages and costs must therefore be divided.

MARX *et al.* v. THE BRITANNIA.<sup>1</sup>

(District Court, S. D. New York. April 28, 1888.)

## SHIPPING—CARRIAGE OF GOODS—NEGLIGENT STOWAGE—LIMITING LIABILITY.

Two drums of glycerine in a consignment of 102 on board the steam-ship *Britannia*, were cut by chafing together during the voyage, whereby the glycerine leaked out. It appeared that the dunnage wood which was placed between all the drums of the consignment, had fallen out during the voyage from between these two drums only. The voyage had been a rough one. The damage was within the exceptions of the bill of lading. *Held*, that the only fair inference was that the wood between these drums was not secured in the usual and proper manner, and that the loss was therefore the result of negligence in stowage, for which the steam-ship was liable, notwithstanding the exceptions of the bill of lading.

In Admiralty. Libel for damages.

*Geo. A. Black*, for libelants.

*R. D. Benedict*, for claimant.

BROWN, J. In December, 1885, the *Britannia* delivered in New York 102 drums of glycerine, consigned from Marseilles on the libelants' account. Two of the drums were so injured on the passage that the glycerine was lost to the value of \$175; the rest of the drums were uninjured. The bill of lading excepted loss from "leakage" or "pressure of other cargo." Drums of glycerine are peculiar in construction, and require to be specially stowed with boards or planks between the drums. The testimony of the mate, given two months after the arrival of the steam-ship, shows that these two drums were in the lower hold; the one being on the top of the other; and that pieces of wood, which in the stowing had been placed between them to keep them properly secured and apart, had dropped out, the ship having met rough weather on the passage. The testimony of the master, taken two years afterwards, as respects the disarrangement of the wood, is, I think, less reliable. The mate states positively that the wood fastenings for these two drums were all that had got out of place, and there is proof of general good stowage. As the loss arose from "leakage," which is one of the exceptions of the bill of lading, the burden of proof, in order to charge the ship, is upon the libelants to show that there was some negligence on the part of the vessel that produced the leakage. The mate's testimony shows the cause to have been the dropping out of the wood that separated these two drums, which allowed the drums to pound or chafe each other. Had there been a general disarrangement of the wood, or had it dropped away between other drums, the proof of such facts, together with the proof of general good stowage, might have warranted the inference that the disarrangement and dropping out of the wood was caused solely by the severe weather, a peril of the sea, which is also within the exceptions of the bill of lading; and not by any defect in securing the wood of these two packages. But the

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