

"The trunks and effects of passengers are included in the adjustment of general average. The case does not often occur; but when it does, the question arises by what standard shall they be estimated. Cleirac, in his commentary upon the *Rolle of Oléron*, says: 'The passengers are required to have produced to the master previous proofs of the contents, or obtain indemnity only for the value of the empty trunk.'"

In *Bedarride's Commentaire*, vol. 5, the distinguished author, after quoting *Emerigon* and *Pothier* to the effect that passengers' baggage must contribute, says, (section 1848:)

"The Code having only repeated the words of the ordonnance of 1681 we can, under it, accept as settled the principles taught by *Emerigon* and *Pothier*. Till now the question has not been raised. What has led to this result is that ordinarily the value of the passenger's baggage would not compensate for the delays or the expense of a settlement in general average, or the delays which would entail on navigation."

The decree of the district court is affirmed, with costs of this court.

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### THE SERAPIS.

*LA SCALA et al. v. THE SERAPIS. LA SCALA et al. v. McINTYRE et al.*

(District Court, E. D. New York. July 27, 1888.)

**1. SHIPPING—CHARTER-PARTY—AGENT'S COMMISSION.**

Where a ship's charter provided that the steamer was to be consigned to charterer's agents at ports of loading, paying one commission of two and a half per cent. to charterer's order at the first loading port, and to be reported at the custom-house by the said agents on customary terms, *held*, the agents were not entitled to a commission at a port of discharge.

**2. ADMIRALTY—PRACTICE—MOTION TO DISMISS LIBEL—HEARING—EVIDENCE.**

Where a motion to dismiss a libel is heard without objection, and the charter-party is presented to the court and commented on by counsel, no question being raised as to its terms, and is also referred to in the answers to the interrogatories, libelants are not entitled to have the question determined according to the allegations of the libel, irrespective of the provisions of the charter-party.

In Admiralty. Two libels filed by *Diego La Scala* and *Filippo Modica*, one against the steam-ship *Serapis*, her tackle, and the other against *John J. McIntyre* and others.

*Chas. Stewart Davison*, for libelants.

*E. B. Convers*, for claimants.

**BENEDICT, J.** The question so earnestly discussed on behalf of the libelants in these two cases, whether, where a charter of a ship contains a provision that the ship shall be addressed to a broker to be named by the charterer, such addressee can maintain an action in his own name against the ship or her owner to recover damages for the failure on the part of the ship-owner to comply with this clause in the charter, cannot

be decided in these cases, for the reason that the charter-party in this case contains no provision for the consignment of the ship at any port except the port of loading. The libelants' claim is for a failure to allow them to do the ship's inward business at the port of New York, which was a port of discharge and not of loading. The language of the charter is as follows:

"The steamer to be consigned to charterer's agents at ports of loading, paying one commission of two and a half per cent. to charterer's order at the first loading port, and to be reported at the custom-house by the said agents on customary terms."

This language imports no obligation on the part of the ship to the charterer's agent at the port of New York, because the port of New York was not a port of loading, but a port of discharge; and its import is too obvious to permit it to be varied by parol testimony.

As to the point made in behalf of the libelants that the charter is not before the court, it is sufficient to say that the present motion is a motion to dismiss the libels. The motions were heard without objection, and the charter-party was presented to the court and commented on by the counsel; no question being raised as to its terms. It is, moreover, referred to in the answers to the interrogatories. It is not now open to the libelants to demand that the question be determined according to the allegations of the libel, and not according to the written contract, on which the libelants' claim must rest.

There are some other causes of action set forth in the libels to which little importance seems to be attached. The principal question is the one already stated, and, as that cannot be raised under the charter-party in question here, the libels may as well be dismissed at this time. If, however, counsel desire an examination and decision upon the other causes of action, and will request such a decision, those questions will be examined and passed on, otherwise the motion to dismiss the libels will be granted.

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#### THE THOMAS MELVILLE.

*WINDMULLER et al. v. THE THOMAS MELVILLE et al.*

(Circuit Court, S. D. New York. October 15, 1888.)

#### 4. SHIPPING—CARRIAGE OF GOODS—INJURIES TO CARGO—PLEADING AND PROOF.

Upon a libel for damage alleging "that by reason of the neglect and failure of the said master \* \* \* to properly stow the said merchandise, and of the improper, unsafe, and unseaworthy condition of the said steamer, and by want of proper care of the said master, \* \* \* and by reason of the improper and insufficient dunnage of the merchandise, and the unsafe and leaky condition of the deck of said steamer, on said voyage, the said merchandise was damaged," no recovery can be had for damage by coal-dust not resulting from improper stowage.