

the plaintiffs' last request, viz., that "the plaintiffs are not prohibited from so manufacturing goods as to conform to a lower, rather than higher, exaction of the tariff; and though they may have adopted a very technical device to escape the higher rate, the question presented by the case is only whether their goods are embraced within the higher rate, and is not whether the plaintiffs have evaded the law."

The defendant requested the court to charge: (1) That if the jury find that the selvedge of these goods was made wholly or in part of cotton, introduced for the purpose of changing the classification, there should be a verdict for the defendant; (2) that if the jury find that the plaintiffs' goods were made with threads composed of wool and cotton, introduced for the purpose of changing the classification, verdict should be for the defendant; (3) that if the jury find that these goods are women's dress goods, substantially composed of wool, and known in trade and commerce as "all-wool fabrics," the defendant is entitled to a verdict; (4) that if the jury find that the quantity of cotton introduced in these goods is so insignificant as not to alter the character of the goods and remove them from the category of "all-wool dress goods," as known in trade and commerce, the defendant is entitled to a verdict,—each of which requests were denied by the court.

Verdict for plaintiffs.

HENDERSON *et al.* v. THREE HUNDRED TONS OF IRON ORE.¹

MARVEL v. THE SCANDINAVIA.

(District Court, S. D. New York. February 5, 1889.)

1. SHIPPING—LIBEL FOR FREIGHT—DAMAGES FOR DETENTION—WHEN ACCRUES.

The steam-ship *S.* arrived at New York with iron ore. The bill of lading receipted for 300 tons, "weight unknown," to be delivered to the libelant *M.*, freight payable on amount delivered. It was unladen into libelant's lighter along-side, and weighed in transit by a custom-house weigher. This weight could only be obtained at the custom-house after the returns were filed. There is no settled custom here as to payment of freight before or during discharge. Before discharge notice was sent to the consignee, requiring payment of freight before delivery. He replied that he would pay when the weight was ascertained. As soon as the ore was on the lighter, and before the exact weight was ascertainable, the vessel attached the ore for the freight; and on the next day a cross-libel was filed for damages for refusal to deliver, no tender having been made. *Held*, that both actions were prematurely brought, and that the libelant should pay all costs and expenses incident to the premature filing of the original libel.

2. SAME—ADMIRALTY—PLEADING—SUPPLEMENTAL COMPLAINT.

A libel fatally defective cannot be sustained through a supplemental bill setting up matters subsequent; but a supplemental libel may, for cause, be allowed to stand as an original libel as of that date.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

3 SAME—REFUSAL TO DELIVER CARGO—CONVERSION

The supplemental cross-libel set up a proper tender made after the weight was ascertained, and the vessel's refusal to deliver. *Held*, that such refusal was not evidence of any conversion of the ore, and would not sustain an action of trover, or any cross-libel, as the ore was at the time in the custody of the law, in a court of competent jurisdiction, and in a *bona fide* suit brought without malice in the prosecution of the ordinary right of suit; and that the consignee's remedy was in the original suit only.

4 SAME—SALE OF CARGO PENDENTE LITE—DAMAGES ON ATTACHMENT.

Iron ore attached was ordered sold as "perishable" on account of the heavy charges for keeping it. It brought less than the market value, and the consignee claimed the loss as damages in his cross-libel. He had full knowledge of the attachment, the application to sell, and the sale, and could easily have bonded the goods, but chose not to do so. *Held*, that the action would not lie; that his remedy in admiralty was in the original suit only, under the rules that provide for bonding; and that no damages are recoverable either for the detention of the *res pendente lite*, nor for the sale by order of the court *pendente lite*, under such circumstances. In general no damages are recoverable for detention under attachment, except as provided by statute.

5 SAME—DELIVERY OF CARGO—WEIGHING—BILL OF LADING.

When a bill of lading states, "weight unknown," and freight is payable on amount delivered, the number of tons receipted for in the bill of lading is not *prima facie* evidence of the weight delivered, and weighing is the duty of the ship.

In Admiralty. Libel for freight, and cross-libel for damage in vessel's refusal to deliver cargo.

On April 26, 1882, the steam-ship Scandinavia arrived at this port with some iron ore, stated in the bill of lading to be "300 tons in bulk, to be delivered to the libelant William D. Marvel or assigns; freight being paid by the receiver at the rate of 11 shillings sterling per ton of 20 cwt. delivered, as per margin, with primage accustomed." Among the conditions of the bill of lading is "weight unknown." The discharge of the ore from the steamer into a canal-boat sent along-side by the consignee for the purpose of receiving the ore, was commenced on April 28th, and finished on the afternoon of May 4th. The weight was taken on the steamer's deck, during the discharge, by a custom-house weigher, (detained there for the purpose of ascertaining duties,) in accordance with the long practice for ship and consignee to accept the weight as thus ascertained. The treasury regulations forbid the weight to be made known except through the custom-house, after the weigher's returns are filed. A bill for freight, as for 300 tons, as per bill of lading, was made out and sent to the consignee on May 2d. There is no settled or uniform custom in this port as respects payment of freight before or during the discharge. Some payments on account are usually made by the receiver; the ship's agents get all they can in advance, and the rest, after delivery; and there are often vexatious delays in securing payment of balances. This consignee's practice had been to pay upon presentment of the custom-house certificate of weight.

On May 4th, shortly before the discharge into the canal-boat was completed, notice thereof was given to Mr. Marvel, and that the freight must be paid before the ore would be allowed to go; to which he replied: "Send bill up here, with weight, and get your money." In a letter of

same date he demanded certificate of weight to be sent him. The exact weight could not be obtained from the custom-house until May 6th, when it was found to be about 28 cwt. short of 300 tons. At about 4 o'clock P. M. of the 4th, after all the ore had been put into the canal-boat, Henderson Bros. caused the ore to be attached by the marshal upon a libel filed in this court on that day. On May 5th, the consignee filed the cross-libel, claiming \$3,000 damages for an alleged willful and wrongful refusal to deliver the ore on request. On May 6th, Henderson Bros. sent Mr. Marvel a corrected bill, stating the true weight and amount of freight due, being \$3.78 less than the former bill. On the 10th, a tender of the true freight was made by Marvel, and delivery of the ore demanded, which was refused without explanation; presumably on account of the two suits pending and the charges therein.

Mr. Marvel designed to send the ore to Jersey City; but when it was attached no tug was present to remove it; and the captain of the canal-boat testified that he was notified by Henderson's dock clerk not to take her away until the freight was settled, and that he agreed not to do so. The ore remained in the marshal's possession until sold by him as perishable under the order of this court dated May 23d, after due notice to the consignee and his proctors; the consignee having taken no steps to bond the ore as he might have done. It brought \$1,230,—about \$900 less than its value, as claimed by the consignee. Both parties were of abundant pecuniary responsibility, and of good standing.

Wing, Shoudy & Putnam, (C. C. Burlinham, of counsel,) for the steamer.
Lee & Lee, for the consignee.

Brown, J., (*after stating the facts as above.*) This controversy has grown out of an attempt of Henderson Bros., in conjunction with the managers of other lines of Mediterranean steamers, to establish a regulation for the provisional payment of freight at their respective offices according to weights named in the bills of lading, before the actual delivery of the goods, leaving the correction of any errors therein to future adjustment, after the weight is ascertained; like the custom-house usage in the provisional and final liquidation of duties. A joint circular to this end was previously issued in December, 1881, which seems not to have reached Mr. Marvel.

When the payment of freight and delivery of the cargo, as a whole, are by the legal rule made concurrent acts, great practical difficulties arise, if the quantity is large, and each side stands on its legal rights. The amount may be so great that part of the cargo may have to be removed before the rest is discharged; and if the consignee refuses to pay *pro rata* freight on what is removable, or to give security for payment, the ship is not bound to deliver piecemeal, and may remove and store such parts as are necessary to be removed at the consignee's expense. *Brittan v. Barnaby*, 21 How. 527, 534; *The Kathleen Mary*, 8 Ben. 165, 170. See *The Tangier*, 32 Fed. Rep. 230.

1. The legal effect of the terms of this bill of lading was to make payment of freight and delivery of the goods concurrent. Although the bill