

L'HOMMEDIEU v. THE H. L. DAYTON.

(District Court, D. New Jersey. May 31, 1889.)

1. TOWAGE.

An offer to pay the amount agreed to be due for towage, less certain disputed claims for damages to respondents' barges other than the one for which the towage is claimed, coupled with a demand for a receipt in full, is not a sufficient tender to destroy the lien on said barge for the towage.

2. SAME—APPLICATION OF PAYMENTS.

A payment on the general towage account without direction by the debtor as to its application may be applied by the creditor to such parts of his account as he desires, before the account is settled, or an action is brought, and if he has applied none of it to the towage against the barge in question, the barge-owner cannot complain.

In Admiralty. Libel for towage.

Anson B. Stewart, for libelant.

Bedle, Muirheid & McGee, for respondents.

WALES, J. This is a libel *in rem* to enforce the payment of a lien for towing the barge H. L. Dayton during the month of August, 1887. It is admitted that the towage services were rendered, and that the charges for the same are correct, but the respondents, in their answer, set up a tender of payment before the libel was filed. The sum total of the libelant's account for towage, during August, was \$510.50, including the five items of charge against the Dayton, which last amounted to \$92.50. This monthly account is credited, on November 24, 1887, with a payment of \$250, and the respondents allege that at different times afterwards they offered to pay the balance of the account, less certain claims for damages done to two other of their barges by the libelant's tugs. There is no doubt that such an offer was made, perhaps more than once, and that it was always refused because it was coupled with a demand for a receipt in full; but there is no proof of any specific tender of payment of the sum due for towing the Dayton. The fact that no separate bill for towing the Dayton was ever presented to the respondents does not affect the lien against that barge one way or the other, nor will the proposition to pay the August account by a smaller sum than the balance called for support the tender. To make a tender effective, as a defense to the suit, it should have been for the full amount of the balance. The correctness of the account was not disputed, but the respondents attempted to compel or make a settlement on their own terms. This is not permissible.

The contention that a proportionate part of the credit of \$250 should be applied to the reduction of the charges against the Dayton is opposed to the rule that the debtor must make the application at the time of the payment; and, if he omits to do so, the creditor can make the appropriation in any way he may think proper, and at any time before an account is settled, or before action is brought. *Pickering v. Day*, 3 Houst. 537. The respondents waived their right by silence. The libelant says that he directed his book-keeper not to credit any portion of the \$250 to

the account of the Dayton, and this testimony is uncontradicted. The tender is not proved, and a decree will therefore be entered for the libellant for \$92.50, with costs.

CORNELL STEAM-BOAT CO. v. THE H. L. DAYTON.

(District Court, D. New Jersey. May 25, 1889.)

TOWAGE—EVIDENCE.

Libellant had a claim against respondents for balance on towage, the amount due being disputed, and respondents had claims against libellant for damages. Negotiations failed to effect an agreement, and libellant placed its claim in the hands of a collector, and thereafter exacted cash payments for towage done for respondents. At this point it was agreed, as alleged by respondents, that their demands should be canceled. Libellant denied this agreement, and the agent of respondents testified that the agreement was made with an agent of libellant, who testified as positively to the contrary. From the time of the alleged compromise towage was again done on credit, and libellant did not include its disputed claim in its bills, and gave, by its agent, a receipt in full at one time, the agent also stating that it included all demands. *Held*, that the weight of evidence was with respondents.

In Admiralty. Libel for towage.

Anson B. Stewart, for libellant.

Bedle, Muirheid & McGee, for respondents.

WALES, J. The libellant company sue to recover a small balance due for towing the barge H. L. Dayton from Newburgh to New York, on the 22d of December, 1886. The original charge for the service, \$40, was objected to by the respondents as being excessive, and they refused to pay more than \$25. Before this time there had been other accounts between the parties for towage service, and the respondents, having subsequently ascertained that the sum demanded for towing through the ice was the customary one, allowed it, at the same time setting up counter-claims against the libellants for damages to the *Mayflower*,—another barge belonging to the respondents,—and also for demurrage; these last two claims being in excess of the balance of the libellants' charge of December 22d, and, if allowed, would leave a balance in favor of the respondents on an account stated. Several interviews were had between the parties in relation to a settlement without success, the libellants finally placing their claim in the hands of a collector, and thenceforward exacting cash payments for towing the respondents' barges, until, as alleged by the respondents, it was mutually agreed that the disputed claims should be canceled on both sides; and thereafter the libellants resumed and continued giving credit to respondents, as before, for towage services. The sum in controversy, \$15, is a trifling one when compared with the amount of business transacted between these parties in the course of a year; but the case, being before the court, must be disposed of and decided according to the evidence.

The question to be decided is one of fact, and the decision depends, in part, on the veracity or accuracy of recollection of the managing agents of the litigants. The evidence for the respondents (testimony of the president of the respondent company) is that the agreement to wipe out the disputed claims on both sides was clear and unmistakable, and that, acting on the faith of that agreement, the charge for demurrage (the claim for damages having been allowed by libelants) was placed to profit and loss on the books of the respondents. The libelants' managing agent, Mr. Valentine, with whom it is alleged the agreement was made, directly and positively denies all knowledge of it. Here, then, is a flat contradiction between the only two witnesses who testify to the making of the agreement; and in such a case the only recourse is to the custom and practice of transacting business between the parties, and to such acts and admissions of their agents as may throw any light on the subject. It is in proof that after the alleged agreement the libelant company gave credit as before, and that the charge of \$15, the balance of the sum charged for towing the *Dayton*, disappeared from the bills rendered to the respondents. It is also proved that, on the 20th of January, 1888, Mr. Hagadorn, the accredited collector for the libelant company, gave the respondents a receipt for \$329, "to balance acc't in full up to date;" and, although an ordinary receipt of this kind is not always conclusive evidence of the payment of all demands, if given under a mistake, or in ignorance of material facts, yet it is in testimony that Mr. Hagadorn was asked, at the time of signing this receipt, if the amount included all demands, and he replied that it did. These circumstances certainly give color to the statement that the agreement to cancel was made. They also create too much doubt of the right of the libelants to recover, to permit of a decree being made in their favor. The libel must therefore be dismissed.