

THE MARIEL.

District Court, S. D. New York. January 18, 1881.

1. PRACTICE—DISMISSAL OF LIBEL—DELAY AFTER ISSUE.

The practice of the court does not authorize the dismissal of a libel for the libellant's delay in bringing the cause to a hearing after issue joined. The claimant has an equal right to move the case.

Rules S. D. N. Y. 136, 123.

In Admiralty.

The libel was filed in 1866 for salvage, and issue was joined. Both parties noticed the cause for trial, and it was placed upon the calendar. It was reserved generally in 1870, and had not been moved again until 1880. The claimants moved to dismiss the libel for failure to prosecute.

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George Chase, for the motion.

La Roy S. Gove, *contra*.

CHOATE, D. J. I am satisfied that the practice of this court does not authorize the dismissal of a libel under rule 136* for the libellant's delay in bringing the cause to a hearing after issue joined. The claimant has an equal right under rule 123† to move the case. On inquiry as to the practice I learn that such has been the construction put upon this rule heretofore. Therefore, although there has been delay which would long ago have barred the claim for staleness if suit had not been brought, or entitled these claimants to a dismissal if libellant had not taken out process; yet rule 123 has at all times put it in the power of the claimant to put an end to the delay. Though it seems that similar rules have elsewhere been differently construed, and though the libellant's delay is extraordinary, yet it would be unjust to dismiss his libel consistently with

the construction which has hitherto prevailed in this court.

Motion denied.

* RULE 136. If the promovent in a libel or information neglects to proceed in the cause with the dispatch the course of the court demands, the respondent or claimant may have the libel or information dismissed on motion, unless the delay is by order of the judge, or the act of the respondent or claimant.

† RULE 123. So soon as issue is joined the respondent or claimant may notice a cause for hearing on his part, and be thereupon entitled to a decree dismissing the same, with costs, or such other decree as the case may demand, unless the libellant shall also notice the cause for the same time and proceed to trial or hearing, or obtain a continuance by order of the court on proper cause shown.

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