

of which he referred its owner to the company for compensation. This notice and this knowledge bound Devlan to make a thorough examination, and to warn away all other boats from the place of the accident, or, at least, not to invite or direct them there until the obstruction was removed. This duty pertained to him as superintendent of the defendants' business. The evidence shows that the examination made by Devlan was inefficient, and apparently of a perfunctory character, with no real desire to find the obstruction. Had he wished to find it, nothing would have been easier than to call to his aid his employe, who knew just where it was, instead of saying that he would discharge the man if he knew who he was. After the previous boat had caught, and full notice of this had been given to Devlan, it is but just that any subsequent damage should be made good by him and his principals, rather than by innocent persons who moved their boats to the same place by his directions without any notice of danger. The defendants were fully represented by Devlan, and are bound by his neglect. The libellant is therefore entitled to judgment. A reference may be taken to compute the damages, and, at the same time, any further evidence desired by either party may be given as to the exact place, nature, and extent of the injury, and of the previous condition of the boat.

**BROUTY v. FIVE THOUSAND TWO HUNDRED AND FIFTY-SIX BUNDLES OF
ELM STAVES, etc.**

(District Court, N. D. New York. 1884.)

1. CARRIER OF GOODS—BILL OF LADING—QUANTITY OF GOODS SHIPPED.
A bill of lading is not conclusive upon a carrier of goods as to the quantity received for carriage, but, like other receipts, may be explained.
2. SAME—EVIDENCE OF LOSS OF GOODS—ACTION TO RECOVER FREIGHT—OFFSET.
Upon examination of the evidence in this case, *held*, that it does not show conclusively that the alleged loss of a portion of the cargo occurred while the same was on the schooner, and that damages for such loss could not, in the absence of proof that the carrier was at fault, be allowed as an offset in an action to recover the freight.

In Admiralty.

Cook & Fitzgerald, for libellant.

Marshall, Clinton & Wilson, for claimant.

COXE, J. This is an action for freight. The defense is non-delivery of a part of the cargo. On the tenth of May, 1884, the libellant, who is the owner and master of the schooner *Seabird*, for and in consideration of the sum of \$121.65, agreed to convey from New Baltimore, Michigan, to Buffalo, New York, certain property described in the bill of lading as "5,256 bundles of staves and 259 barrels of heading." As no tally was made at New Baltimore, the only evidence at

that time of the number placed on board is furnished by the bill of lading. On or about the sixteenth of May the *Seabird* arrived at the port of Buffalo. The consignee was duly notified and the cargo immediately discharged. The greater portion thereof was, the same day, placed in freight cars by stevedores employed by the claimant. Two and a half car-loads, however, remained on the dock all night. When the cars were loaded they were sealed, and were soon afterwards, by order of the claimant, conveyed to his manufactory, five or six miles from the dock, where they remained on a siding till June 28th. On that day a tally was commenced, which was not completed till July 5th. It was then that the deficiency of 631 bundles of staves and 5 barrels of heading was discovered. So far as is disclosed by the evidence, no other authentic tally was made at any time. The claimant refused to pay the freight until the libelant furnished him a statement showing that the full number called for by the bill of lading had been delivered. He now seeks to offset against the freight the value of the missing property. There is no theory upon which he should be permitted to do this. The libelant did all that he was bound to do. There is not a particle of evidence that any of the cargo was lost, stolen, or destroyed while in his possession. It was not of a character to excite the cupidity of seamen. It could not be secreted or easily carried away, and it is absurd to suppose that it was wantonly destroyed. No motive, or opportunity even, for fraud has been shown; no negligence has been proved. Indeed, nothing has been found in the testimony which would justify the court in the shadow of a suspicion against the libelant or any of his crew. Every witness who speaks upon the subject swears that all of the cargo put on board the *Seabird* at New Baltimore was delivered at Buffalo. This fact must be regarded as conclusively established.

It is argued for the claimant that the libelant is concluded by the allegations of his libel and the statement in the bill of lading signed by him. That having receipted for 5,256 bundles and 259 barrels, he will not now be permitted to say that a less number was placed on his vessel. Assuming this position to be well founded, there is not, as before stated, sufficient to charge the loss upon the libelant. The tally, showing the alleged deficiency, was not made until after the property had remained six weeks in freight cars on a side track in a populous city. The libelant may, with reason, retort that if presumptions and suspicions are to be indulged in, it is quite as reasonable to suppose that the loss occurred during the six weeks that the property was on land as during the one week it was on the water. Had the claimant brought an action for damages founded upon such proof, it would have been the duty of the court to dismiss it. The evidence is too speculative and conjectural. But the bill of lading is not conclusive upon the libelant; like other receipts it may be explained. *Abbe v. Eaton*, 51 N. Y. 410. It would be an intolerable doctrine

to hold the carrier irrevocably bound by every statement signed by him in the bustle and excitement of commerce. He should always be permitted to show the truth. Whether the mistake or loss occurred at New Baltimore or Buffalo is not material so long as no fault can be imputed to the libellant.

There should be a decree for the libellant, with costs.

THE COLORADO.

(*District Court, N. D. New York. 1884.*)

ADMIRALTY PRACTICE—MARSHAL'S FEES—COMMISSIONS.

Where a marshal has been paid his fees and commissions on the sale of a vessel under decree of the district court, and a claimant files a petition, on which monition is issued, asking that the balance of the proceeds of the sale in the registry of the court be paid to him, and it so ordered, the marshal is not entitled, in addition to his fees for serving the process, to a commission on the amount paid to the claimant.

Appeal from Taxation of Marshal's Costs.

James A. Murray, for marshal.

William B. Hoyt, for respondent.

COXE, J. In May, 1884, the propeller Colorado was sold by the marshal, under a decree, and the proceeds were paid into court. His fees and commissions for this service, estimated on the entire amount realized, were paid him in full. After discharging the debt of the libellants there still remained a large sum in the registry of the court.

On the seventh of June, 1884, the present proceeding was instituted by Frederick L. Danforth, as receiver, to reach the amount so remaining. A petition was filed and a monition issued which was placed in the hands of the marshal for service.

In addition to his fees for serving mesne process, mileage, etc., he charged \$49.58 "per cent. on amount recovered." This item was disallowed by the clerk. The marshal now appeals. The clerk was clearly correct. The marshal had already received his commissions. The money was in the registry of the court and under its control. No action on the part of the marshal was necessary to restore it to its rightful owner. When its owner was found the clerk was directed to pay it over. That was all. No process was required and none was issued, there was no sale and no settlement. There is no section of the fee-bill which directly or indirectly makes such a charge permissible, and it is not a case where the discretionary power of the court on the subject of costs can be invoked.

Taxation affirmed.