CHAMBERLAIN *v.* THE TORGORM.

(*District Court, D. South Carolina.* May 6, 1891.)

1. ADMIRALTY—BILL OF LADING—LIBEL—PLEADING.
Where a railroad company libeled a steam-ship, alleging that it had delivered to it certain bales of cotton for transportation to Bremen under customary bills of lading, which cotton had been received by libelant at Atlanta under through bills of lading to Bremen, and that the master took the cotton, but refused to deliver to libelant any bill of lading therefor except one containing a provision that it should be subject to the conditions of a charter-party to which libelant is not a party, and by which it is not bound, and also refused to redeliver the cotton, the action is in no sense founded on the through bill of lading under which libelant first received the cotton, and the libel was not insufficient because it failed to set it out.

2. SAME.
Nor can the libelant be required to set out the terms of bills of lading expressed to be subjected to the conditions of the charter-party, which were tendered by the libelee, since it had not received and could not be expected to know their provisions.

3. SAME.
The through bills of lading under which libelant took the cotton provided that it should be delivered to the libelee steam-ship for transportation to Bremen under "customary bills of lading." *Held*, by this language it was intended to designate not a particular instrument, but a class of instruments whose tenor is susceptible of proof, and that it is no objection to the libel that it failed to set out such bill of lading, or have a copy thereof annexed.

In Admiralty. On exceptions to libel.

I. N. Nathans and *Mitchell & Smith*, for libelant.

I. K. Bryan, for claimant.

SIMONTON, J. The libel, after stating that libelant is the receiver of the South Carolina Railway Company, alleges that he delivered to the steam-ship Torgorm 52 bales of cotton, marked "Sa-Sa," to be carried from the port of Charleston to Bremen, under the usual and customary bills of lading, to be issued by said steam-ship to libelant; that the cotton had been transferred over the road of the South Carolina Railway from Atlanta, Ga., under what are known as "through bills of lading," and to be delivered by libelant to said steam-ship for transportation to Bremen under the customary bills of lading to be issued by said steam-ship; that the steam-ship received the cotton, and is about to depart without giving libelant proper bills of lading, and in lieu thereof tenders bills with the words written thereon, "subject to the conditions of a charter-party," to which libelant is not a party, and by which he is in no manner bound; that he has demanded proper bills of lading or redelivery of cotton to him; that the master has refused both; and fixes his damage at $3,000. The master has intervened and filed claim for the owners, and makes exceptions to the libel for insufficiency and want of certainty and definitiveness in the allegations thereof:

1. Because it fails to set forth and allege the terms of the said alleged through bill of lading from Atlanta to Bremen, mentioned in paragraph 2 of said libel, and fails to attach thereto a copy of the same as an exhibit to said libel.

As to the First Exception. Whenever a suit is founded upon a written instrument, and it is not set out in full in the libel, the libelant should attach to the libel a copy of the instrument. 2 Conk. Adm. p. 485; *Card* v. *Hines*, 33 Fed. Rep. 189. Were this not so, the respondent, in preparing his defense, would be made dependent upon the construction given by his adversary to the instrument, or upon such parts only of it as it suited the other party to disclose. If this suit was founded on the through bills of lading, this rule would be enforced now. The libel is based upon the refusal of the ship to give customary bills of lading for cargo delivered to it for transportation. The contract upon which libelant relies is that arising out of the delivery of cargo. In order to show his right to bring the action he does not claim as owner, but alleges a qualified property in him as a common carrier. He is a carrier, not by delivery of cotton to him by its owner, but by virtue of a through bill of lading from Atlanta, Ga., from another carrier. This through bill of lading can only be used to show his title. It cannot be used to show a contract between him and the ship. He alleges that such contract arose from the fact of delivery. This being so, it would simply incumber the record to require the copy of the through bill of lading as an exhibit. This exception is overruled.

2. Because it fails to set forth and allege the terms of the said alleged bills of lading tendered, mentioned in paragraph 3 of said libel, and fails to attach thereto a copy of the same as an exhibit to said libel.

As to the Second Exception. This is founded on an error. The terms of the objectionable bill of lading, or, rather, the objectionable phrase in the bill of lading, is set out in the libel: "The words written thereon, 'subject to the conditions of a charter-party,' to which libelant is in no manner a party, and by which he is in no manner bound." Libelant cannot be expected to annex a copy of this, because he did not receive it.

3. Because it fails to set forth the terms of the alleged "customary bill of lading" mentioned in the fourth paragraph of said libel, and fails to annex a copy of the same as an exhibit to said libel.

As to the Third Exception. When libelant uses the term "customary bills of lading" he refers to no particular instrument, but to a class of instruments, whose tenor must be susceptible of proof. There is no necessity to annex a precedent of that class of instruments. The distinction is this: The cause of action, if in writing, should be set forth in full, either in the libel or in an exhibit to the libel. The latter is the better practice. Matters of evidence to sustain the cause of action need not be attached as exhibits, although they be written instruments. The exceptions are disallowed.

WOOD *et al. v.* TWO BARGES *et al.*

(Circuit Court, E. D. Louisiana. May 9, 1891.)

1. ADMIRALTY—"SHIPS"—COAL-BARGES—POSSESSORY ACTION.
Coal-barges, which are rough, square-cornered boxes, from 165 to 180 feet long, about 26 feet wide, and 8 to 10 feet deep, and have no motive or propelling power, no master or crew, no tackle, apparel, or furniture, and no name, being generally designated by number, and which are not permitted to be enrolled or licensed under any law of the United States, and have no license, are not "ships," within the language of admiralty rule No. 20, and cannot be made the subject of a possessory suit, therein provided for.
2. SAME—MARINE TORT.
Where the claimant had negotiated with the libelant for the purchase of certain coal barges, and, being informed of the location and price, and that he could have them, if suitable, took possession at once, without advising the libelant, and the latter subsequently sold them to a third party, and seeks by action to recover possession, so as to carry out that contract, there is no such fraudulent taking by the claimant as will enable the libelant to maintain an action for a marine tort, and the action must be regarded as a possessory action only.

In Admiralty. Appeal from district court.

T. M. Gill, for claimant.

W. S. Benedict, for libelants.

PARDEE, J. Suit was commenced in the district court by filing a sworn libel, as follows:

"The libel of the commercial firm of Wood, Schneidau & Co., of this district, composed of Jno. A. Wood & Co., of Pittsburg, state of Pennsylvania, and of P. M. Schneidau of this city, in a cause of tort on navigable waters from the sea, against James Sweeney of this district, and as against the property hereinafter named, alleges and articulately propounds as follows, namely: (1) That at the dates hereinafter named your libelant was the owner of two vessels engaged in carrying merchandise on the Mississippi river and tributaries, known as boat No. 137, of the Marmie Company, and boat No. 205, of the firm of Lysle & Son. (2) That said barges had come from Pittsburg, in the state of Pennsylvania, to this port laden with coal, and had been unladen by your libelant, and when so unladen, were, by libelant, sold to the firm of Thomas Fawcett & Sons of this city, and paid for, but delivery thereof was not effected by reason of the acts hereinafter set forth. (3) That after such sale one James Sweeney of this city called at the office of libelant, and expressed himself as desirous of purchasing said barges, and, no authorized person being present, the said Sweeney proceeded to take possession of said barges, and did so, without delivery order. His brother, being the representative of your libelant at the landing where said boats were located, did, without an order, and contrary to law and right, give possession of said boats to said James Sweeney, and, notwithstanding said fact, said James Sweeney has taken possession thereof, and threatens to take and carry same away. (4) That the said barges were of the full value of $1,300, and now within the jurisdiction of this honorable court; and your libelant, as owner and vendor, not having made delivery, and delivery being demanded, has a maritime lien on said property, and is entitled to process to make perfect such right; that said property is movable, engaged in navigation upon navigable waters of this country, and they are entitled to a lien upon said property, as well as against said James Sweeney *in personam*, and for the possession of said property, with all damages sustained. (5) That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this honorable court. Wherefore libelant prays that admiralty