

THE DALE.

MUMPTON v. THE DALE.

(District Court, E. D. New York. June 11, 1891.)

WEIGHT OF EVIDENCE—DISPUTE OF FACT—NUMBER OF WITNESSES.

In a dispute of fact, when all the witnesses are equally positive and equally credible, and one story is as plausible as the other, the party presenting two witnesses must prevail over the party presenting but one.

In Admiralty.

Hyland & Zabriskie, for libelant.

Edwin G. Davis, for claimant.

BENEDICT, J. The question in this case is whether the canal-boat *James Nelson*, while navigating the Erie canal, lost her rudder-blade by striking it on the berme bank through her own negligence, or whether the rudder-blade was knocked out by the steam canal-boat *Dale*, while passing the *James Nelson*. Upon this question of fact the testimony stands two witnesses in favor of the libelant's story to one witness for the claimant in opposition. All the witnesses are equally positive and equally credible, and one story is as probable as the other. If there be any difference in probability, it is in favor of the libelant. In such a case the party presenting two witnesses must prevail over the party presenting but one. Let a decree be entered in favor of libelant, with an order of reference to ascertain the damage.

CUFF v. NINETY-FIVE TONS OF COAL.

(District Court, E. D. New York. June 10, 1891.)

1. SHIPPING—LIEN FOR FREIGHT—WAIVER OF LIEN—WHAT CONSTITUTES—INTENT.

A delivery of cargo subject to a lien for freight, made to a person liable to pay the freight, will not be held to be a waiver of the lien for freight unless facts appear from which it can be found that the act of delivering the cargo was accompanied with an intention to waive the lien for freight. *Costello v. Laths*, 44 Fed. Rep. 105.

2. SAME—EVIDENCE OF INTENT.

When a master began to deliver cargo, but demanded his freight before the unloading of the cargo was completed, and when the freight was not paid stopped the delivery, and then, continuing, made special delivery of the remainder subject to the lien for freight, held, that this was not sufficient to show an intent to abandon the lien.

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

In Admiralty. Suit to enforce a lien.
Goodrich, Deady & Goodrich, for libellant.
Wing, Shoudy & Putnam, for claimant.

BENEDICT, J. This is an action to enforce a lien for freight and demurrage. The defense as to the freight is that the lien for freight was waived. The defense as to the demurrage is that no detention was caused by the consignee of the cargo. In the case of *Costello v. Laths*, 44 Fed. Rep. 105, the decision of this court was that a delivery of cargo subject to a lien for freight, made to the person liable to pay the freight, will not be held to be a waiver of the lien for freight unless facts appear from which it can be found that the act of delivery of the cargo was accompanied with an intention to waive the lien for freight. Following the reasoning of that case, the question here is whether it appears that the act of delivering this coal was accompanied with an intention on the part of the master of the vessel to waive the lien for freight. In my opinion it does not so appear. The fact is proved that the master demanded his freight before the unloading of the cargo was completed, and when the freight was not paid he stopped the delivery; then, going on, he made special delivery of the remainder subject to the lien for freight. This is sufficient, in my opinion, to show that the master at no time intended to abandon his lien. There must therefore be a decree entered for the libellant for the amount of the freight, with interest and costs. As to demurrage, I do not think a case of liability for detention of the vessel is made out.

THE GLOAMING.¹

BRAKER *et al.* v. THE GLOAMING.

(District Court, E. D. New York. June 11, 1891.)

CARRIERS—DAMAGE TO CARGO—OIL AND PLUMBAGO—LEAKAGE—PRECAUTION.

Casks of plumbago and cocoanut oil were stowed together in the ship *G.*, and on her arrival from Ceylon the plumbago was discharged damaged by the oil. It is customary to stow the two articles in the same ship, and leakage from casks of such oil on voyages from Ceylon to New York is to be expected. Some of the oil was stowed in the wings of the ship, between decks, and the plumbago stowed between the wings, where the oil was, was laid on the deck. No precaution was taken to prevent the leakage of the oil from reaching the plumbago. Held that, even if the leakage was occasioned by perils of the sea, yet, as the damage to the plumbago might have been avoided by the reasonable exercise of skill and diligence, the omission to take any precaution against such damage constituted negligence for which the carrier was liable.

In Admiralty. Suit to recover for damage to cargo.
R. Burnham Moffatt, for libellants.
Wing, Shoudy & Putnam, for claimant.

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