

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.

BENEDICT, J. This is an action to recover damages for the failure on the part of the ship *Gloaming* to deliver in like good order as shipped certain barrels of plumbago brought to the port of New York from Colombo, Ceylon. The entire consignment of plumbago amounted to 1,909 barrels. On the arrival at New York some 200 barrels were found to have been rendered unmerchantable by contact with cocoanut oil. The cargo of the ship consisted of plumbago and cocoanut oil, the latter in pipes, puncheons, and barrels. Of the packages of cocoanut oil, 12 emptied themselves of their contents during the voyage either wholly or partially, and the damage to the libelants' plumbago arose from this fact. The evidence shows that it is customary to stow cocoanut oil and plumbago in the same ship, and that leakage from casks of cocoanut oil on such a voyage is to be expected, owing to the fact that the heat of the sun upon a ship during the voyage from Ceylon to New York will cause the casks to shrink and the oil to leak. Leakage of cocoanut oil to a greater or less amount was therefore to be expected on the voyage in question. It appears by the testimony of Charles Gertschaw, who was the stevedore who discharged the *Gloaming* in New York, that the plumbago belonging to the libelants which was damaged came from the between-decks of the ship. The following was the stowage in the between-decks: She had oil right from the fore peak to the fore part of the aft-hatch solid, and then she had two tiers of oil in each wing of the ship. In the middle of that, and on top, was plumbago, and some coir yarn right aft. This plumbago, stowed between the wings, where cocoanut oil was stowed, was, according to the stevedore, laid on the decks, so that the bottom of the casks got soaked with the oil leaking onto the between-decks from the oil casks in the wings. It is manifest that with such stowage cocoanut oil would be present upon the between-decks of the ship, and that it would damage plumbago stowed on the between-decks, unless some precaution was taken to prevent the oil from reaching the plumbago. The testimony of the stevedore shows that no such precaution was taken. In my opinion, to stow plumbago in such a place upon the decks, without protection from oil that might flow on the decks, in view of the fact that oil might be expected to leak upon the deck from the casks of oil stowed in the wings, was negligence; for assuming, but not deciding, that the leakage of the oil is shown to have been caused by peril of the sea, yet, inasmuch as evidently damage to the cargo from the leakage might have been avoided by a reasonable exercise of skill and diligence, the omission to take any precaution against such damage constitutes negligence, and for negligence the carrier is liable.

BACK v. SIERRA NEVADA CONSOLIDATED MIN. CO.

(Circuit Court, D. Idaho. June 30, 1891.)

1. FEDERAL COURTS—TRANSFER OF CAUSES FROM TERRITORIAL COURTS.

Transfer of causes to national courts, under the admission act of Idaho, may be made by certified copies of the files and records, and such courts have no power to compel a state court to transmit its files and papers.

2. SAME—SUFFICIENCY OF RECORD.

The record must show that the facts at the commencement of the action were such as would give the United States court jurisdiction had it then existed; and an affidavit showing the value of the matter in dispute when it was made, instead of when the action was commenced, is insufficient.

(Syllabus by the Court.)

On Motion to Dismiss the Record.

W. B. Heyburn, for plaintiff.*Albert Hagan*, for defendant.

BEATTY, J. The record in this cause shows that the plaintiff claims to be the owner of the Pilgrim tunnel site, located in pursuance of the provisions of section 2323, Rev. St. U. S., and defendant claims to be the owner of the Sierra Nevada mining claim; that, to defendant's application for a patent for such mining claim, the plaintiff interposed in the land-office his protest, and, in support thereof, brought this action in the district court of Idaho territory; that on the 9th day of July, 1890, after the admission of Idaho as a state on the 3d day of said month, the plaintiff filed in said territorial court his request for a transfer of the cause to this court, and at the same time, with his request, filed his affidavit, stating therein "that the said action is one brought under the laws of the United States, and that the adjudication of the issues therein made involves the construction of the acts of the congress of the United States," and "that the sum and value involved in said action exceeds the sum of two thousand dollars, exclusive of costs." On the 17th day of October, 1890, the plaintiff filed in this court a transcript of the record of said cause. The defendant, on the 7th day of April, 1891, filed in this court a motion to strike from the files and dismiss said transcript, and on the next day the plaintiff filed his motion for an order of this court directing the court and clerk having the custody of the original papers to transmit the same to this court.

The questions involved in this hearing are the motion to dismiss the transcript, the motion for an order on the state court and clerk to transmit to this court the original files in the cause, the value of the matter in dispute, and whether the construction of a congressional act is involved in determining the issues in the cause. In accordance with the decision of this court, the learned circuit judge presiding, rendered June 18, 1891, in the case of *Burke v. Concentrating Co.*, 46 Fed. Rep. 644, it is concluded that duly-authenticated copies of the original files and record in the territorial court may be used here, and that this court has no power to compel the state court, now the custodian of such files and