

until the cargo had been more than half discharged, and removed for consumption. The amount of 72 tons claimed in the answer, is an estimate derived from the proportion of short cuttings observed in what remained of the cargo after more than half had been discharged. But one of the libelants' witnesses testifies very positively that a considerable amount of the shorter pieces during the earlier part of the discharge was allowed to fall down and accumulate in the hold, and was not taken out until the last. This would make the proportion in the last half, or third, of the cargo greater than in the whole cargo. On the other hand, one of the witnesses for the respondent who saw the unloading every day, testifies that in his judgment the proportion of short pieces remained about the same during the whole discharge. Under such circumstances, though I think the respondent is entitled to some offset, it is impossible to say that the amount of 72 tons is really proved; but as some accumulations of small sticks, in dealing in the usual way with a cargo of large and small ones, would naturally arise towards the end, I can only determine the matter as a jury under such circumstances would be obliged to do, and allow such deduction as seems probably just and equitable. I allow, therefore, for 50 tons, at the proved damage of \$3 per ton, making \$150. Deducting this amount from the amount of unpaid freight, there remains \$68.59 for which the libelants may take judgment, with interest; but as the respondent is successful on the main issue in litigation the decree must be without costs.

THE CITY OF ROME.

CARMODY v. THE CITY OF ROME.

(District Court, S. D. New York. November 21, 1891.)

ACTIONS FOR NEGLIGENCE—FORMER TRIAL AT COMMON LAW—WHEN A BAR IN ADMIRALTY.

Concurrent negligence of the plaintiff being a ground for dismissal of an action for negligence in a common-law court, but not in admiralty, a plea of a former common-law adjudication for the defendant is not sufficient unless it appear that the ground of the adjudication was absence of fault in the defendant, and not proof of fault in the plaintiff. It appearing in this case upon submission of the stenographer's notes of the former trial that a verdict for the defendant was directed by the judge, because the facts proved did not constitute negligence in the defendant, *held*, on exceptions to the answer, that this would constitute a bar to the present action.

In Admiralty. Libel by James Carmody against the City of Rome for personal injuries. Hearing of exceptions.

A. G. Vanderpoel, for libelant.

Frederick G. Gedney, for claimant.

BROWN, District Judge. Exceptions to the libel have been filed by the defendant setting up *res adjudicata* upon a trial of the same matter in a common-law action brought by the libelant against the owner of the

City of Rome, in the court of common pleas of this city. In that action concurrent negligence of the plaintiff would be a sufficient ground of dismissal; in admiralty, it is not. *The Max Morris*, 137 U. S. 1, 11 Sup. Ct. Rep. 29. To determine the sufficiency of the plea it is, therefore, necessary to know whether the former judgment of dismissal proceeded on the ground of the plaintiff's concurrent negligence, or solely upon the ground of failure of proof that the defendant was negligent. In the latter case, the former judgment, though in a common-law court, becomes a bar and estoppel here. Upon these exceptions no judgment can be rendered now, inasmuch as the facts stated in the exceptions must be sustained by proof at the hearing. I have, nevertheless, examined the matter upon the request of the parties and for their convenience in reference to any future trial. Upon the evidence as to the grounds on which the dismissal was ordered by the presiding judge on the former trial, as shown by the stenographer's notes of that trial submitted to me, and upon the admitted facts as stated in the affidavit of counsel, and assuming also on behalf of the libelant that the evidence offered by him was ruled out, as he states it was, I am satisfied that upon the hearing of this cause I should be obliged to hold that the former trial and judgment are a bar to the present action, inasmuch as the proofs submitted would be sufficient to show that the direction of a verdict by the judge was not based upon negligence of the plaintiff, but because the proofs before him did not amount to any negligence on the part of the defendant.

THE SERAPIS.

SMITH v. THE SERAPIS.

(District Court, D. Maryland. December 4, 1891.)

1. INJURY TO EMPLOYE—DANGEROUS APPLIANCES—CONTRIBUTORY NEGLIGENCE.

Libelant, a stevedore, lost his right hand by its being caught between the cogs of a steam-winch, which the court found to be dangerous and unsafe because of the nearness of the steam-valve to the cogs, and of the absence of casing over the cogs to prevent such accidents. Libelant knew the dangerous condition of the winch, and spoke of it to the mate of the vessel, but continued during part of two days to work the winch, unloading cargo out of the steamer's hold. *Held*, that the fact that libelant continued to work the winch with knowledge of the danger and risk did not of itself, as matter of law, bar his recovery in admiralty, but was evidence merely of contributory negligence on his part.

2. SAME—DAMAGES—IN ADMIRALTY.

Held that, the libelant's contributory negligence being neither wilful, gross, nor inexcusable, and the facts presenting a strong case for his relief, he should be decreed one-half the sum as damages which he would have recovered if he had been without fault.

(Syllabus by the Court.)

In Admiralty. Libel for personal injuries.

J. Cookman Boyd, for libelant.

Convers & Kirkin and *W. Benton Crisp*, for respondent, cited—

Robertson v. Cornelson, 34 Fed. Rep. 716; *Stringham v. Hilton*, 111 N. Y. 188, 18 N. E. Rep. 870; *Railroad Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. Rep. 1044; *Miles v. The Servia*, 44 Fed. Rep. 943; *The Maharajah*, 40