

case, the contract was silent as to the time of delivery, and I cannot find that any fixed day was subsequently agreed upon before the time named in the permit of the 16th for delivery on the 20th. The carrier, however, was entitled to compensation for the use of his boat. She was under the direction of Mr. Burroughs, the shipper; he is liable to the lighter for her detention, and has not sufficiently shown that Mr. Herbst, through any reference to the steamship agents, or any fixed time agreed on with them has relieved him of that liability or entitled him to call upon Mr. Herbst for indemnity.

Mr. Burroughs, before suit, tendered to the libelant's attorneys the freight, though refusing to pay demurrage. The attorneys refused to receive it, lest by receiving it they should release any lien for demurrage. There must be a decree, therefore, for the freight and demurrage against the lumber and the defendant Burroughs, with the provision that he is primarily liable to pay the amount; with an order of reference to ascertain the value of the use of the lighter, if it is not agreed on. The question of costs reserved as between him and the libelant.

The defendant Herbst is entitled to a decree against Burroughs, with costs.

THE MARY L. PETERS.

HOWELL et al. v. THE MARY L. PETERS.

(District Court, S. D. New York. June 25, 1895.)

CARRIERS—DAMAGE TO CARGO—SEA PERILS—LEAKY DECK—UNSEAWORTHINESS—HARTER ACT—"DUE DILIGENCE" REQUIRED OF SUPERINTENDENT OF REPAIRS.

The Mary L. Peters with a cargo of sugar from Sagua La Grande to New York met extraordinary weather in February and March, and the sugar was damaged by water through leaks about the waterways, and hatches, and through the decks; the evidence showed the deck in poor condition before sailing, and unfit for such a voyage and cargo. *Held* (1) that the vessel was answerable for the damage from leaks through the deck; (2) that there was no such "due diligence" exercised by the persons employed by the owners to see to the repair of the ship as to exempt the ship and owners.

This was a libel by Benjamin H. Howell and others against the schooner Mary L. Peters to recover damages to a cargo of sugar.

George A. Black, for libelants.

Goodrich, Deady & Goodrich, for respondent.

BROWN, District Judge. The above libel was filed to recover for damages to bags of sugar upon a voyage from Sagua La Grande to New York in February and March, 1894. The damage arose from sea water taken in through the decks, and in the waterways and around the coamings of the hatches.

The evidence of very severe weather on the voyage is in this case much stronger, in my judgment, than in the case of *The Centurion*, 68 Fed. 382, in which the court of appeals in this dis-

trict has recently held the ship exempted by reason of sea perils. If I were satisfied of the reasonably fit condition of the schooner to encounter the ordinary perils of a winter voyage, I should have held her excused, as I did in the case of *The Sintram*, 64 Fed. 884, for some water damage arising through strains in the waterways. But the evidence shows not only the bad condition of the schooner's deck, but leaks also through the deck, besides what water might have been taken in around the coamings and the waterways compatibly with a seaworthy ship, under the circumstances of the voyage.

I must, therefore, hold the ship answerable in this case for insufficiency for the voyage and cargo (*The Edwin I. Morrison*, 153 U. S. 199, 14 Sup. Ct. 823; *The M. R. Bohannon*, 64 Fed. 883; *Hubert v. Recknagel*, 13 Fed. 912; *The Giles Loring*, 48 Fed. 463); and there is no such evidence of "due diligence" on the part of the owner, or of those who represented him in the inspection and repair of the ship before sailing, as to exempt the ship under the Harter act (Act Feb. 13, 1893).

Decree for libelant, with costs.

HINE et al. v. NEW YORK & BERMUDEZ CO.

(District Court, S. D. New York. April 9, 1895.)

CHARTER PARTY—ASPHALT—FITTINGS INSUFFICIENT—PORT OF REFUGE—NO GENERAL AVERAGE—HARTER ACT—EXPRESS CONTRACT.

A charter of the S. D. to bring asphalt to New York provided that the ship should be "fitted with shifting boards and bulkheads suitable for carrying asphalt cargo safely, to be done by owner's agents, but at charterer's expense"; after loading at Guanaco, the ship on the first day out took a list, and she then put in to Port of Spain where the list increased, and on the third day the forward bulkhead and fittings gave way, which necessitated unloading, stowage, and refitting and reloading before the vessel could proceed. On the evidence, it being found that this expense and the delay thereby caused arose from the insufficiency of the bulkhead and fittings: *Held* (1) that the providing of a suitable bulkhead and fittings was under the charter one of the owner's duties and risks, though at charterer's expense; (2) that the owners could not recover charter hire or a general average expense for the delay and costs at Port of Spain; (3) that though the owner's agents used "due diligence" in directing the master to shipwrights of high repute, who made the bulkhead, the Harter act was inapplicable; because that act does not interfere with the liberty of contract, as respects matters not within its prohibition.

This was a libel by Wilfrid Hine and others against the New York & Bermudez Company to recover charter hire of the steamship *San Domingo*, together with certain port of refuge expenses, and for detention during the voyage.

Convers & Kirlin, for libelants.

George A. Black, for respondents.

BROWN, District Judge. The above libel was filed by the owners of the steamship *San Domingo* against the charterers of the vessel to recover \$3,912.37 charter hire, and \$11,803.24 for port of refuge