Lawrence Vs. Minturn

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Appeal No. : 58 U.S. 100

Appellant : Lawrence

Respondent : Minturn

Judgement :

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Lawrence v. Minturn

58 U.S. (17 How.) 100

APPEAL FROM THE DISTRICT COURT OF THE UNITED

STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

SYLLABUS

A consignee of goods has a right, in his own name, to libel a vessel for their nondelivery unless there is something to show that he had no interest in them. The presumption is that he had an interest, and to defeat the right to sue in his own

name, this presumption must be rebutted by proof.

In the present case, there is no such proof.

The goods being thrown overboard, the facts in this case show that the jettison was justifiable and the loss occasioned by the perils of the sea.

The nature of the contract explained between the master and owner of a vessel and the shipper where the latter knows that the articles shipped are to be carried upon the deck, and the cases upon this subject examined.

In this case the evidence shows that there was no want of due diligence and skill either in the construction of the vessel or the stowage of the cargo.

Minturn libeled *The Hornet* for the nondelivery of two steam boilers and chimneys shipped on board of that vessel in the port of New York and consigned to the libellant.

Alexander M. Lawrence and seven others intervened as claimants, and after a hearing upon the pleadings and profits, the district judge decreed that the libellant should recover $25,275 and costs. From this decree the claimants appealed to this Court.

The case is stated in the opinion of the Court.

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MR. JUSTICE CURTIS delivered the opinion of the Court.

This is an appeal from a decree of the District Court of the United States for the Northern District of California, sitting in admiralty. The appellee filed his libel in that court against the ship *Hornet* for the nondelivery of two steam boilers and chimneys shipped on board that vessel in the port of New York and consigned to the libellant.

The appellants intervened as owners of the ship, and upon the pleadings and proofs the district court made a decree in favor of the libellant. The claimants appealed.

The first question to be determined on the appeal is whether the libellant had a right to sue in his own name. The facts bearing on this question are that on the nineteenth day of July, 1851, Edward Minturn, at New York, made a contract with the agent of the ship *Hornet,* which was reduced to writing, as follows:

"Memorandum of agreement to ship on board the ship *Hornet* by Edward Minturn, Esq., two boilers, two chimneys or steam chests, smoke pipes in sheets, and some grate bars, in all about forty tons weight, from this port to San Francisco, California, for the sum of forty-five hundred dollars, with five percent primage, the whole to go on deck except the grate bars and sheet iron for smoke pipe. It is understood that the shipper is to put them on the deck of the vessel at his expense, and the ship is to discharge them as soon as convenient, and they are to be received at Cunningham's wharf, in San Francisco, without other than the ordinary charge per day for discharging. It is further understood that the said boilers are to be ready to go on board the

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vessel on the ninth day of August or as soon thereafter as the ship may require them, giving shipper two days' notice thereof."

"[Signed] EDWARD MINTURN"

"E. B. SUTTON"

" *Agent for ship Hornet* "

It appeared that the boilers and chimneys were manufactured in New York upon an order given by James Cunningham; that they were intended for the steamer *Senator,* a boat then in California; that James Cunningham and Edward Minturn were part owners of *The Senator,* and that they paid the makers for these articles. The bill of lading was as follows:

"210. Shipped in good order and well conditioned by Edward Minturn on board the ship called *The Hornet,* whereof Lawrence is master, now lying in the port of New York and bound for San Francisco, California, to say: two boilers, and two steam chimneys for ditto, eight pieces sheet iron work, three pieces pipe, one band, two hundred and four grate bars, sixteen grate bar bearers, eight boiler bearers, six man-hole plates, eight boiler doors, one bundle four bolts, two boxes; the whole to be discharged as soon as convenient, and to be received at Cunningham's wharf, in San Francisco, without other than the usual or ordinary charge for discharging per day; being marked and numbered as in the margin."

Freight $4,500.00

5 percent primage 225.00

$4,725.00

E. B. SUTTON

84 Wall street

Dispatch line California packets

Contents unknown

"Goods to be delivered at the vessel's tackles when ready to be delivered. Not accountable for breakage, leakage, or rust; freight payable before delivery, if required, and are to be delivered in like order and condition at the port of San Francisco, the dangers of the seas, fire, and collision only excepted, unto Charles Minturn, or to his assigns, he or they paying freight for the said boilers, steam chimneys, and other iron work, forty-five hundred dollars, with five percent primage, and average accustomed."

"In witness whereof the master or purser of the said vessel hath affirmed to four bills of lading, all of this tenor and date, one of which being accomplished, the

others to stand void."

"Dated in New York, the 19th day of August, 1851."

"[Signed] WILLIAM W. LAWRENCE"

Upon the proofs, we are of opinion that the libellant had a right to sue the carrier in his own name. He is the consignee named in the bill of lading, and in the absence of evidence to control the effect of that document, the property is presumed to

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be in him. In *Evans v. Marlett,* 1 Lord Raymond 271, it is laid down that

"If goods, by bill of lading, are consigned to A, A is the owner, and must bring the action against the master of the ship if they are lost; but if the bill be special, to be delivered to A to the use of B, B ought to bring the action."

Whether it be strictly correct to affirm that in the case first put, A shall have a right of action against the carrier, though in point of fact he be only an agent for the consignor, has been much controverted. In *Griffith v. Ingledew,* 6 S. & R. 429, goods were shipped by A for his own account and risk, but deliverable under the bill of lading to B or his assigns. The previous decisions were examined with great care. There was a difference of opinion on the bench, Mr. Justice Gibson dissenting, but the majority of the court held that by force of the bill of lading, the legal title was in the consignee, and he could maintain the action.

Since that decision was made, the question has been much discussed both in this country and in England. It is not easy to reconcile the decisions. We shall not attempt to do so here; the case does not require it. For if we take the rule to be that an action against the carrier cannot be brought by a consignee who has no beneficial interest in the goods, it still remains true that a presumption of such an interest in the consignee arises from a bill of lading which makes the goods deliverable to him or his assigns. This is admitted in the cases in which it has been held that the consignee had not the right of action or was not liable for the freight. *Coleman v. Lambert,* 5 M. & W. 502; *Wright v. Snell,* 5 B. & Ald. 350; *Chandler*

v. Spraigue, 5 Met. 306.

In *Grove v. Brien,* 8 How. 439, this Court said: "The effect of a consignment of goods generally is to vest the property in the consignee," and though it is also there declared that this effect may be controlled by special clauses in the bill of lading or by evidence *aliunde,* yet the general effect of a bill of lading to raise a presumption of property in goods in him to whom it makes them deliverable is conceded.

This is in accordance with the rule given in Abbott on Shipping 415-416.

Such being the presumption arising from the bill of lading, we do not find it to be controlled by any proof in this case. It does appear that Edward Minturn and James Cunningham were part owners of *The Senator,* for which boat these boilers and chimneys were intended, and that they contracted with the makers of the articles and paid for them, and that Edward Minturn shipped them in New York. But all this leaves open the question whether the libellant was not the managing owner

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and ship's husband of *The Senator,* residing in California, where that boat was employed, attending to its repairs and supplies for the joint account of himself and the other owners. Indeed, the testimony of Squire, an agent of the libellant, in the absence of all other evidence, tends to prove that such was the fact, for he speaks of himself as acting for the libellant in reference to the management of *The Senator,* and says that, her boilers being worn out, an order was sent out to obtain new ones to replace the old. We understand this order to have been given by the libellant for the boilers now in question.

Considering the burden of proof to have been on the respondents to displace the *prima facie* right of action of the consignee arising from the bill of lading, that for aught he has shown, and upon the proof, we may conclude that the consignee ordered these articles as managing owner of *The Senator,* and that, if so, he, as consignee and managing owner, might sustain the libel in his own name, this

objection to the decree must be overruled.

The next inquiry is whether the failure to deliver the boilers and chimneys is justified.

The Hornet sailed from New York on the 23d of August, 1851, having these articles on deck. On the 5th of September the chimneys, and on the 12th of September the boilers, were thrown overboard.

Two questions arise:

1. Was the jettison necessarily made for the common safety? and, if so,

2. Was the necessity attributable to any, and what, fault on the part of the master or the vessel?

The material facts upon which the first of these questions depends are that *The Hornet* was a clipper ship of about sixteen hundred tons burden, built at New York in the years 1850 and 1851, of the best materials in use for first-class ships at that port. She had a cargo under deck, and the weight of these boilers and chimneys on deck was somewhat over thirty-one tons. The height of each of the boilers, above the deck at the forward end, when stowed, was about twelve feet. The steam chimneys were between five and six feet in diameter, and besides these there was a piece of steam pipe weighing 667 pounds. The ship sailed on the 23d of August, and on entering the gulf stream encountered rather heavy weather and a cross-sea. The performance of the vessel in this sea was found to be bad. On the 26th, a gale came on from the south, veering to the northwest, and lasted until the night of the 27th.

Though this gale was not of uncommon severity, it raised a heavy cross-sea. The effect of this sea was to cause the ship

to roll down to leeward so as to take in water over her rail; she rose very slowly and then rolled over to windward, straining and laboring in a manner described by

the witnesses as very unusual. She would not mind her helm, but would fall off; she would settle down aft and take in water over her stern, and plunged heavily forward. At sundown on the 27th, the wind lulled and the sea became more smooth. It was found during and immediately after the gale that the ship was very severely strained, so as to open some wood-ends aft one-half to three quarters of an inch, and her waterway seam half an inch, and that other injuries of an alarming character had been received. The master then held a consultation with his officers and drew up the following protest:

"August 29, 1851, latitude 310' N., longitude 615' W."

"At sea, on board ship *Hornet,* of New York, William W. Lawrence, master, bound from New York to San Francisco, California."

"We, the undersigned, master, officers, and mariners of the ship *Hornet,* of New York, do, after mature and serious deliberation, enter this solemn protest:"

"That on the 26th day of August, 1851, the ship *Hornet* being then in or about the longitude of 49W., latitude 37N., experienced a gale of wind from south, veering to N.W., and that during said gale, which lasted until the night of the 27th of August, the weight of the deck load, consisting of two boilers, with furnaces attached, and two steam chimneys, the whole supposed to be of the weight of forty tons or thereabouts, did cause the ship to labor very hard, rolling gunwale deep, shipping large bodies of water, straining the ship in her upper works and decks, causing the ship to leak badly, and her pumps constantly worked, placing our lives, ship, and cargo, in imminent peril for their safety. We now, therefore, do most seriously and solemnly assert that for the future preservation of the ship, and thereby our lives and cargo, the said boilers, furnaces, and chimneys are unsafe on the decks, and for the safety of the whole should be thrown overboard as soon as possible, the weather and sea permitting."

"In testimony whereof to the above, we hereby subscribe our respective names."

This protest was signed by all the officers and by such of the crew as could write, and its substantial facts are testified to by the master and officers who were

examined in the cause in such a manner as to satisfy us of their truth.

Upon these facts, we have come to the conclusion that the jettison was necessary for the common safety.

The nature of the case imposes on the master the duty, and clothes him with the power, to judge and determine upon the

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facts before him whether a jettison be necessary. He derives this authority from the implied consent of all concerned in the common adventure. The obligation of the owners is to appoint a competent master, having reasonable skill and judgment and courage, and they are liable if through his failure to possess or exert these qualities in any emergency the interest of the shippers is prejudiced. But they do not contract for his infallibility, nor that he shall do, in an emergency, precisely what, after the event, others may think would have been best.

If he was a competent master; if an emergency actually existed calling for a decision, whether to make a jettison of a part of the cargo; if he appears to have arrived at his decision with due deliberation, by a fair exercise of his skill and discretion, with no unreasonable timidity, and with an honest intent to do his duty, the jettison is lawful. It will be deemed to have been necessary for the common safety because the person to whom the law has entrusted authority to decide upon and make it, has duly exercised that authority.

Applying these principles to the case before us, we find no reason to doubt that this jettison was thus necessary. It is true that when it was actually made, the sea was smooth and the ship in no immediate danger. But it satisfactorily appears that these boilers and chimneys could not be thrown overboard without the greatest risk when there was any considerable sea. To require delay until a storm, would be, in effect, to prohibit the sacrifice. Precaution against dangers which are certain to occur is surely proper. That they must experience gales and heavy seas at that season in that voyage was so nearly certain that it was not unreasonable to act on the assumption that they would occur and prepare the ship to encounter them

while in a smooth sea, when alone they could do so.

We find the conduct of the master and crew in making the jettison to have been lawful, and the remaining inquiry is whether the necessity for it is to be attributed to any fault on the part of the master or owners.

The libel alleges the loss of the goods to have been "through the mere carelessness, unskillfulness, and misconduct of the said master, his mariners, and servants."

We were at first inclined to the opinion that this allegation is not broad enough to put in issue what the libellants have at the hearing much relied on, and what we think is the main question in this part of the case -- the sufficiency of the ship to carry this cargo. It is, no doubt, the general rule that the owner warrants his ship to be seaworthy for the voyage with the cargo contracted for. But a breach of this implied contract of the owners does not amount to negligence or want of skill of the master or mariners.

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There would be much difficulty, therefore, in maintaining as a general proposition that an allegation of negligence of the master would let the libellant in to prove unseaworthiness of the vessel.

But it must be observed that this libellant relies not on general unseaworthiness, but upon the fact that a vessel, staunch and sufficient to carry a cargo, was overloaded by this burden on the deck, and as the quantity of lading and the consequent trim and seaworthiness of a vessel are matters as to which the master is generally speaking bound to exercise his skill, and over which he is entrusted for the benefit of all concerned with a supervision, his failure to do so properly is negligence for which the owner may be liable. While, therefore, we have some difficulty in respect to the sufficiency of this allegation, we think it is such as necessarily leads us into the inquiry whether the loss by jettison was occasioned by negligence of the master in overloading the ship. And as we find it extremely

difficult, if not impossible, to distinguish between the obligation of the owners and master in these particulars, we shall proceed to consider the question whether the case is one of culpable negligence or is within the exception of perils of the seas contained in the bill of lading.

There can be no doubt that a loss by a jettison occasioned by a peril of the sea is a loss by a peril of the sea. In that case, the sea peril is deemed the proximate cause of the loss. But if a jettison of a cargo becomes necessary in consequence of any fault or breach of contract by the master or owners, the jettison is attributable to that fault or breach of contract, and not to sea peril, though that also may be present and enter into the case. This distinction is familiar in the law of insurance. *General Mut. Ins. Co. v. Sherwood,* 14 How. 365, and cases there cited.

In this case, did the necessity for the jettison arise from any fault or breach of contract by the master or owners?

Two grounds are assumed by the libellant. The first is that considering the great weight of these articles, resting upon a small part of the upper deck, sufficient means were not used to support the weight and stiffen the ship so as to prevent the deck from being strained.

This was a new ship, built of such materials and so fastened and braced as to be uncommonly strong. The owners employed a ship carpenter, who had worked on the vessel when built, to do what he deemed necessary to support this unusual weight on the deck. He describes what was done. The master superintended these alterations. He and the carpenter deemed them sufficient. They were both going to sea in the vessel, the one

as commander, the other as carpenter, and can hardly be supposed to have omitted anything which they thought necessary for safety. The owners do not appear to have restricted them in point of expenditure. We cannot avoid the conclusion that everything was done which these men thought necessary, and

possessing, as they must be presumed to have done, competent skill in their respective occupations, they believed this part of the cargo was securely stowed and fastened and stayed to go safely on the voyage. In point of fact, however, after being subjected to the action of the sea in a storm, it was found the deck had settled.

The second ground taken by the libellants is that the ship was so overloaded by the great weight of these articles on deck as to be unseaworthy, and as the jettison was made to relieve the vessel from this condition, the owners are responsible for the loss. In part, at least, the same principles of law will be found applicable to both these grounds, and therefore we consider them together.

The principal question -- and it is one of much importance -- is what is the extent and operation of the implied contract of the owner respecting the ability of his ship to carry a particular deck load which he receives on board, under a contract that it shall be carried on deck, dangers of the seas excepted.

In general, the owner warrants the sufficiency of his vessel to carry the cargo put on board by the freighter provided the vessel be not injured by a peril of the sea. Besides this, he contracts for the use of due care and skill in stowing the cargo and in navigating the vessel.

But in applying these rules to cargo on deck, some peculiar considerations must be borne in mind.

This bill of lading declares that the property is to go on deck. It excepts perils of the seas. The exception must be construed with reference to the particular adventure which the contract of affreightment shows was contemplated by the parties. Under this bill of lading, the question is not what in other circumstances could be deemed a peril of the sea, but what is to be deemed such when operating on this vessel, with this deck load. If a very burdensome cargo, like iron, is taken on board, and heavy weather met with, and a jettison made, it would not be a ground of claim against the owner that the weather encountered would not have been sufficient to justify a jettison if the cargo had been cotton.

And when this freighter consented to place on the deck of this ship his boilers and chimneys, weighing upwards of thirty tons, not distributed about the deck, but lying in a small space, must he not be taken to have known that their necessary effect

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might be to embarrass the sailing of the ship in a gale of wind and cause her to labor in a heavy sea. The grounds upon which the rights and obligations as to contribution of owners of cargo on deck in case of jettison have long rested have an intimate connection with this question. Valin, lib. 3, tit. 8, art. 12, giving the reason of the rule that goods jettisoned from the deck are not paid for in general average, but contribute if not thrown over, says:

"The reason why articles on deck, thrown overboard or damaged, are not contributed for is that as they cannot but embarrass the working of the ship, the presumption is that they have been jettisoned before a full necessity for a jettison of cargo arose, and only because they hindered and confused the maneuvering of the vessel."

This has been still more clearly expressed by Locre in his Commentary on the Code du Commerce Maritime, lib. 2, tit. 12, art. 421. He says:

"Perhaps the common safety would not have made a jettison necessary if the lading had not been in contravention of rule, if it had not brought the dangers on the vessel, or contributed to enhance them."

Similar views have been taken by the most approved writers on the law of insurance, in this country and in England, and they have been applied in many cases. Abbott on Shipping 481, 490, and notes; 3 Kent's Comm. 240; 2 Phillips on Ins. 71; 2 Arnold on Ins. 890. It was remarked by Lord Denman in *Milward v. Hibbert,* 3 Ad. & El.N.S. 120, that the reason assigned by Valin that goods on deck embarrassed the navigation of the ship is not sufficient to form the basis of a universal rule excluding goods on deck from the benefit of contribution, because it may be that in many cases, goods can best and most safely be stowed on deck, and that they may in some cases be so stowed as not to be in the way of the crew

in their operations. This may be true, but the point here is not whether there may be cases in which the deck load does not embarrass the navigation or increase the danger, but whether, in case it does so, the shipper who has consented to his goods being placed on deck under a special contract, and not pursuant to any general custom, which might be evidence of the safety of the practice, must not be taken to have known that such might be its effects.

It was strongly urged by the libellant's counsel that the shipper could not be supposed to have, and should not suffer for not possessing, a knowledge of the capacity or sufficiency of the ship; that the carrier was bound to know that the instrument by which he agreed to perform a particular service was sufficient for that service, and that, as these carriers contracted to convey this deck load to San Francisco, they were obliged to

ascertain whether placing it on deck would overload their vessel. This appears to have been the ground on which the court below rested its decree.

This reasoning would be quite unanswerable if applied to a shipment of cargo under deck, or to its being laden on deck without the consent of the merchant, or to a contract in which perils of the sea were not excepted. But the maritime codes and writers have recognized the distinction between cargo placed on deck with the consent of the shipper and cargo under deck.

There is not one of them which gives a recourse against the master, the vessel, or the owners if the property lost had been placed on deck with the consent of its owner, and they afford very high evidence of the general and appropriate usages in this particular of merchants and shipowners. Consolato, par Pardessus, c. 186; Ord. de Mer, Valin, lib. 2, tit. 1, art. 12; Code du Com. Mar. par Locre, art. 229, lib. 2, tit. 4, art. 229; Emerigon, ch. 12, sec. 42; Boulay Paty, tom. 4, 566, 568.

So the courts of this country and England and the writers on this subject have treated the owner of goods on deck, with his consent, as not having a claim on the master or owners of the ship in case of jettison. The received law on the point is

expressed by Chancellor Kent with his usual precision in 3 Com. 240:

"Nor is the carrier in that case jettison of deck load responsible to the owner unless the goods were stowed on deck without the consent of the owner, or a general custom binding him, and then he would be chargeable with the loss."

The cases of *Smith v. Wright,* 1 Caines 43; *Dodge v. Bartol,* 5 Green. 286; *Hampton v. Brig Thaddeus,* 4 Martin 582; Story on Bailments 339, sec. 531; and *Gould v. Oliver,* 4 Bing.N.C. 142, support this statement. In the last-mentioned case, Tindal, C.J., says:

"Now where the loading on deck has taken place with the consent of the merchant, it is obvious that no remedy against the shipowner or master for a wrongful loading of the goods on deck can exist. The foreign authorities are indeed express on that point, and the general rule of the English law that no one can maintain an action for a wrong where he has consented or contributed to the act which occasions his loss leads to the same conclusion."

It must be admitted that no one of the authorities referred to go so far as to maintain that the shipowner contracts no obligation whatever to the merchant respecting the sufficiency of the vessel to carry the deck load received on board. They should not be understood as supporting such a position. The extent to which we understand them to go, and the law which

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we intend to lay down, is this: that if the vessel is seaworthy to carry a cargo under deck, and there was no general custom to carry such goods on deck in such a voyage, and the loss is to be attributed solely to the fact that the goods were on deck, and their owner had consented to their being there, he has no recourse against the master, owners, or vessel, for a jettison rendered necessary for the common safety by a storm, though that storm, in all probability, would have produced no injurious effect on the vessel if not thus laden. It is not for him to say that in the first storm the vessel encountered, though not of unusual severity, she proved to be unable to carry the deck load, and so was not of sufficient capacity to

perform the contract into which the carrier entered.

The carrier does not contract that a deck load shall not embarrass the navigation of the vessel in a storm or that it shall not cause her so to roll and labor in a heavy sea as to strain and endanger the vessel. In short, he does not warrant the sufficiency of his vessel, if otherwise stanch and seaworthy, to withstand any extraordinary action of the sea when thus laden. If the vessel is in itself stanch and seaworthy and her inability to resist a storm arises solely from the position of a part of the cargo on the deck, the owner of the cargo, who has consented to this mode of shipment, cannot recover from the ship or its owners on the ground of negligence or breach of an implied contract respecting seaworthiness. His right to contribution is not involved in this case.

Applying these principles to the case before us, there is no difficulty in coming to a satisfactory conclusion. This vessel was uncommonly stanch and strong. The amount of dead weight on board was not excessive, for there is no pretense that she was too deep in the water. There was no apparent inability to carry the deck load when she sailed, nor until heavy seas were encountered. Her inability to carry these boilers and chimneys arose solely from their particular position on deck.

The libellant, through the shipper in New York, consented to their being placed in this position. He took the risk of their rendering the ship unmanageable in a storm, and he, and not the shipowners, must bear the loss occasioned by their being placed on the deck so far as the liability for the loss rests upon any ground of negligence in the place of stowage or breach of warranty respecting the seaworthiness of the vessel. As to the argument that there was negligence in not properly stowing and supporting this burden on deck, we think it is not made out in proof. The master is bound to use due diligence and skill in stowing and staying the cargo, but there is no absolute warranty that what is done shall prove sufficient. We are of

opinion that due diligence and skill were used. Besides, we do not find the necessity for the jettison attributable to any defects in these particulars. It may be that additional supports of the lower deck would have assisted the vessel in bearing the weight, but we see no reason to believe they would have enabled it to carry this unusual burden through a storm, and therefore, if we found negligence in this particular, we could not declare that the loss was to be attributed to it.

The decree of the district court is to be

Reversed and the cause remanded, with directions to dismiss the libel with costs.

ORDER

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of California, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said district court in this cause be and the same is hereby reversed with costs, and that this cause be and the same is hereby remanded to the said district court with directions to that court to dismiss the libel with costs.