

Case No. 4,521.
[9 Ben. 191.]¹

THE EROE.

District Court, E. D. New York.

July, 1877.²

DAMAGE TO CARGO—REBATE OF DUTY—MARKET VALUE
EVIDENCE—MEASURE OF DAMAGES.

1. A rebate of duty for damage to goods obtained by the consignee, is not to be considered in computing the damage recoverable by the consignee against the ship; as an element of market value it has no place.

[Cited in *Morrison v. L & v. Florio S. S. Co.*, 36 Fed. 573.]

2. A bill for the amount of damage, made out after an appraisal, and presented, may be taken to show the difference in the market value of sound and damaged goods at that time.
3. The case of *The Carlotta* [Case No. 2,413] dissented from.

In admiralty. A vessel that had carried petroleum to Italy brought back to New York a cargo of almonds, wine, etc., and the almonds being found tainted with petroleum the consignees brought suit against the vessel for damages, and recovered. Upon reference to ascertain the amount of damage, the commissioner allowed evidence of a rebate of duty, obtained by the consignees upon the almonds for damage on the voyage of importation, exceeding the amount of difference in market value between sound and damaged almonds at the time of sale, fifteen months after; and, following the case of *The Carlotta* [Case No. 2,413], reported no damages for the libellant. Upon exceptions to his report and argument, the following decision was made.

Beebe, Wilcox & Hobbs, for libellant.

Butler, Stillman & Hubbard, for claimant.

BENEDICT, District Judge. This action is brought upon a bill of lading to recover for damages to almonds caused by petroleum. The interlocutory decree determined that the libellant was entitled to recover the damages caused by petroleum to the almonds in question.

The evidence taken before the commissioner shows 192 bags of almonds damaged by petroleum. It also appears that these same bags were stained by salt water and by wine. The evidence fails to show the proportion of injury arising from these different causes. In this state of the proofs it must be assumed that no diminution in value was caused to almonds injured by petroleum by the contact with sea water or wine. The damage, from the character of the injury, was caused by petroleum. The difference then between the market value of the almonds in the 192 bags as they arrived, and the sound value of the almonds, is the true measure of damages.

It has been claimed on the part of the respondents that the libellant must give credit for any rebate of duties that he may have received upon these damaged bags, and I am

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referred to a decision where such rebate was taken into consideration in determining the amount of damages to cargo. The Carlotta [Case No. 2,413].

With all my respect for the learned judge who made the decision referred to, I am unable to agree with him. The market price of a merchantable commodity must furnish the test of value. To take into consideration the amount of duty paid upon an article in determining its value, is, according to my view, to resort to cost as a test of value. The rate of duty doubtless is an element which goes to fix market value, but the amount paid for duties upon any particular article is not taken into consideration in determining the value of that article. The article sells for the same, whether the owner paid or escaped paying the duty. So in this instance the damaged almonds were worth the same in the market, whether the libellant paid the whole or a part or none of the duty. And the difference between that value and the market value of sound almonds shows the amount of injury caused by the failure of the ship-owner to perform his contract.

Any advantage which the freighter has gained in adjusting the duties was an advantage to him in his contract with the government,

not a benefit to the goods arising from the act of the shipowner. The shipowner is no party to the dealing of the freighter with the government, and the result of that dealing cannot inure to his benefit, otherwise the ship-owner might claim to take upon himself the adjustment of the duty, and if not permitted, he might ask to show in diminution of his liability, that if permitted, he would have obtained a larger rebate.

Upon these grounds I must reject the claim of the respondents that the rebate of duties obtained by the libellant from the government be credited to them, in calculating the damage arising from their negligence.

The bags damaged by petroleum were sold at a loss of \$140.39, and this sum the libellant claims should be allowed him as his damages. The damaged almonds were kept in store some fifteen months before they were sold, and when sold, it was without notice to the ship. There is evidence that the almonds were sold in the usual way, and some evidence that no material change in the market occurred while they were in store. On the other hand, it is shown that soon after the arrival of the cargo, the consignees caused an estimate of the damage to be made by their own broker, and upon such estimate sent in a bill to the ship for \$100 as the damage. I am of the opinion that the respondents can resort to this bill rendered as showing that a difference in value did occur between the time of arrival and time of sale, in which case there being no other proof, it must be taken as evidence of the amount of such difference. Of this the consignees cannot complain, as it is their own bill.

The libellant is therefore entitled to recover \$100 with interest from the date of the arrival of the ship.

¹ [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission.]

² [Affirmed in Case No. 4,522.]