

Case No. 4,522.

THE EROE.

{17 Blatchf. 16.}<sup>1</sup>

Circuit Court, S. D. New York.

Aug. 11, 1879.<sup>2</sup>

CARRIERS—DAMAGE TO CARGO—REBATE OF DUTY—MEASURE OF DAMAGES.

Where a rebate of duties is made in regard to goods respecting which damage is awarded for a breach of a contract of affreightment by a vessel, the vessel cannot have credit, against the amount of damage, for the amount of the rebate.

[Followed in *The Lizzie W. Virden*, 8 Fed. 627. Cited in *Morrison v. I. & v. Florio S. S. Co.*, 36 Fed. 573; *The Umbria*, 8 C. C. A. 194, 59 Fed. 490.]

[Appeal from the district court of the United States for the eastern district of New York.]

In admiralty.

Beebe, Wilcox & Hobbs, for libellant.

Butler, Stillman & Hubbard, for claimant.

BLATCHFORD, Circuit Judge. The libel claims \$300 for damage to 1,503 bags of almonds in the shell, the damage being alleged to have been, caused by the improper stowage of the almonds, so that they were injured by oil and wine. The district court found, from the proofs, that the contents of 192 of the bags were, on arrival, injured by contact with petroleum oil, and that the vessel was responsible for such damage. On a reference to ascertain the amount of such damage, the referee reported that no damages to the libellant were proved. On exceptions to the report by the libellant, the district court sustained the exceptions, and made a decree awarding to the libellant, as damages, \$100, with \$15 75 interest and \$112 57 costs, being \$228 32, in all. [Case No. 4,521.] The libellant is satisfied with this decree, and has not appealed. The claimant has appealed. The district court held, that the diminution of the almonds in value was wholly caused by petroleum, and that the proper measure of damage was the difference between the market value of the almonds in the 192 bags, as they arrived, and their sound value. This the court fixed at \$100, and it allowed interest thereon from the date of the arrival of the vessel.

The claimant insisted, before the district court, that the libellant ought to give credit for a rebate of duties which he had received from the United States government, on the damaged almonds in the 192 bags, on account of petroleum damage; and that the amount of such rebate exceeded \$100. The district judge rejected this view, and said, in his decision: "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 par-

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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 ship-owner. The ship-owner is no party to the dealings 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 respondent, that the rebate of duties obtained by the libellant from the government be credited to him, in calculating the damage arising from his negligence." This decision was made in July, 1877. In January, 1877, in the district court for the southern district of New York, the case of *The Carlotta* [Case No. 2,413] came before me, in which, in directing an interlocutory decree for the libellant, and a reference, in a suit for the breach of a contract of affreightment by a vessel, I said, that, if any sum of money had been received by the libellant, or by any purchaser of the damaged goods from him, from the government, as a rebate of duties, for loss or damage in respect of any goods as to which an allowance should be found due for loss or damage, he must be charged with such sum. The view thus expressed was brought to the notice of the district judge who decided the present case. He announced his dissent from it, and proceeded to give his own views, as above set forth. In the case of *The Carlotta* [supra] no allowance was, in fact, made for a rebate of duties, because, no allowance was made for damage in regard to any goods respecting which a rebate of duties was made. The case of *The Carlotta* came, on appeal, before Chief Justice Waite, sitting in the circuit court for the southern district of New York, July 31st, 1879 [unreported], but the question raised was not decided, because he concurred with me in not allowing any damage in regard to any goods respecting which a rebate of duties was made. It remains, therefore, to decide, in this case, whether, where a rebate of duties is made in regard to goods respecting which damage is awarded for breach of a contract of affreightment by a vessel, the vessel can have credit, against the amount of damage, for the amount of the rebate. I think the considerations set forth by the district judge, in this case, present the proper view of the law, and that the libellant is entitled to a decree for \$100, with interest from the date of the arrival of the vessel, with \$112 57, his costs in the court below, and with his costs in this court.

<sup>1</sup> [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

<sup>2</sup> [Affirming Case No. 4,521.]