13FED.CAS.—73

Case No. 7,547.

THE JOSHUA BARKER.

{Abb. Adm. 215.}[1]

District Court, S. D. New York. April, 1848.

CAPSIZING OF VESSEL AT WHARF—DAMAGED CARGO—SALE BY CARRIER WITHOUT NOTICE—UNLAWFUL CONVERSION—RIGHTS OF OWNER OF CARGO—COMPUTATION OF DAMAGES—EXCEPTIONS TO COMMISSIONER'S REPORT—COSTS.

1. A vessel having on board a cargo of flour for transportation, capsized at her wharf before sailing, and the cargo was much damaged. The carriers might easily have communicated with the owners of the cargo, and sought instructions as to the disposal of it; but they neglected to do so, and sold the cargo upon their own authority, at auction; after which the vessel sailed, and in due time arrived at the port of delivery. *Held*, that the sale of the flour, under these circumstances, was an unlawful conversion by the carrier.

{Cited in Astsrup v. Lewy, 19 Fed. 541; Moore v. Hill, 38 Fed. 335.}

2. The owners of the cargo were entitled to recover the value of the cargo at the port of delivery, deducting freight and charges, and adding interest on the balance.

{Cited in The Boston, Case No. 1,671.}

3. The value of the cargo should be computed by the market price at the port of delivery, at the time of the arrival of the vessel, it appearing that except for the accident, the cargo would at that time, in the ordinary course of things, have been delivered; with a privilege, however, to the owner to claim the amount realized upon the sale of the goods at auction.

4. Of the allowance of costs upon exceptions to a commissioner's report made in the alternative.

This was a libel in rem, by James M. Hoyt and Jesse Hoyt against the bark Joshua Barker, to recover the value of goods shipped on board that vessel, but never delivered pursuant to the affreightment. The owners of the vessel intervened by claim and answer, and contested the action. The facts in the case were, that in October, 1847, the libellants shipped on board the vessel at Albany, for transportation to the city of New York, a large quantity of flour, to be there delivered to consignees. The bark was secured to the wharf at Albany in such manner, that on the falling of the tide, after the flour was laden on board, she capsized and sunk. This was on October 8, 1847. On the following day she was raised, and the flour taken out and immediately sold by order of the owner of the vessel, without any communication with the consignees or libellants, who were then in New York. The bark was pumped out, laden with lumber, and despatched to New York, where she arrived on the 15th of October, bringing to libellants the first intelligence received by them of the loss of the flour. The cause came before the court for hearing on the merits, in February, 1848, when the court, by interlocutory decree, determined that the libellants were entitled to recover in the suit the value of the flour, and directed a reference to a commissioner to ascertain and report its value "at the time when the libellants

were deprived of it." On the hearing before the commissioner, the libellants contended that they were entitled to recover the market value of the flour at New York City on the 15th of October, (the day of the bark's arrival at that port,) with interest from that day, but deducting freight. The claimants insisted,—first, that they were not responsible for more than the amount received from the auction sale, which they claimed fixed the value of the flour for the purposes of the suit;—and, second, that at most they were not liable for more than the market value of the flour at the time of the sale. The commissioner reported that the market price in New York, of such flour as that shipped by the libellants, was, on the 8th of October, $4,290.50, and that it was on the 15th of October, $4,491; referring it to the

court to determine which valuation the libellants were entitled to recover. He also reported the amount due for freight and for interest. The sum received by the claimants from the auction sale of the flour was $3,648.88. The cause now came up on exceptions by the claimants to the commissioner's report

I. By the phrase "the time when the libellants were deprived of the use of their property," referred to in the decree, in the connection in which it is used, and in reference to the subject-matter of the suit, must be understood, the time when, under the circumstances of this case, the claimants should have delivered the property in question in New York. This construction is according to the rule of law, and the only one which will afford the libellants adequate indemnity. Arthur v. The Cassius [Case No. 564]; Amory v. McGregor, 15 Johns. 24; Sedg. Dam. 370, 372. Upon a contract to deliver goods, the general rule of damages for nondelivery is the market value of the goods at the time and place of the promised delivery. 2 Greenl. Ev. 215, § 261. The same principle applies to this case. See Commercial Bank of Buffalo v. Kortright, 22 Wend. 348, and cases cited.

II. Instead of selling the flour without consulting the owners, which they might have done in a few minutes by telegraph, the claimants should have put the flour back again, and it should have been delivered at New York on the arrival of the boat on the 15th of October last, when, for the first time, the libellants had notice of the loss of their property. The damage to the flour would then have been measured by the difference between what the flour sold for and the market value. There was no necessity for selling it, and the claimants had no right to sell it. Arnold v. Halenbake, 5 Wend. 33. As to the time of delivery, the extent of the carrier's liability is to deliver within a reasonable time, and what time is reasonable must depend on the circumstances of each particular case. Story, Bailm. § 545a (Ed: 1846); Howe v. The Lexington [Case No. 6,767a].

III. The libellants, therefore, ask for a decree for the amount found due upon the valuation of the flour of the 15th of October last, the time of the arrival at New York of the Barker, and of the first notice to the libellants of the loss.

IV. But if the libellants are not entitled to the amount found due on that valuation, then, although this does not amount to an indemnity, they ask for a decree for the amount found due on the valuation of the 8th and 9th of October last, when the property was wrongfully sold at a sacrifice, and the money withheld from the libellants, to force them to agree to the claimants' terms.

V. The allowance of interest is expressly provided for in the decree, and is proper in this case. In cases where interest has been withheld on the value at the port of destination, in suits against carriers, it has been expressly on the ground that the loss complained of happened by misfortune, without any fault or misconduct on the part of the carrier. It was not misfortune, but gross misconduct on the part of the claimants to sell the flour, and retain the use of the proceeds, (nearly $4,000,) and during a time when money has

been worth more than legal interest. There never was a case where interest was disallowed when the defendants had converted or received the proceeds of the property; and this is the foundation of the rule allowing interest in actions of trover.

E. Ellingwood, in support of the exceptions.

C. Van Santvoordt and Henry E. Dodge, opposed.

BETTS, District Judge. The answer admits that the flour was taken out of the bark at Albany, after her disaster, and immediately sold, and that the sale was made without authority from the libellants. It is matter of notoriety that communication could have been had with the owners of the flour at New York in a few minutes, by telegraph, and their instructions thus taken on the subject; and also, that the regular mail conveyance by steam from Albany to New York and back, is made within forty-eight hours, while by the ordinary running of the steamboats, a special messenger could have obtained orders in New York, and returned with them to Albany within twenty-four hours. Under these circumstances, the acts of the claimants, in making peremptory sale of the flour at their own discretion, immediately on the bark being raised was, in respect to the rights of the libellants, unnecessary and wrongful. The libellants were accordingly entitled to charge the claimants with the full value of the flour laden on the vessel and not delivered at the port of destination, as tortiously disposed of by them.

No case of necessity for the sale being shown by the claimants, the fact in proof that subsequently to the sale they demanded of the libellants the allowance of an account against them, amounting to $1,175.15, arising upon prior distinct transactions, before they would pay over the proceeds of the flour, indicates that the claimants assumed the power to dispose of the flour at their own discretion, and having its avails in hand, to force the libellants to a settlement of antecedent dealings between them, as a condition to their accounting for the conversion of the property. Common carriers cannot coerce payment of debts in that manner out of property committed to them for conveyance. This would be an abuse of the bailment, amounting to a trespass. They have not power, in any emergency, to sell the entire bailment, so as to give a purchaser title to it against the bailor or shipper. Arnold v. Halenbake, 5 Wend. 33. Upon the general principles of mercantile law the libellants are entitled to the full value of the property at the port of

delivery. Watkin v. Laughton, 8 Johns. 213; Amory v. McGregor, 15 Johns. 24; Brackett v. McNair, 14 Johns. 170; Gillingham v. Dempsey, 12 Serg. & R. 188; 12 Barn. & A. 932. And the wrongful disposal of it also Justifies imposing interest on carriers. See same cases. Interest is the appropriate recompense in case of loss of property by the fault or misconduct of another. 17 Pick. 1; 21 Pick. 559; 1 Mete. (Mass.) 172; Stevens v. Low, 2 Hill, 132.

The exceptions raise the question whether the libellants can demand more than the value of the flour at the time it might have been reasonably delivered at New York if it had not been sold. This point becomes material, because between the 9th of October, when the bark, in her ordinary course of navigation, might have reached New York, and the 15th, the time of her actual arrival after being raised, the price of flour was materially enhanced. The commissioner reports the difference upon this shipment to amount to $200.50.

The delay of the vessel in this case was merely temporary. The accident did not disable her from completing her voyage, and it was well known, when the flour was taken out and sold, that the bark was uninjured, and that she could be immediately despatched to her port of destination. The interruption was no more than a circumstance which prolonged her voyage. The delivery of the flour at New York on the 15th could incontestably have been made within the undertaking of the claimants, and the libellants must then have accepted it, subject to compensation for the injury it had received. Carries by water are liable for the actual value of goods withheld or lost, without legal excuse, computed at the time when the goods might have been delivered at the place of destination. Arthur v. The Cassius {Case No. 564}; Howe v. The Lexington {Id. 6,767a}. The arrival of the vessel herself (she not having made intentional deviation) on which the goods were laden, would ordinarily be received as satisfactory evidence of the time at which the delivery might reasonably have been made. Casualties which should retard the arrival beyond the usual period would not vary the rule so as to enable the consignee to charge the carrier upon the footing of a wilful or unreasonable delay. Accordingly, when the goods are sold, or applied to the necessities of the ship during the voyage, the measure of compensation to the owner is the clear net value at the port of destination, as the market stands on the failure of the ship to deliver the goods; with the privilege, however, to the owner, to take the sum for which the goods actually sold. Abb. Shipp. 455. And the inquiry as to value does not seem, from the authorities, to turn at all upon the consideration, whether without the accidental delay, the goods would have come into a better market. In a case of tort, the owner, doubtless, might have taken either period for fixing his damages; that at which the wrong was done and his property destroyed or converted, or that at which he might have had possession of it but for the wrongful act; and where he has notice he might be compelled to declare at once his election. But I do not pursue that question, because the

laches of the claimants prevented the libellants insisting upon having the property delivered to them in its then condition, which could have been easily and safely done in a few hours; and also, because the arrival of the vessel, notwithstanding her misadventure, was in a reasonable time after the flour was laden oh board; and the libellants are, accordingly, entitled to take the time of her arrival as that at which the value of her cargo, put on board, shall be determined.

I think that the finding-of the commissioner, that the flour was worth in New York, on the 15th of October, $4,841, is justified by the proofs. In addition to the deduction of $350, admitted by the libel and answer to be properly allowable, the freight from Albany to New York, amounting to $70, is also to be deducted as composing in part the value, of the flour at New York. The libellants will therefore take a decree for the balance, of $4,421, with interest thereon from October 15, 1847, to the date of the final decree, together with their costs to be taxed.

Costs will not be allowed to either party upon the exceptions. They are not allowed against the claimants, because the report is in the alternative, and does not fix definitely the sum with which they are chargeable, and because they are not allowed by it the freight to which they are entitled. And costs are not allowed against the libellants, because the claimants are defeated upon the merits of the exceptions to the report, and because the refusal of the commissioner to allow the freight, was the consequence of the inadvertent admissions of the claimants in their own answer. Decree accordingly.

[1] {Reported by Abbott Brothers.}

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