

ants have been adjudged to be infringers, and decreed to account for the gains, profits, and damages of their infringement, they are to go forward in the accounting and bear the necessary expenses of doing so, among which are the master's fees. This was so held in *Bridges v. Sheldon*, Dist. Vt. Oct. Term, 1879.

Let an order be entered that the defendants pay these fees within 15 days from the entry of the order.

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THE J. C. STEVENSON, now the Stanmore.

(District Court, D. Maryland. June 20, 1883.)

1. SHIPPING—LOSS OF CARGO OF CATTLE—STORM AT SEA—BURDEN OF PROOF—SUITABLENESS OF VESSEL.

Where respondents prove that a steam-ship, on which a lot of cattle were shipped by the libellant, encountered a storm of unusual severity, and show the character of the damage sustained by their vessel and by other steam-ships carrying cattle which encountered the same hurricane, the burden is put upon the libellant of proving that the losses sued for were occasioned by the want of due care in providing a proper ship, and suitable stalls and other fittings, for carrying the cattle.

2. SAME—EVIDENCE.

Upon the whole testimony, considering the contrivances then in use for carrying cattle, and the known risks and uncertainties of the business, and the character of vessels customarily used, it does not appear that the steam-ship in this case would have been considered unsuitable for the business at the time she was so used, or that the fittings were improperly constructed, and no damage can be recovered on that account.

3. SAME—DELAY IN COMING TO PORT FOR CARGO—DAMAGES.

Where a vessel is to arrive at a port and receive a cargo of cattle by a certain day specified, and she does not arrive for several weeks after the appointed time, the only damages that can be recovered on account of the delay, when the vessel is accepted and the cattle shipped, is such expense as may have been incurred for keeping the cattle during the period of delay, and the additional insurance the shipper may have had to pay by reason of the increased risk caused thereby.

4. SAME—DAMAGES A LIEN ON VESSEL.

Where the cattle were actually laden on board under the contract, and reference being specially made to it in the libel, and the ship has obtained the benefit of the contract, it seems that the shipper would have a lien on the vessel for such damages.

In Admiralty.

*Marshall & Hall*, for libellants.

*Brown & Brune*, for respondent.

MORRIS, J. This libel is filed to recover damages for the loss of a large number of cattle shipped by libellant on the steam-ship J. C. Stevenson, on November 13, 1879, to be carried to London, which were lost on the voyage, and for damages resulting from the delay of the steam-ship in arriving at the port of Baltimore to enter upon the voyage. The contract for the shipment of the cattle was as follows:

September 22, 1879, Mr. Francis Bell, hereinafter called the shipper, hereby agrees to ship in the steam-ship J. C. Stevenson, to sail from Baltimore for London on the twelfth day of October or thereabouts, seven days' notice having been previously given by the agents of the steam-ship to the shipper, 380 cattle, subject to the following conditions:

(1) The steam-ship is to carry the cattle stowed on her decks; (2) the steam-ship is to provide stalls or pens for the cattle constructed upon the plan of those hitherto adopted, or such new plan as may be mutually approved; (3) the between-decks are to be satisfactorily ventilated; (4) a supply of fresh, cool water, equal to a maximum of eight gallons per head *per diem* is to be supplied by the steam-ship; (5) the steam-ship is to provide free steerage passages to and from London to one attendant upon every 25 cattle, if required, and cabin passages to the foreman in charge; (6) the shipper is to provide feed, and all necessaries and utensils, such as buckets, pitchforks, ropes, etc.; (7) the ship is to carry all the feed that the animals consume on the passage freight free; (8) the shipper is to rope the animals before or after they are put on board; (9) the freight is payable upon said cattle, for transportation from Baltimore to Deptford, at the rate of three pounds ten shillings per head each, at Baltimore or Deptford, at shipper's option, but is to be collected upon the number shipped at Baltimore; (10) the steam-ship is warranted by the shipper free from responsibility for mortality or accident of any kind; and if any of them die, or are thrown overboard, or are washed overboard, or are lost in any manner whatsoever, the freight is nevertheless to be paid.

If the shipper desires that freight should be paid at Deptford he must, if required, deposit insurance policy with agent of vessel assigned to him, or, if insured in England, assign lien or policy to the amount that "may be incurred."

The bill of lading, dated November 13, 1879, contains all customary exceptions, and states the rate of freight to be £3 10s., "and all other conditions as per contract dated September 22, 1879."

In the margin of the bill of lading is written: "Not responsible for mortality, nor for any accident of any nature or kind whatever; and if any of them die, or are thrown overboard, or are washed overboard, or are lost in any manner whatsoever, freight is nevertheless to be paid on them on arrival of vessel at London." When the ship arrived in the port of London, after a long and tempestuous voyage, of the 380 head of cattle all had been lost but 21.

The respondents having shown that the steam-ship encountered a storm of unusual severity, and having proved the character of the damage sustained by this and by other steam-ships carrying cattle which encountered the same hurricane, have shown enough, in my judgment, to put upon libellant the burden of proving that the losses sued for were occasioned by the want of due care in providing a proper ship, and suitable stalls and other fittings, for carrying the cattle. In judging of what was reasonable in this respect, we are to put ourselves in the situation of these parties who were contracting with respect to carrying cattle across the Atlantic in November, 1879. It was then a new and experimental venture, and the improved appliances now used in the business are greatly the result of the experience then being obtained. The original contract between the agents of the steam-ship and the libellant contained the following provisions with regard to the fittings for the cattle:

"The steam-ship is to provide stalls or pens for the cattle constructed upon the plan of those hitherto adopted, or such new plan as may be mutually approved."

It is shown that the stalls on this voyage on which the loss occurred were the same which had been put upon the steam-ship at Montreal and used on the previous voyage. On that voyage she had successfully carried 350 head of cattle and 400 sheep from Montreal to England, not losing a single head of cattle, and but a few of the sheep. Immediately after the voyage to England, on which she carried these cattle and sheep, the steam-ship came to Baltimore, bringing as cargo a small quantity of pig-iron. When the pig-iron was discharged, such of the stalls as had been taken down for that purpose were replaced, and all were put in repair by competent carpenters, experienced in putting up stalls for cattle on board ship. These fittings were then inspected and approved by a marine surveyor, who certified, after the cattle were on board, that the loading was completed properly, and the ship in good condition to proceed on her voyage. The stalls were seen by the libelant and his agents before and while the cattle were being put on board, and no complaint or suggestion was made with regard to them. When the ship arrived at the port of London the libelant paid the freight on all that were shipped, as had been agreed, and no complaint was ever made, or claim for damages, until the filing of this libel, 14 months afterwards. The respondents, in my judgment, have not only shown that the stalls and the ventilation were such as might reasonably have been expected to be sufficient, but have shown that they had been actually tested on the previous voyage and found sufficient.

It was urged on behalf of the libelant that the fact that 15 of the cattle between-decks died before there was any rough weather, and while the hatches were open, is conclusive that the ventilation could not have been sufficient. But it is shown that on the previous voyage 200 cattle were carried between-decks and not one died, although the weather experienced on that voyage required the hatches to be closed. In the face of this, it seems to me that it must be held that the owners of the steam-ship had every reason to believe that the ventilation was sufficient; and, indeed, it would appear that these 15 cattle must have died from some other cause than suffocation. As to the severity of the weather which the steam-ship encountered, and how long the cattle-stalls endured the violence of the storm before they were destroyed, I think that, probably, the most trustworthy testimony, after so long a lapse of time, is to be had from the ship's log. It contains these entries:

*Tuesday, November 18, 1879.* Towards midnight, fresh gale blowing, with heavy squalls and rain. Hands employed repairing cattle-stalls, and threw overboard three cattle that died in the hold. Midnight ends—fresh, increasing gale. Ship rolling heavily, and taking heavy water on deck.

*Wednesday, November 19, A. M.* Increasing gale, with hard rain-squalls; high sea getting up. At 2:30 A. M., washed several cattle-stalls away on the after-deck. Some cattle rolling about the decks. Hove ship to, and slowed engines. All hands employed securing the loose cattle and repairing stalls. At 8 A. M., set fore lower top-sail, and kept ship on her course. At 11 A. M., gale veered west with great violence. In top-sail, and brought ship to the wind. Battened all hatches down. Ship laboring heavily, and taking in heavy water fore and aft. Noon, cattle-stalls give way on the after-deck. Cattle all washing and rolling about the decks. All hands commenced throwing the cattle overboard. P. M., blowing a hurricane; a high cross-sea running; ship laboring heavily. Started starboard bulwark, with weight of the cattle rolling against it. Cattle washing and rolling about the after-deck; all hands throwing them overboard. 4 P. M., continues blowing a hurricane. At 8 P. M., gale moderating; kept ship S. E.; set fore trysail; ship laboring heavily. At 9 P. M. took off fore hatch for ventilation; found in the between-decks cattle-stalls all down; several dead. Midnight, moderate breeze.

*Thursday, November 20, A. M.* Moderate breeze; ship rolling heavily; a high cross-sea running. At daylight commenced throwing dead cattle overboard. After between-decks, several dead cattle and some stalls broken down. A quantity of water washing about the after between-decks. Noon, fresh increasing gale from southward. P. M., fresh increasing gale and high cross-sea running; ship laboring heavily, and taking heavy water on deck. All hands employed throwing the dead cattle overboard. At 5 P. M., violent gale blowing; battened all hatches down fore and aft. Several cattle-stalls on upper deck forward, washed away; cattle getting adrift, and rolling and washing about the decks. Several washed overboard. Midnight, gale moderating and sea going down.

*Friday, November 21st.* Gale moderating, and high cross-sea running; ship rolling heavily. At daylight, commenced throwing the dead cattle overboard out of the fore and aft between-decks. Five horses and three cattle left alive in the fore between-decks, and all dead in the after between-decks. P. M., high cross-sea running, and ship rolling heavily. At 6 P. M. got all dead cattle overboard, and commenced bailing water out of after between-decks. On looking around the ship found the starboard after-boat stove in and rails broken, ventilators washed down and broken, two stanchions started in the after between-decks.

*Saturday, November 22d.* Moderate breeze and clear weather. At daylight commenced taking out the dead cattle on the deck forward. Carpenter repairing stalls for the 35 cattle left.

These were the entries in the log, and the testimony of such of the officers of the ship as could be found after the libel was filed, show the storm to have been of the severest character.

It appears that the gale began at midnight on Tuesday, with the ship taking large quantities of water on deck, and continued with increasing violence, the stalls on the after-deck giving way about noon on Wednesday. This destroyed not only the cattle on the after-deck, but broke down the ventilators so that the cattle below, the hatches having to be battened down, were without any ventilation. The gale continued throughout Wednesday, doing more damage to the ship and to the cattle fittings on deck, and made it necessary to keep the batches down until 9 o'clock in the evening. On Thursday morning the gale had moderated, but increased again in the afternoon, when

the stalls on the forward deck were broken down and the cattle were washed about the deck, and some of them carried overboard. The hatches were again battened down, and so continued until midnight of Thursday. I think the proof is quite convincing that experience has shown that no cattle fittings of a temporary nature, and without a permanent shelter deck over them, can be constructed which can be depended on to withstand a continuous gale of this character.

It is shown that the Rathmore, a steam-ship which sailed from Baltimore on November 18th with cattle, and which on the 20th encountered this same gale, although she was also a steam-ship which had previously carried cattle successfully, and had stalls constructed upon an improved plan, had nearly all her cattle-stalls forward of the bridge carried away, and suffered such damage that she put back to Baltimore, with a loss of 64 cattle and with others badly injured. The official survey of the Rathmore shows that the cattle pens were broken and mashed up, both forward and aft, on the main deck, and that between-decks some were broken down and more or less damaged by the heavy rolling and lurching of the ship.

It is contended that the fact that the stalls between-decks on the J. C. Stevenson did not stand, shows that they must have been improperly constructed. But the fact that many of the beasts had died of suffocation, and that a large weight of water had got down into the between-decks through the broken ventilators, and was washing the carcasses about as the vessel rolled, is, in my judgment, sufficient to account for the destruction of the stalls. Sufficient appears to make it evident that, except on a vessel specially constructed for the protection of cattle, their safe carriage across the Atlantic is much a question of good or bad weather on the voyage, and that, with bad weather and heavy seas sweeping the decks, temporary fittings will give way, and the cattle be lost, and if the cattle are between-decks the ventilators will be broken down and water get below, and their safety thus imperiled. Upon the whole testimony, I do not find that, considering the contrivances then in use for carrying cattle, and the known risks and uncertainties of the business, and the character of the vessels customarily used, that this steam-ship would then have been considered unsuitable for the business, or that the fittings were improperly constructed. I think the steam-ship and the fittings were as good as were ordinarily provided and used at that time.

It remains to consider what were the liabilities incurred by the steamer by her delay in arriving at Baltimore to perform the contract dated September 22, 1879, in which it is provided that "Mr. Francis Bell agrees to ship in the steam-ship J. C. Stevenson, to sail from Baltimore for London on the twelfth day of October, or thereabouts, (seven days' notice having been previously given by the agents of the steam-ship to the shipper,) 380 cattle, subject to the following conditions," etc. The steamer did not arrive in the port of Baltimore until November 4th, and did not take the cattle on board until No-

vement 13th, and sailed on the 14th. This was a delay of about one month.

Damages of various kinds are claimed in the libel for this delay; but, in my opinion, the damages on this ground cannot be extended beyond such as had accrued up to the time the cattle were put on board. The libellant, when the vessel did not arrive, had his right of action for breach of the contract, and could have recovered the expenses of keeping the cattle and any additional freight he might have had to pay if he sent them forward by another ship, and the additional insurance premium he might have had to pay if the premium was increased by the lateness of the season. As the ship, when she did arrive, was accepted by him, and did in part perform the contract by their taking the cattle with his consent, all he can recover is the cost of keeping the cattle during the delay, and the increased rate of insurance premium actually paid by him. It is a question not free from doubt, perhaps, whether for these items of damage the libellant has a lien on the ship; but as the cattle were actually laden on board under the contract, reference being specially made to it in the bill of lading, and as the ship obtained the benefit of the contract it seems to me within the spirit of the decisions that she should be held for the delay in receiving them on board. *Oakes v. Richardson*, 2 Low. 173.

I will sign a decree in favor of libellant, with a reference, if required, to ascertain the expenses of keeping the cattle for, say, one month, and the extra premium actually paid by libellant in excess of what he would have had to pay for the same insurance if the ship had sailed on the fourteenth of October.

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## THE MORNING MAIL.<sup>1</sup>

(District Court, D. Kentucky. July, 1883.)

1. "UNAVOIDABLE DANGERS OF NAVIGATION"—LOSS BY STRIKING BRIDGE PIERS.  
The exception, "unavoidable dangers of navigation," as used in a bill of lading for transportation of goods by river, includes unavoidable dangers of navigation which may arise from bridges across the rivers to be navigated. Under the circumstances of this case, the goods being lost by the boat striking a bridge pier, and the court finding that the boat was properly navigated, *held*, that the loss was within the exception.
2. DETENTION OF GOODS UNTIL GENERAL AVERAGE PAID.  
Where there was a privilege of reshipping, and the goods were damaged while in the possession of one of the connecting lines, making a general average necessary, such connecting carrier can hold the goods until the average contribution is paid or secured.

<sup>1</sup> Reported by J. C. Harper, Esq., of the Cincinnati Bar.

## 3. SAME—PROXIMATE CAUSE OF LOSS.

Where a detention takes place by reason of the adjustment of such general average contribution, one boat in the connecting line leaving port in the mean time, and the goods go forward on the succeeding boat of the line and are lost by the boat striking a bridge pier, *held*, that such detention was too remote, and not the proximate cause of the loss of the goods.

In Admiralty.

*Collins & Beach*, for libellant.

*Lincoln & Stephens* and *Goodloe & Roberts*, for respondent.

BARR, J. The libellant, Blatterman, sues to recover the value of goods and household furniture shipped at Maysville, Kentucky, to Kansas City, Missouri, by the Morning Mail, and which were sunk on the Joe Kinney in the Missouri river, at the Glasgow bridge, April 12, 1882. The bill of lading, which is dated March 16, 1882, agreed to deliver in good order, without delay, at Kansas City, "unavoidable dangers of navigation and fire only excepted." The Morning Mail was a packet running between Maysville and Cincinnati, and both parties understood the goods were to be reshipped at Cincinnati and St. Louis. The goods were reshipped at Cincinnati for St. Louis on the Montana, and passing down the Ohio river the Montana met with an accident at the mouth of Louisville canal, which detained her and made the cargo subject to general average. The Montana arrived at St. Louis, noon, March 25, 1882, and her cargo was there unloaded and the general average ascertained and apportioned. The libellant's goods remained in St. Louis until the eighth of April, when they were reshipped on the Joe Kinney. The Fanny Lewis went out on the first of April, but the libellant's goods were not sent on that boat, and were held subject to the claim for general average. The Kinney was the next boat of the packet line, and the average having been, as it was supposed, adjusted, the goods were shipped on her and lost, with the boat, at the bridge at Glasgow. The libellant's claim based upon this delay I do not think is good.

It is agreed that the goods were properly subjected to the payment of a general average claim, and the proof shows that five days were a reasonable time within which to assort and determine the amounts to be paid by the owners of the cargo. The shipper was not bound to send the goods on to Kansas City and there hold them until the average claim was paid, but, I think, might hold them at St. Louis, which was the termination of the Montana's voyage. Again, I think this claim cannot be sustained because the sinking of the Kinney was in no way connected with the detention of the goods, and the loss of the goods was not directly caused by their detention. This loss is too remote and indirect to be compensated for as the result of the detention.

The defendant, as common carrier, is liable for the loss occasioned by the sinking of the Kinney, as she gave a through bill of lading, unless the loss was caused by the "unavoidable dangers of navigation." This means the dangers of navigation as they existed at the

time, and includes, I think, unavoidable dangers of navigation which may arise from bridges across the rivers to be navigated.

The libel alleges that the Morning Mail had the right, by agreement, to reship said goods, etc., at Cincinnati and at St. Louis, which was done at St. Louis by shipping on the Joe Kinney; but there is no allegation that the Kinney was negligently or unskillfully navigated. The allegation is that the Kinney "was old and unseaworthy in this: that her tiller-ropes were old and worn, and were carelessly, negligently, and improperly allowed so to remain; insomuch that, without unusual external cause co-operating, it was broken by the ordinary turning of the pilot-wheel in guiding said steamer under the bridge at Glasgow, whereby said steamer became unmanageable, and, striking the pier of the bridge, sank, and thus caused the total loss of said merchandise."

The libellant has taken no evidence upon this allegation resting upon the presumption which he is insisting arises from the fact that the tiller-ropes did in fact break, and the boat and cargo were lost. The respondent has taken the depositions of all of the officers on the Kinney except the captain, who is now living in the city of Mexico, and several witnesses not on the boat, who prove the repairs done the Kinney just before she started on this trip.

This testimony shows that the Kinney had been on the docks some two weeks, and had been overhauled and repainted, and was generally in excellent condition. The tiller-ropes were handled and examined. It was taken out, and greased and oiled, and then replaced, and no defect or weakness was discovered in it. It was not a new tiller-ropes, nor is it shown how long it had been in service. There is nothing in the record tending to show that it was defective, either in size or strength, except the fact that it broke when put to the test under the bridge. This was a severe test, but not an extraordinary one. The pilot testifies that his wheel felt, at the time of the parting of the tiller-ropes, as if the rudder had struck drift in the river. There is also proof that the river was rising rapidly and much drift in it, and that the piers had caused cross currents in the river.

Several of the officers of the boat testify that the tiller-ropes would have been of no use at the time of the accident, as the boat was backing on both wheels, and that that was the only thing which could be done, and hence the parting of the tiller-ropes made no difference in the result. If these opinions are correct, the sinking of the boat and cargo would have been unavoidable, even if the tiller-ropes had not parted. There are no opposing opinions to this view taken by the libellant, but I must think these opinions are extreme ones, and not correct to the extent stated, since the rudder must have been of some use in getting to shore after the boat struck, if of no use in avoiding the pier which was struck.

It would not, however, do for me to ignore all of the evidence introduced by the defendant which tends to show that caution and care

were taken in overhauling and repairing this boat, and that the tiller-rope was taken out, examined, and oiled, without the discovery of any defect, and make the Morning Mail liable for the value of these goods, etc., because, and only because, the tiller-rope in fact broke, especially as the evidence shows this is not an unusual occurrence in the Missouri river.

The evidence, I think, proves that the sinking of the Kinney was caused by the "unavoidable dangers of navigation," within the meaning of the bill of lading.

The libel will be dismissed.

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### THE C. & C. BROOKS.

(District Court, D. New Jersey. July 26, 1883.)

#### 1. SALVAGE SERVICE—TOWAGE—UNCONSCIONABLE CONTRACT.

A schooner of 135 tons, worth about \$2,000, with a cargo of the value of \$400 or \$500, was leaking badly on the high seas from the effect of a collision with a vessel that had afterwards abandoned her, but was not derelict. Her crew was tired out by pumping and long watchings; she was making very little progress, and with a change of wind was gradually working seaward, when a tug came to her and towed her up the bay to Jersey City, where she was left, at the request of her master, on the flats, consuming in so doing about four hours. *Held*, that this was a case of salvage service of low grade, involving no circumstances which would justify the court in making large compensation; that a contract to pay \$1,000 for such service was unreasonable and would not be enforced; but that \$250 and the costs of the proceeding would be allowed for the towage and salvage service.

#### 2. SAME—CONTRACTS, WHEN ENFORCED.

Contracts made for salvage service and salvage compensation will be enforced when the salvor has not taken advantage of his power to make an unconscionable bargain; but the courts will not tolerate the doctrine that a salvor can take advantage of his situation and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit.

In Admiralty. Libel *in rem*.

*Samuel H. Valentine*, for libelants.

*Bebee & Wilcox*, for claimants.

NIXON, J. This is a libel *in rem*, and the claim is for \$1,025 for a towing and salvage service rendered by the libelants. The libel sets forth that on the twenty-ninth of November, 1877, the schooner of the respondents was on the high seas, east of the Highlands, in a sinking condition, and with a flag of distress flying at her mast-head; that libelants' tug, seeing her in this condition, steamed along-side, and the master of the schooner requested the master of the tug to make fast and tow her into the port of New York; that the request was complied with, and the tug towed the schooner, with a hawser, up the bay to Jersey City, and, at the request of the master of the