

"The libelants have been awarded damages for a loss which was not such a probable and necessary consequence of a breach of the warranty as may fairly be supposed to have entered into the contemplation of the parties when the contract was made. Such a recovery is not sanctioned by authority. *Griffin v. Colver*, 16 N. Y. 489; *Baldwin v. Telegraph Co.*, 45 N. Y. 744; *Murdock v. Railroad Co.*, 133 Mass. 15; *Pennypacker v. Jones*, 106 Pa. St. 237; *Howard v. Manufacturing Co.*, 139 U. S. 199, 11 Sup. Ct. 500."

In *The Giulio*, 34 Fed. 909, it appeared that a vessel chartered for a voyage from New York to Gibraltar and Malta, and thence for return cargo back to New York, from Oran, duly arrived and discharged her cargo, and being ordered to Oran, on the north coast of Africa, left Malta, and put into an Italian port, where she remained unnecessarily long, and did not arrive at Oran within due time. As a consequence there was a delay in the delivery of the cargo at New York, and for this delay, resulting in a diminished market value, a recovery was permitted. In the opinion (page 911) the court said:

"The liability of the vessel for the loss of a market during the period of negligent delay, after the goods have been taken on board, has been often decided in the courts of this country. *The Success*, 7 Blatchf. 551, Fed. Cas. No. 13,586; *The City of Dublin*, 1 Ben. 46, Fed. Cas. No. 12,094; *The Golden Rule*, 9 Fed. 334; *Page v. Munro*, 1 Holmes, 233, Fed. Cas. No. 10,665; *Desty, Shipp. & Adm.* § 256. I see no reason why the same rule should not be applied, though the delay arose before the cargo was shipped, where the delay was voluntary, and arose in the course of the voyage contracted by the charter, and after it had been entered upon. The charterers assuredly had the right to count upon the ship's proceeding to Oran, pursuant to orders, with reasonable dispatch, as it was her duty to do."

The conclusions of the court in the case at bar, and the authority of the circuit court of appeals, as enunciated in *The Ceres*, require a decree for the libelants for the damages to the bananas, with costs. Some question was raised as to the libelants' right to recover for these bananas. Should there be any defect in that regard, it can be raised on exception to the commissioner's report.

THE ANTONIO ZAMBRANA.

(District Court, E. D. New York. July 11, 1898.)

1. WHARFAGE—STATUTORY CHARGES.

When a vessel in charge of the marshal is sent to a wharf, without any contract as to the charges, the wharfinger is entitled to the maximum rate fixed by the state statute (*Laws N. Y. 1877, c. 315*).

2. CONSTRUCTION OF STATUTES—REGULATION OF CHARGES FOR PUBLIC SERVICE.

When a statute states that for a given service a person having a public relation may charge a specific sum, he is entitled to receive such sum, in the absence of a contract for a less amount, though the actual market rates are much lower.

This was a petition by *Mary A. Eldridge* and others against the proceeds of the steamship *Antonio Zambrana* to obtain payment of wharfage.

Ward, Hayden & Satterlee, for claimant.
Alex. Van Wagoner, for petitioners.

THOMAS, District Judge. The petitioners ask the court to decree the payment of \$205.11 from money arising from the sale of the steamship Antonio Zambrana, and now in the registry of this court, for the use of the petitioners' wharf while the ship was in the hands of the marshal, from the 13th of February to the 27th of March, 1893, being 43 days, at the rate of \$4.47 per day. The ship is of 505 tons gross tonnage, and the rate charged is said to be the maximum rate allowed by chapter 315 of the Laws of New York for the year 1877. The evidence discloses that the charge is largely in excess of that made for similar services by the petitioners and others concerned in the business. This is important, as bearing upon the question of the fair market value of the services, if such question be involved. The petitioners contend that such usual or customary charges arise out of agreements, and hence are not evidence of market value. It appears, however, that agreements, with rare exceptions, are made; and therefore the sums which wharfingers are willing to accept, and shipowners are willing to pay, for wharfage, are the strongest indications of the value of the services. But it is urged by the petitioners that the court must not be governed by the market value, but, in the absence of agreement, by the highest rate permitted by the statute of the state. If this contention be correct, the statute fixes the amount which this court must order paid from its registry, whatever the relation thereof be to the services rendered, and however unconscionable the charge. In other words, it is urged that, in the absence of contract, the rates mentioned in the statute are the just market rates. The court is constrained, against its will, under the facts in this particular case, to interpret the statute in accordance with the petitioners' contention. When a statute states that for a given service a person having a public relation may charge and receive a specific sum, it does not lie in the power of another to assert that such person shall not charge and receive such sum for such service, but shall charge and receive a sum computed upon some other basis, or ascertained according to current or customary charges. The statute is supreme, and confers a right; and unless the person upon whom the right is conferred waives it, by contract or otherwise, a court is technically barred from declaring that the exercise of the right is unlawful. The statute is crude and ungrammatical, but it was the evident intent of the state to declare what should be due wharfingers for facilities afforded to vessels; and the fact that wharfingers, or even the wharfingers in question, do not customarily avail themselves of the statutory rates, does not estop the petitioners from claiming the benefit of the statute in any given instance, unless persons dealing with them have been misled by the previous conduct of the business. In the present case the ship was carried to the wharf and left with utter disregard of the expense of wharfage, and without any attempt to protect the money in the care of the court from the statutory charge by means of agreement, which is freely and usually made by wharfingers with their customers. Indeed, the evidence discloses that wharfingers seldom charge according to the statutory rates, for the simple reason that such rates are not the market rates, and no one will pay them, unless, from accident, ig-

norance, or design, he has failed to stipulate the rate. It is suggested that the obvious duty of making such an agreement be observed in the future by officers having vessels in charge. The explanation offered concerning the system of keeping his books, wherein the petitioners' superintendent has stated the rate of wharfage in this case to be \$1.50 per day, is of doubtful credit; but there does not appear to be sufficient in such entry to enable the court to affirm that the petitioners have waived the right conferred by the statute.

It must be decided that the petitioners are entitled to the statutory rate for the wharfage furnished, but a decree therefor shall not be entered until the court shall have been furnished with the computation, and shall have approved the same. It is probable that the rate should be upon the registered, and not gross, tonnage. The *Craigendoran*, 31 Fed. 87. There will also be presented to the court a statement of the expenses of this proceeding, and it will be determined to what extent, if any, the fund in the registry of the court shall be further depleted on account of this claim, wherein the wharfingers, pursuing their technical right, have seen fit to discriminate in their charges against property in the care of this court.

THE MARIA DOLORES.

(District Court, D. South Carolina. June 30, 1898.)

PRIZE—ENEMY'S PROPERTY.

A vessel and cargo whose papers, supported by the testimony, show that both belonged to a subject of the king of Spain, held lawful prize of war, having been captured by a United States cruiser while on a voyage from one port of the enemy to another.

This was a libel in behalf of the United States against the *Maria Dolores* to procure her condemnation as prize of war.

A. Lathrop, U. S. Dist. Atty.

BRAWLEY, District Judge. This is a cause of prize arising out of the capture of the Spanish bark *Maria Dolores* by the United States cruiser *Minneapolis*. The libel was filed June 10, 1898. No claimant has appeared, and the testimony taken by the prize commissioners, and an examination of the ship's papers, show that the *Maria Dolores* is a bark of 375 tons, owned by Tomas de Gorosica, a subject of the king of Spain; that she was manned by a crew of 11 persons, and under the command of Buenaventura Ferrer, master. She sailed from San Sebastian, in ballast, about the end of March, and on the last days of March and the first days of April, 1898, she took on a cargo consisting of 250 tons of bituminous coal and 250 tons of patent fuel at Avilas, a port of the kingdom of Spain, whence she sailed early in April for San Juan, a port in the island of Puerto Rico; both ship and cargo being consigned to Sobrinos de Azguiaga, Spanish subjects at the last-named port. She was captured in the early morning of May 21, 1898, about 12 miles from San Juan, by the United States cruiser *Minneapolis*, commanded by Captain Jewell, of