

present case. Instead of bringing such a suit for the value of the cargo, the plaintiffs have elected to sue the defendant, who has received a fund which, in legal contemplation, is the cargo itself. If the defendant had sold the cargo and received the proceeds, the plaintiffs could maintain an action against him for the amount, upon the promise implied by law to pay them to the true owners. What the defendant has done is equivalent to that, because he had no right to appropriate the fund to any other object than that of paying it to the true owners in order to exonerate himself. Although he has not been guilty of a technical conversion, he has sought to retain money to which, as against the plaintiffs, he has no equitable claim. The action for money had and received, which is sometimes termed an equitable action, affords an appropriate remedy to the plaintiffs. If defendant has allowed his proctor to retain part of the money, he must account for it as though he had received it himself, and paid over to the proctor the amount, which the latter retained. Judgment is ordered for the plaintiffs for the sum of \$3,496.92, with interest from October 13, 1885.

GOLDSMITH v. TOWER HILL STEAM-SHIP Co.¹

(District Court, S. D. New York. February 20, 1889.)

CARRIERS OF LIVE-STOCK—DELAY IN SAILING—EXPENSE OF KEEPING STOCK—LOSS OF WEIGHT—LIABILITY OF CARRIER.

Where a steam-ship's sailing day was delayed, and in consequence libelant brought suit to recover alleged loss for the keep of his live-stock while awaiting shipment under a prior contract, as well as for their loss of weight during such delay, but it appeared that part of the original lot was sent forward by another steamer, and that the rest were sold in this city without any loss proved, and that the steamer's delay was without fault, and that the libelant had early notice of the expected delay, *held*, that libelant had sustained no damage on the original lot. But the evidence indicating that on a second lot, procured on notice from the ship, there was further delay, *held*, that libelant was entitled to recover for the keep and loss of weight on the last lot.

In Admiralty. Libel for damages for delay in transporting cattle.

The respondents on the 22d of September, 1888, agreed to transport upon the next voyage of their steamer Tower Hill, from New York to London, 275 head of cattle and 500 head of sheep; the cattle to be shipped on notice of the time of sailing, to-wit, about September 29th. On the arrival of the steamer she was found to have sustained some damage, which would cause detention, at first supposed to be slight; and notice was given to the libelant that she would sail on October 3d. It was afterwards found that the damages were much greater than supposed; and the steamer did not sail until the 15th, when she carried the agreed number of cattle and sheep. The libel is to recover damages for the ex-

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

penses of keeping the live stock, and the loss of weight in the mean time.

Butler, Stillman & Hubbard, for libelant.

Wing, Shoudy & Putnam, for respondents.

BROWN, J. The evidence shows that none of the cattle or sheep that were first designed to be sent by the Tower Hill were kept until she sailed. The libelant was in the business of purchasing cattle in the west, to be shipped to this port, and thence forwarded by steamer. Of those originally designed for the Tower Hill, 117 were forwarded by the steamer *Helvetia*, which sailed on October 7th, belonging to another line; the rest were sold to butchers in this city. All the sheep first brought were likewise sold. At the end of the trial two adjournments were had to allow the libelant to furnish legal evidence of the kinds of damage sustained. No further evidence was introduced; and, upon the cause thus submitted, there is no sufficient proof of any loss to the libelant on the cattle or the sheep sold. The libelant failed to appear for examination; and the evidence of his clerk and book-keeper is quite indefinite as to the small loss which he thinks arose on the sale of the sheep. No claim for that item was made on the respondents before suit.

As respects the 117 cattle for which damages are claimed for their keep and loss in weight from October 3d until the *Helvetia* sailed, on October 7th, there is no certain evidence that they arrived by October 3d, or any sooner than was necessary to ship them on the *Helvetia*. Again, from the failure to prove any loss on the remainder of the consignment that was sold, it must be inferred that the 117 could also have been sold without loss, had the libelant chosen to sell them. If so, he could not keep them here for the purpose of sending them on the *Helvetia*, and then charge the respondents for keeping them in the mean time. The inability of the respondents to have their vessel sail upon the day assigned, and the subsequent several delays, were all accidental, and without any fault on their part. The libelant had notice of the expected delays. In such a case, the other contracting party is held to reasonable care and exertion to render the injury as light as possible. *Hamilton v. McPherson*, 28 N. Y. 72, 77. If, therefore, the 117 cattle were kept over for the *Helvetia*, there is no evidence to show that the respondents are chargeable for this item. It was the libelant's voluntary act.

There is no evidence of any damages sustained in holding back the cattle or sheep first designed for the Tower Hill.

The respondents are liable for the keep and loss of weight on the second lot of cattle and sheep, upon the last postponement from October 14th to October 15th. The cost of "keeping" here is for cattle, 50 cents per head a day; and for sheep, 10 cents. This item is \$187.50; for loss of weight, \$266.87; making in all, \$454.37, for which a decree may be entered, with interest since October 15, 1888, with costs.

PETERSON v. THE WAYNE.

(District Court, N. D. Illinois. March 14, 1889.)

COLLISION—BETWEEN SAILING VESSELS—CONFLICTING THEORIES.

The libel for damages to the schooner *P.* by a collision while she was cruising around the entrance to Chicago harbor, waiting for daylight and a tug, charged that for some time before and at the time of the collision the wind was blowing strong from east-north-east, and the weather clear, so that the vessel's lights could be seen at least two miles away; that the schooner was on the starboard tack, close-hauled, with all hands on deck, in charge of the master, with a lookout forward and a seaman at the wheel; that a vessel's red light was reported over the starboard bow, and, as it approached without change in direction, a torch-light was shown, and repeated, but without change of course; that when the other vessel, which was the barge *W.*, passed so that her red light appeared over the schooner's portbow, she suddenly changed her course, striking the schooner stem on, on the port bow, between the fore-rigging and the cat-head; that as the *W.* was sailing with wind free it was her duty to have kept out of the way. The answer denied these allegations, and charged that the wind was north-east; that the barge was heading south-west by south; that her crew discovered from her starboard side a torch-light on a vessel approaching her from her stern, and that the sails, as seen by the torchlight, appeared to be trimmed on the starboard side, and the vessel to be going in the same general direction as the *W.*; no side lights were seen on the schooner; that her course so converged to that of the *W.* as to cause her to run her jib-boom and bowsprit on her port bow against the *W.*'s starboard bow; and that it was the duty of the *P.* to have kept out of the way. The statements of the pleadings were supported by the testimony of the respective crews, but the crew of the *W.* admitted that they had no knowledge of the presence of the *P.* until they saw the torch-light. *Held*, that the proof from the *P.* was the most natural and consistent, and that the *W.* must be held liable for the damage.

In Admiralty. Libel for collision.

Schwytler & Kremer, for libellant.

Robert Rae, for respondent.

BLODGETT, J. In this case libellant, as owners of the schooner *Phenix*, seek to recover damages sustained by said schooner from a collision with the barge *Wayne* on the morning of November 24, 1887, on the waters of Lake Michigan, a few miles north-east of the entrance to Chicago harbor. The proof on the part of the libellant shows that the *Phenix* was bound on a voyage from Milwaukee to Chicago, and arrived at the entrance to Chicago harbor at about 12 o'clock midnight; that, instead of coming to anchor, she cruised around about the mouth of the harbor, waiting for daylight, and a tug to take her in. The libel charges that some time before and at the time of said collision the wind was blowing a strong breeze from the east-north-east, and the weather was clear enough so that vessel's lights could be seen at least two miles away; that for some time before and at the time of the collision the schooner was on the starboard tack, close-hauled; all hands were on deck, a lookout was stationed forward, and a seaman at the wheel, and the deck in charge of the master; and, while sailing along in this way, the lookout discovered and reported a vessel's red light over the schooner's starboard bow. This was closely watched, and, as it approached without apparent change of course,