

Case No. 4,424.

[2 Blatchf. 336.]<sup>1</sup>

THE ELVIRA HARBECK.

Circuit Court, S. D. New York.

Oct. 7, 1851.<sup>2</sup>

CARRIERS OF PASSENGERS—PERSONAL BAGGAGE—LIABILITY FOR LOSS.

1. Where a passenger accompanies his baggage, the fare charged for his passage includes compensation for its transportation, and the carrier becomes responsible for its safe delivery.
2. If a passenger does not accompany his baggage, the carrier may claim compensation in advance for its transportation, or may postpone his claim till the delivery and rely on his lien or on the personal responsibility of the owner; in either of which cases, the carrier is responsible for the safe keeping and delivery of the baggage.
3. Where a person took passage in a vessel, but his personal baggage did not reach him in season to be put on board of that vessel, and he sailed without it, and it was put on board of another vessel, a receipt or bill of lading being given for it by the mate of the latter vessel, but it was never delivered at its port of destination: *Held*, in an action in rem brought against the latter vessel for the value of the baggage, that the case was one of the ordinary shipment of goods on freight, for whose safe delivery the vessel was liable, and that her

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owner was not to be regarded merely as a gratuitous bailee, responsible only for gross negligence.

4. The words "personal goods" on the margin of the receipt or bill of lading, were at most but a description of the character of the goods, and did not exempt the owner of the goods from freight, or the vessel from responsibility.

{Appeal from the district court of the United States for the southern district of New York.}

In admiralty. This was a libel in rem, filed by Jeanette Brown, in the district court, against the bark Elvira Harbeck. The libel set forth that the libellant shipped, on board the Elvira Harbeck, lying at the port of Antwerp and bound for New York, ten packages and one basket of goods—the same being personal baggage and tools—all in good order and condition; that the mate of the vessel, acting on behalf of the master and owners, undertook and agreed to deliver the same, at the port of New York, to the libellant or her order, the dangers of the sea only excepted; that eight of the ten packages contained the tools of the trade of her son, put up in boxes, and two others were trunks secured by lock and key; that the two trunks and the basket contained the personal apparel belonging to the libellant and her family; that the Elvira Harbeck arrived from Antwerp safely, in New York, on the 10th of August, 1849, and eight of the packages were delivered according to the bill of lading executed by the mate; but that the two trunks and basket had not been delivered to the libellant, though the same had been frequently demanded.

The answer denied the allegations in the libel, and averred that all the packages received on board the vessel were delivered to the libellant. It denied all negligence, and charged that, if any of the goods had been lost, they were lost by the negligence and carelessness of the libellant.

The proofs showed that the libellant and her family emigrated from Aix-la-Chapelle to this country; that the goods were packed in eight boxes, two trunks and a basket which were forwarded to Antwerp by the railroad; that the family had taken their passage to New York in the ship Roscoe, then lying at Antwerp; and that in consequence of this vessel's having left the port on her voyage, with the family, before the arrival of the boxes of tools and baggage by the cars, it became necessary to send them on another vessel. They were sent accordingly, by the agent of the libellant in the Elvira Harbeck, and a receipt or bill of lading for the goods was duly executed by the mate, then in charge of the vessel, at the port of Antwerp. The receipt when put in evidence, had on its margin the words "personal goods," in pencil. When they were put on, did not appear. A witness, the brother of the libellant saw the goods put on board the vessel and stowed away in the hold, the usual place for stowing away merchandize. On the arrival of the vessel at New York, the eight boxes of tools were duly delivered to the order of the libellant; but the two trunks and basket could not be found and had never been delivered. The libel was filed to recover the value of their contents.

The ground of defence relied on was, that the goods were shipped on a passenger ship, as personal baggage belonging to a passenger or passengers; and that, inasmuch as the owner did not take his passage on board the ship and pay the fare, which would include compensation for the usual baggage, no compensation was paid, in this case, for the freight and the ship was entitled to none; and hence, that the master and owners were to be regarded as gratuitous bailees, and responsible only for gross negligence, to be charged and proved, in the transportation of the property.

The district court sustained the defence set up and dismissed the libel. [Case No. 2,005.] The libellant appealed to this court.

Erastus O. Benedict for libellant.

Welcome R. Beebe, for claimants.

NELSON, Circuit Justice. There is no evidence that the libellant and her family took passage in the *Elvira Harbeck* or ever intended to take passage in her. On the contrary, their passage was taken in the *Roscoe*, on which ship they expected to have carried with them their personal effects; but they were disappointed, in consequence of the non-arrival of the goods in the cars from *Aix-la-Chapelle*, when the vessel sailed. It was then arranged with their agent to send the goods in some other vessel bound for the same port. But even assuming that the libellant and her family had engaged their passage in the *Elvira Harbeck*, but changed their minds, and failed to complete the engagement and took passage in another ship, sending their baggage, however, in the *Elvira Harbeck*, it by no means follows that the vessel is not entitled to freight or that the owners are to be regarded as gratuitous bailees, and to be held responsible only for gross neglect in the transportation of the goods. On the contrary, I cannot doubt that they would be entitled to reasonable freight money, and to a lien on the goods until it should be paid.

In cases where the passenger accompanies his baggage, the fare charged for his passage includes compensation for its transportation, and the carrier becomes responsible for its safe delivery. If the passenger does not accompany it the carrier may claim compensation in advance for its transportation, or may postpone his claim till the delivery and rely on his lien or on the personal responsibility of the owner. And I do not see why the rule of responsibility for the safe-keeping and delivery should not be the same in both cases. The actual payment of the freight in the one case, and the actual liability

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and lien for its payment in the other, constitute the consideration for the undertaking.

But it is sufficient to say, in this case, that the proofs show an independent shipment of the goods in question, unconnected with the owner as a passenger. The case is one, therefore, of the ordinary shipment of goods. The words "personal goods," in pencil-marks, upon the margin of the receipt—when put on, does not appear—cannot alter the nature of the undertaking. They do not exempt the owner of the goods from freight or the ship from responsibility. At most, they are but a description of the character of the goods put on board.

I think that the libellant is entitled to recover, and must, therefore, reverse the decree below, and refer the case to the clerk, to report the value of the property lost.

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

<sup>2</sup> [Reversing Case No. 2,005.]