

I am not prevented from considering the facts as they actually existed. I agree with the assessor, therefore, that the Bronx was responsible only for the damage which the schooner would have sustained if she had been hauled off the beach on the morning of July 5th; and I overrule the libelant's exceptions to that part of the assessor's findings.

The libelant's exception E relates to the liability of the tug for damages sustained by the schooner's cargo. Had the schooner been floated on the morning of July 5th, the cargo would not have been injured.

Exception M relates to the disallowance of the expenses of Mr. Champion's first trip. Exception N relates to the amount of demurrage. I am not disposed to differ from the findings and rulings of the assessor upon these points.

Regarding exception T, I agree with the assessor that, if the claimants had performed salvage service, they would so far have satisfied their own liability by services instead of money; and I see no reason why the libelants should recover an amount which, under the circumstances, they would not have been called upon to pay. It is said that while the owners of the tug might have been prevented from recovering for the salvage services rendered by their vessels, because they were liable for the original disaster, yet that the officers and crew of the tug might have recovered from the schooner the value of their own individual salvage services. Had they done so, the owners of the schooner could doubtless have claimed reimbursement from the owners of the tugs, but I think a hypothetical expense of that sort cannot be recovered in this action.

Holding the above opinion, I need not consider the respondents' exceptions. Decree in accordance with the assessor's report.

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THE NEW YORK.

UNION S. S. CO. v. ERIE & W. TRANSP. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. February 8, 1898.)

No. 461.

**COLLISION—RIGHT OF WAY—SIGNALS.**

When a vessel is pursuing a course which the law gives her a right to take without the assent of another vessel, the whistle consistent with that course is to be regarded as a positive indication of her intention to pursue it. But, where a vessel has no right to pursue a particular course without the assent of the vessel she is meeting, the whistles she uses to obtain that assent are merely invitations to an agreement contrary to the usual mode of passing, and are not to be taken as a distinct indication that, on failure to obtain such assent, she will violate the rules of navigation, at least until there is something additional in her conduct to justify such an inference.

This was a libel by the Erie & Western Transportation Company, owner of the steamer Conemaugh, against the steamer City of New York, owned by the claimant, the Union Steamship Company, to recover damages for a collision between the two vessels, whereby the Conemaugh was sunk in the Detroit river. The claimant filed a cross libel for damage occasioned to the New York. The district court, by its final decree, found that the New York was solely in fault, and assessed the entire damages against her. The claimant of the New York thereupon appealed to this court, which, on October 5, 1897, filed an opinion reversing the decree below, finding that the Conemaugh was alone in fault, dismissing the libel against the New York, and ordering a decree in personam against the owner of the Conemaugh for the damages received by the New York, and also dismissing the intervening petition of certain insurance companies. 27 C. C. A. 154, 82 Fed. 819. The cause is now heard upon a petition for a rehearing.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge. In this case a petition for rehearing has been filed, asking that the court reconsider its decision already announced in so far as it was adjudged thereby that the New York was not guilty of fault contributing to the collision. We deem it necessary to consider only two points made in the petition. One is that the finding of fact by the court made the relative situation of the vessels such that, under the case of *The Manitoba*, 122 U. S. 97, 7 Sup. Ct. 1158, the New York should have whistled. The other is that the two blast whistles of the Conemaugh were a distinct indication to the New York that the Conemaugh was about to fail in her duty to keep out of the way of the New York, and was on a course across the bows of the New York, and that, by reason of this indication, it became the duty of the New York to stop and reverse. We think the rule laid down in the *Manitoba* has no application to the case at bar. In that case two vessels were approaching each other for a considerable time on slightly converging and nearly parallel courses, and, as the courses did not change, it was held the duty of each vessel to be cautious, to indicate by whistle its course, and to reduce speed and stop. In the case at bar, if we assume that the lookout of the New York saw all that he ought to have seen, he would have discovered that the Conemaugh was changing her course from one crossing that of the New York, and was swinging round into the wake of the tow, presumably for the purpose of keeping out of the New York's way by going to the starboard. For a time it is true that their courses might have been parallel, but only in the execution of this proper maneuver. We have no doubt that a lookout on the New York could have had the same view of the red light of the Conemaugh which the captains of the last two tows of the *Burlington* had as

the Conemaugh swung round into their wake, and might well have inferred therefrom that the Conemaugh was complying with her obligation to swing to starboard out of the way of the New York.

This conclusion of fact is important in considering the next point made in the petition for rehearing,—that the Conemaugh's two blast whistles were distinct indications of her intention to do what she did. In situations where a vessel is pursuing a course which the law gives her the right to take without the assent of another vessel, the whistle consistent with that course is to be regarded as a positive indication of her intention to pursue it. But we apprehend that, where a vessel has no right to pursue a particular course without receiving the assent of the vessel she is meeting, the whistles she uses to obtain that assent are merely invitations to an agreement contrary to the usual mode of passing, and are not to be taken as a distinct indication that, on failure to obtain the assent she seeks, she will violate the rules of navigation, at least until there is something additional in her conduct to justify such an inference. This distinction is a necessary corollary to the ratio decidendi of *The John King*, 1 U. S. App. 64, 1 C. C. A. 319, and 49 Fed. 469, and *The B. B. Saunders*, 23 Blatchf. 383, 19 Fed. 118. The captain and lookout of the New York, if they had seen and heard the Conemaugh, would have observed her swinging slowly to starboard in the wake of the last barges in the tow, although blowing signals of her intention, if assented to by the New York, of changing her course across the bows of that vessel. This was not a distinct indication of her intention to cross the bows of the New York as she did.

Other questions are made in the petition to rehear, but as they are mere repetitions of the arguments on the facts considered in the original opinion, and as they do not change our views, it is needless to state or discuss them. The petition is denied.

## REED et al. v. NORTHERN PAC. RY. CO. et al.

(Circuit Court, D. Minnesota. May 7, 1898.)

## REMOVAL OF CAUSES—FEDERAL QUESTION—LIABILITY ASSUMED BY DEFENDANT FROM NATIONAL CORPORATION.

A corporation purchasing a railroad at foreclosure sale in a federal court, and assuming as part of the consideration all liabilities incurred by the receivers of that court in their management, is not entitled to remove a suit to enforce such a liability, on the ground that it involves a federal question, because the receivers, if sued, could have removed the suit on that ground.

This is an action brought in a state court by Lathrop E. Reed and others, partners as Reed & Sherwood, against the Northern Pacific Railway Company and others. Defendant Reed removed the cause to this court, and it is now heard on a motion to remand.

D. F. Morgan, for plaintiffs.

C. W. Bunn, for defendants.

LOCHREN, District Judge. This action was commenced in the state district court, Anoka county, to recover of the defendant railway companies the value of a large quantity of lumber alleged to have been burned in plaintiffs' lumber yards in July, 1894, by fire negligently dropped or scattered from the locomotives of the Northern Pacific Railroad Company and the Great Northern Railway Company while passing the said yards. The Great Northern Railway Company is a Minnesota corporation, and the Northern Pacific Railroad Company was a federal corporation, organized under acts of congress, and at the time of the said fire its railroad and property was in the possession of and operated by receivers appointed by this court, and under decree in the same action in which said receivers were appointed the said railroad and property were sold to the defendant the Northern Pacific Railway Company, which is a Wisconsin corporation, and which by the terms of the sale became obligated to pay, as part of the consideration for its purchase, any liabilities contracted or incurred by the receivers before the delivery of the possession to it of the railroad property. The action was removed to this court upon the petition of the two railroad companies, defendants, upon the alleged ground that it is a suit "arising under the constitution or laws of the United States." The plaintiffs now move for an order remanding the cause to the state court, claiming that it is not such a suit.

Had the suit been brought against the receivers while they remained in the discharge of their functions, it would have been such a suit; as the corporation represented by them existed and derived its rights and powers from the laws of the United States, and the right to sue the receivers so appointed rested on the same laws. *Railway Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905; *Landers v. Felton*, 73 Fed. 311; *Cableman v. Railway Co.*, 82 Fed. 790. But the defendant the Northern Pacific Railway Company does not represent the Northern Pacific Railroad Company nor the receivers. It is liable, if at all, by virtue of the terms of its contract of purchase, by which it assumed the then pending indebtedness and liabilities of the receivers. If the Northern