THE PAUNPECK.

THE ANDREW J. WHITE.

HOBOKEN FERRY CO. et al. v. HALL.

HEIPERSHAUSEN v. SAME.

(Circuit Court of Appeals, Second Circuit. March 10, 1898.)

Nos. 79 and 80.

1. COLLISION—PRECAUTIONS AGAINST—FERRYBOATS AND TUGS.
While ferryboats crossing the Hudson from New York are privileged to entrance to and exit from their slips without embarrassment from the presence of other vessels, it is not for that reason negligence for a steam tug with a tow 150 feet astern to pass up the river opposite such slips 800 feet from shore, though another tug and tow are also coming up on a parallel course 350 feet outside of it.

2. SAME—VESSELS CROSSING—NEGLIGENCE CAUSING COLLISION.
A tug with a tow 150 feet astern, passing up the Hudson, obeyed the signal of a ferryboat, and allowed it to cross ahead. After the tug had crossed under the stern of the ferryboat, the latter, fearing collision with another vessel, stopped and backed, coming in collision with the tow. *Held* that, even if negligent in being too near the shore, the tug was not liable for the injury, which was not the proximate result of such negligence, but of the intervening negligence of one or both of the other vessels.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by John W. Hall, owner of the schooner Ettie H. Lister, against the steam ferryboat Paunpeck, for damages for injuries in a collision. A cross libel was filed by the Hoboken Ferry Company, owners of the Paunpeck, against Hall and the steamtug Andrew J. White. Appeal from decrees holding both vessels in fault. Reversed, with instructions.

Albert A. Wray, for appellant the White.
James J. Macklin, for appellant Hoboken Ferry Co.
George B. Adams, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal from two decrees of the United States district court for the Southern district of New York holding the steam ferryboat Paunpeck and the steamtug Andrew J. White mutually in fault for the damages caused by a collision between the Paunpeck and the schooner Ettie H. Lister, in tow of the White.

On April 24, 1894, the ferryboat Paunpeck left her slip at the foot of Christopher street, New York, at 5:46 p. m., bound for the foot of Newark street, Hoboken, across the river from, and a little to the southward of, Christopher street. There was an ebb tide running 2½ miles an hour. When she had gotten within about 100 feet of the mouth of her slip, she was slowed and stopped to allow a tug with a tow to cross the mouth of the slip ahead of her. After the tug and tow passed, the Paunpeck blew a long whistle, and went ahead under one bell. As she emerged from the slip, three tugs with tows were coming up the river,—the steamtug E. L. Austin, towing three scows tandem, about 200 feet off the pier line; the

steamtug Andrew J. White, with the Ettie H. Lister in tow astern on a hawser of about 150 feet, about 800 feet off shore, and about 1,100 feet below Christopher street; and the New York Central lighterage tug No. 17, with a car float in tow alongside on her port side, about 350 feet outside of the tug White, and about abreast of the wheel of the Lister. The White was making about four knots against the tide, and the New York Central tug was overhauling her. The Paunpeck, as she came out, blew a signal of one whistle, which was answered by each of the tugs with a like signal. The White, on answering the whistle of the ferryboat, immediately slowed. The Paunpeck continued on her course, passing in front of the White, about 150 feet away, and the White passed under her stern. After the White had gone under the stern of the ferryboat, the latter began backing, and an alarm signal was given on the White. But the Paunpeck continued to back, and, drifting down on the ebb tide, came into collision with the schooner. The collision took place about 200 feet below the ferry slip. The pilot of the Paunpeck checked her speed, blew an alarm whistle, and backed, while the New York Central tug was still 200 feet to the westward of him, and on his port bow. In his report to the supervising inspector he stated that as his vessel emerged from the ferry slip he blew a signal of one whistle to pass ahead of all the tugs, and that it was answered by each of them, but that the New York Central tug failed to comply, and, after he had passed ahead of the White, he was compelled to stop and back, to avoid collision with the New York Central tug. In fact, the New York Central tug had complied, and, if the Paunpeck had kept on, she would have passed safely in front of the New York Central tug.

The district judge found the ferryboat in fault because she unnecessarily backed when the New York Central tug would have avoided her if she had kept on, and also because it was imprudent for her to start on an ebb tide in front of the three lines of boats; and he condemned the White for fault "in running so near the slips with such a tow, and in line with another tow parallel and only a little outside of it."

It is no doubt obligatory upon vessels navigating the Hudson river opposite New York City to conform their movements, so far as is reasonably practicable, to the convenience of ferryboats in entering and leaving their slips. Because of the necessity that these transits be made with great frequency and regularity for the accommodation of the public, ferryboats are privileged to entrance and exit without embarrassment from the presence of other vessels in unnecessary proximity to the slips. Accordingly it is adjudged to be the duty of such vessels plying up and down the river "to keep a sufficient distance from the slips, and hold themselves under such control as to enable them to avoid ferryboats leaving their slips upon their usual schedule time." The Breakwater, 155 U. S. 252, 15 Sup. Ct. 99.

It would seem to be a somewhat violent application of the rule to hold the White in fault. She was proceeding sufficiently far off shore to allow the ferryboat ample room for any maneuver the latter might see fit to attempt in leaving her slip. There was no

reason why she should anticipate any hazard because the New York Central tug, with her tow, came up the river and overtook her on an outside and parallel course. If that tug had governed her movements properly, her presence would not have embarrassed the maneuver of the ferryboat. Any hazard from the proximity of that tug and tow was purely a speculative one.

If it should be assumed, however, that the White was in fault, the case is one where her fault was remote, and not contributory to the collision as a proximate cause. She had allowed the ferryboat the right of way, and the latter had availed herself of the privilege with safety. There would have been no danger in the situation except for the subsequent intervening negligence of others. Even if this intervening negligence was the misconduct of the New York Central tug in failing to slow as promptly as she should have done to permit the ferryboat to pass in front of her, the White was not responsible for her misconduct. But the intervening negligence was the misconduct of the ferryboat, and there would have been no collision if she had been properly navigated. It was caused by her fault in stopping and backing when she ought to have kept on in front of the New York Central tug. Her pilot was not justified in assuming that the New York Central tug would not perform her duty while there was yet time for her to do so, and in doing so he took the risk of being wrong in his assumption. The principle is applicable that no liability attaches to an act of negligence for a result which could not have been foreseen, or reasonably anticipated as the probable consequence, and would not have been induced but for the interposition of a new and independent cause. The Clara, 5 C. C. A. 390, 55 Fed. 1021; Railway Co. v. Elliott, 5 C. C. A. 347, 55 Fed. 949; Railroad Co. v. Bennett, 16 C. C. A. 300, 69 Fed. 525; Motey v. Granite Co., 20 C. C. A. 366, 74 Fed. 155; Scheffer v. Railroad Co., 105 U. S. 252.

The decrees are reversed, with costs, and with instructions to dismiss the petition of the Hoboken Ferry Company, and decree conformable with this opinion.

MEIGS et al. v. HAGAN et al.

(District Court, E. D. Pennsylvania. April 4, 1898.)

COMMON CARRIER—EMPLOYED BY VENDEE—SUIT BY VENDOR.

Where property is delivered to a carrier employed by the purchaser to receive it, the right to sue the carrier for failure of duty vests in the vendee, and not the vendor. Blum v. The Caddo, Fed. Cas. No. 1,573, 1 Woods, 64, followed.

This was a libel in personam by H. V. L. Meigs & Co. against Peter Hagan and others, owners of the barge Morrisdale, to recover damages for breach of a contract of carriage.

Horace L. Cheyney and John F. Lewis, for libelants.

Henry R. Edmunds and John A. Toomey, for respondents.

Supplemental Brief on Behalf of Respondents.

The assumption by libelants that they were the shippers of the coal and that the bill of lading is the contract between the parties is without foundation. The uncontradicted testimony is that the boat was chartered to the consignees for the purpose of carrying the coal which had been sold to them by libelants

f. o. b. The bill of lading shows that the actual shipper was the Finance Company Commercial Agents of the Receivers of the Philadelphia & Reading Coal & Iron Company, who put the cargo aboard at their own wharves, for account of libelants, whose only interest was that of vendors. The bill of lading presupposes the charter, as it refers to the payment of freight by the consignee as agreed, that is the agreement between Hagan and McGinn as to the rate of freight, the consideration for the contract, with which the libelants or shippers had nothing to do, so that the bill of lading in this instance is nothing more than a receipt for the cargo and not a contract of affreightment as the libelants assume.

The libelants were careful to develop the fact that they sold the coal f. o. b., and when the disaster occurred were also careful to declare that they had no interest in the cargo after its delivery on board, which are all consistent with the contention that the charter and not the bill of lading is the contract of affreightment.

In Blum v. The Caddo, 1 Woods, 64, Fed. Cas. No. 1,573, the libelants claimed the right to sue because they made the contract of affreightment with the carrier, but it was also the fact that the freight was paid by the agent of the consignees. This case has never been overruled or questioned.

In Griffith v. Ingledew, 6 Serg. & R. 440, Gibson, J., in contending in his able dissenting opinion that the consignee had no right to sue in that case, says that the discriminative circumstances giving the right to sue are:

(1) An engagement to pay the freight by the person who brings the action.

(2) An order by the consignee to deliver the goods to a particular carrier for account and risk of consignee.

(3) Not merely the legal property but the beneficial interest in the goods existing in the person who brings the action.

A reference to the authorities relied upon by the libelants in their supplemental brief will show that these discriminative circumstances appear in the cases cited by them. In the case of Dunlop v. Lambert, 6 Clark & F. 600, the suit was by the consignor who made the contract and paid the freight. The court, on page 607, say: "The real question here is whether the appellant and respondents were the contracting parties, for if they were and the appellant paid the freight they are entitled to maintain an action." On page 620 the court further says: "It is no doubt true as a general rule that the delivery by the consignor to the carrier is a delivery to the consignee, and that the risk after such delivery is the risk of the consignee. This is so if without designating the particular carrier the consignee directs that the goods shall be sent by the ordinary conveyance; the delivery to the ordinary carrier is then a delivery to the consignee, and the consignee incurs all the risk of the carriage. And it is still more strongly so if the goods are sent by a carrier specially pointed out by the consignee himself for such carrier then becomes his special agent."

In the case of Railroad Co. v. Schwartz, 13 Ill. App. 490, the conflict of authorities upon this point is admitted.

In the case of Packet Line v. Shearer, 61 Ill. 263, the suit was brought by a husband who shipped a trunk to his wife. It was held he had a right to sue for its nondelivery. He probably paid the freight.

Blanchard v. Page, 8 Gray, 281, was the case of a shipment of goods on a general ship to be carried for a stipulated freight. The purchasers of the goods were Sutton, Griffith & Co. of Ft. Smith, Ark., who authorized and requested the plaintiff to ship the goods on board a vessel, to a forwarding house at New Orleans to be sent from there to the purchaser. The court considered the contract binding on the shipper to pay the freight, saying: "In the ordinary form of a bill of lading there is no express stipulation on the part of the shipper to pay freight but this liability results from his having engaged the ship owner to take on board and carry the goods at his instance." The court also found that the contract of shipment was made by the plaintiff as agents for the owners of the goods whose name was not mentioned in the bill of lading.

In the case of Finn v. Railroad Corp., 112 Mass. at page 529, the court says, after referring to the decision in the above case: "When carrying goods from seller to purchaser, if there is nothing in the relation of the several parties except what arises from the fact that the seller commits the goods to the carrier as the ordinary and convenient mode of transmission and delivery in

execution of the order or agreement or sale, the employment is by the seller, the contract of service is with him and an action based upon that contract may be in the name of the consignor; if however the purchaser designates the carrier making him his agent to receive and transmit the goods, or if the sale is complete before delivery to the carrier, and the seller is made the agent of the purchaser in respect to the forwarding of them, a different implication would arise, and the contract of service might be held to be with the purchaser. This distinction we think must determine whether the right of action upon the contract of service implied from the delivery and receipt of goods for carriage is in the consignor or consignee."

Most if not all of the cases which hold that the consignor may sue for the nondelivery of goods are cases where goods have been delivered to a railroad or express company by persons to whom the bills of lading were issued, and who in the first instance were liable to pay the freight.

Among the cases cited by Judge Wood in the case of The Caddo are Dawes v. Peck, 8 Term R. 330, in which Lord Kenyon says the only case where a consignor can maintain the action is where he is answerable for the price of the carriage. And in Evans v. Marlett, another case cited by Judge Wood, reported in 1 Ld. Raym. 271, it was held that if goods by bill of lading are consigned to A., A. is the owner and must bring the action against the master of the ship if they are lost.

In Joseph v. Knox, 3 Camp. 320, Lord Ellenborough held the consignor could recover because the consideration in the bill of lading was paid by him, and on the same ground Lord Mansfield decided the case of Davis v. James, 5 Burrows, 2680.

BUTLER, District Judge. Blum v. The Caddo, 1 Woods, 64 [Fed. Cas. No. 1,573], is directly in point, as respects the libelant's right to sue, and is well supported by the cases cited in the opinion. It is a decision on appeal, in admiralty, and I therefore feel bound to follow it. The facts before me present the question in an unusually strong light for the respondent. The property was delivered to a carrier employed by the purchaser to receive it on his account. The carrier was therefore his agent, not by implication of law simply, but by express authorization. He was sent for the property by, and undertook to carry it for, the purchaser, who bound himself to pay for its transportation. The libelant, when applied to by the carrier for instructions after the accident, denied all interest in the subject, his view of the transaction then agreeing with the respondent's now.

The foregoing was written and intended to be filed as the opinion of the court, some months ago. When counsel were informed of what was about to be done, counsel for the libelant asked leave to file a supplemental brief, which was granted. It is now before me, with an answer from the respondent. A further examination of the subject, in the light of these briefs, has not changed my mind. The question whether a vendor of goods delivered to a common carrier may sue the carrier for failure of duty, under ordinary circumstances, has given the courts much trouble and caused many conflicting decisions. Where, however, the goods are delivered to the vendee's agent, who is a carrier, hired by him and sent for them at his cost, as in this instance, it seems generally to be conceded by the authorities that the right of suit is in the vendee. I do not propose to discuss the subject, but as the respondent's brief presents a fair consideration of it and the authorities, and expresses the views I have adopted, I will attach it hereto.

The libel must be dismissed, with costs.

CONTINENTAL TRUST CO. v. TOLEDO, ST. L. & K. C. R. CO. et al.

(Circuit Court, N. D. Ohio, W. D. April 1, 1898.)

1. RAILROAD COMPANIES—BONDS AND STOCK—VALIDITY.
Where one K. contracted to perform certain services in the reorganization of a railway company, for which he was to receive certain amounts of bonds and stock in the reorganized company, it being claimed that the bonds were issued for less than 75 per cent. of their par value, and were therefore void, under Rev. St. Ohio, § 3290, *held*, that the stock should be taken at its actual, and not at its par, value, in computing the amount received by the company for the bonds; that the stock so issued was not void by reason of its issue at less than par; and that the bonds were not void, it being determined by the above rule that their price exceeded 75 per cent of par.

2. SAME—PURCHASE BY DIRECTORS.
The purchase, by a director of a corporation, of bonds already sold in good faith to a third party, although such purchase be at less than par, does not fall within Rev. St. Ohio, § 3313, making void bonds so purchased by a director from the company.

3. CONTRACTS—VALIDITY—PUBLIC POLICY.
An agreement between one engaged in performing services in the reorganization of a railway company and the president of the company, by which the two are to become partners in a performance of the former's contract previously made with the company, and the president is to become entitled to part of the bonds which the contractor was to receive from the company, is void, as contrary to public policy, and vests in the president no title in bonds delivered to the contractor, and sold by him to third persons. Such bonds are not therefore void, under section 3313, on the ground that they were purchased by the president from the company at less than par.

4. SAME.
In the reorganization of a railway company, the bondholders of the old company consented to accept in place of their bonds preferred stock in the new company. As an inducement to them to consent to this, K., who was managing the reorganization, and who was to receive from the new company for his services a large amount of its bonds and stock, agreed to sell them a certain number of his bonds, giving them with each bond an amount of common stock of equal par value. Later, certain of these bondholders became directors, and purchased their bonds under this agreement while serving as such. *Held*, that these bonds were not void as having been issued to directors at less than par, because (1) they were not issued to the directors, but in good faith to K.; (2) there was no evidence to show that the concession made by them in accepting preferred stock for their old bonds was not worth as much as the stock bonus, so that the bonds in fact were sold at par; (3) they could not be held to have purchased them as directors, since they took them under a contract which was binding on all parties before they became such.

5. SAME—CORRUPT AGREEMENT BETWEEN CONTRACTOR AND PRESIDENT.
When a contractor enters into a corrupt agreement with the president of the corporation, which is the other party of the contract, such as would justify the corporation in rescinding the contract, but the contract is not rescinded, the corrupt relation is terminated before the termination of the original contract, and the work is satisfactorily completed, the fraudulent agreement will not avoid bonds issued to the contractor by the company in final settlement of their transactions.

6. CORPORATION—ACQUISITION OF PROPERTY—ASSUMPTION OF OBLIGATIONS.
When a corporation accepts title to property held by the vendor subject to the conditions of certain contracts, of which contracts the corporation has actual or imputed knowledge, it assumes the obligations of such contracts, without formal action by its directors.