

SCOW NO. 190 and FOUR HUNDRED AND FIFTY BALES COTTON.

(District Court, D. Maryland. July 12, 1898.)

CARRIAGE BY SEA — CONNECTING LINES — DAMAGE IN TRANSIT — PRO RATA FREIGHT.

When goods, shipped for long distances under through bills of lading, which recognize several distinct carriers and stages of transportation, are damaged at one of the recognized points of transshipment so that their further transportation becomes impracticable, and an immediate sale is necessary for the interests of all concerned, the carrier which has performed the last stage of the carriage, and advanced the freights of preceding carriers, is entitled to pro rata freight.

J. Southgate Lemmon, for Baltimore Steam-Packet Co., intervening petitioner.

Schumacher & Whitelock, for claimant of cotton.

MORRIS, District Judge. This suit originated in a libel for salvage filed May 18, 1898, by one Schultz, owner of a steam tug, against the Bay Line scow No. 190 and 450 bales of cotton. On May 17, 1898, about noon, a fire broke out on the wharf of the Baltimore Steam-Packet Company, usually called the "Bay Line," in the port of Baltimore, while a scow belonging to said Bay Line was lying at its wharf, having on it 450 bales of cotton, just brought from Norfolk by one of the Bay Line steamers, and which was about to be sent on board an ocean steamer of the Johnston Line, to be carried to Liverpool. The libelant, Schultz, alleged that about 1 o'clock on the day of the fire he discovered the scow adrift in the harbor, with the cotton on fire, and that he had towed the scow to a place of safety, and, by pumping water upon the burning cotton, he had, with some assistance from other steam tugs, finally quenched the fire, and had saved the scow and a great part of the cotton. On the 20th May, Mr. William Cunningham, as agent of the owners of the cotton, filed in the case his claim for the cotton; and the Baltimore Steam-Packet Company, its claim for the scow. By agreement the damaged cotton was delivered to Mr. Cunningham, in order that he might deal with it for the benefit of all concerned. Upon a survey the cotton was found to be much burned and wet, and the bales bursted, and marks not decipherable, so that it was totally unfit for shipment to Liverpool; and the surveyor recommended that it be sold. On the day after the fire the agents of the Johnston Line, learning of the condition of the cotton, notified the steam-packet company that they would not receive it. Mr. Cunningham had the cotton at once put in condition for immediate sale, and on May 26th it was sold at auction as wet and damaged cotton. The sound value of the 450 bales was \$13,685.45. The net proceeds of the sale were \$8,560.03. Out of these proceeds, Mr. Cunningham has, by agreement, settled the claim for salvage, and other expenses, and has in hand the remainder, subject to such decree as may be passed in the matter now before the court. The present controversy arises upon a petition of the Baltimore Steam-Packet Company to be allowed out of the fund a claim for freight pro rata itineris. The cotton had been shipped

from places in Georgia to be carried by railroad to Norfolk, Va., and from there had been brought on a steamer of the Baltimore Steam-Packet Company, called the "Bay Line," to Baltimore, to be delivered by it, upon lighters, to a steamship of the Johnston Line, to be carried to Liverpool. For 200 of the bales there had been issued through export bills of lading, at an agreed through rate of so much per 100 pounds, from Newman, Ga., to Liverpool. These bills of lading called for transportation by the Atlantic & West Point Railroad to Atlanta, by the Southern Air Line to Norfolk, by the Bay Line to Baltimore, and by the Johnston Line to Liverpool, with different stipulations for different parts of the route. The other 250 bales had been brought from Georgia by railroad to Norfolk, and a bill of lading had there been issued by the Bay Line and the Johnston Line at a through rate per 100 pounds from Norfolk, via Baltimore, to Liverpool. There was a memorandum on the bill of lading that \$301.63 back charges had been paid. It was also stipulated that a delivery by the Bay Line (the cotton being lightered at shippers' risk) to the Johnston Line should end the liability of the Bay Line. The through rate was divided among the carriers by agreement, and, according to their understanding, each paid when it received the cotton the accrued freight charges of the preceding carriers. This was, however, an arrangement between the carriers which did not concern the shippers, as they were only to pay the through rate upon landing of the cotton at Liverpool, but it was notice to them that the cotton was to be carried from point to point by successive carriers. With regard to the condition of the cotton after the fire, it was obvious to all concerned that it was, commercially speaking, impossible to send it forward. A considerable quantity had been burned up. All the bales had been burst open, or so defaced that the baling and the marks were gone. The agents of the ocean steamer would not touch it, for fear that fire might break out again in some portion of it. There were no appliances in Baltimore for putting it into merchantable shape, if it were anywhere possible to do so. It was recognized by all that the only sensible course was to accede to Mr. Cunningham's suggestion,—that he, as representing the underwriters and owners, should take the damaged cotton in charge, and dispose of it promptly, before the damage and expenses made the loss greater.

The general rule is that the freight cannot be recovered unless the stipulated voyage has been actually performed, or is prevented or is dispensed with by the shipper; and there is at common law no implied promise to pay *pro rata itineris* for carrying the goods a part of the voyage unless the owner of the goods voluntarily, and not under compulsion, accepts the goods at an intermediate point in such a way as to raise a fair inference that further carriage of the goods was intentionally dispensed with. *Vlierboom v. Chapman*, 13 Mees. & W. 230; *Osgood v. Groning*, 2 Camp. 466; *Hunter v. Prinsep*, 10 East, 378; *Mitchell v. Darthez*, 2 Bing. N. C. 555; *Caze v. Insurance Co.*, 7 Cranch, 358; *Hurtin v. Insurance Co.*, 1 Wash. C. C. 530, Fed. Cas. No. 6,942; *The Nathaniel Hooper*, 3 Sumn. 542, Fed. Cas. No. 10,032; *Hutch. Carr.* § 455 et seq.; 1 Pars. Adm. 239. Under the old rule applicable to continuous voyages, it would seem

that when goods were damaged in the course of the voyage, and from necessity sold at an intermediate port, they were not liable for any freight whatever. *The Nathaniel Hooper*, 3 Sumn. 542-549, Fed. Cas. No. 10,032. But more recently, and with respect to the carriage of goods for long distances under bills of lading which recognize several distinct carriers and stages of transportation, it has been held in the admiralty that when the further transportation of the goods is prevented by some incapacity in the goods themselves, and a condition of things arises which makes a sale, or delivery to those representing the owner of the goods, at one of the recognized points of transshipment, and where there is a market for the goods, the only really practicable course, then a reasonable rule of partial compensation for the service performed may be applied. The case of *British & Foreign Marine Ins. Co. v. Southern Pac. Co.*, heard first in the district court for the Southern district of New York (55 Fed. 82), and then on appeal in the circuit court of appeals for the Second circuit ([1896]; 18 C. C. A. 561, 72 Fed. 285), was in its facts substantially similar to the present case. The finding of facts in that case does not state the difficulties of forwarding the damaged cotton as strongly as the evidence shows them to have been in this case. But the difficulty was in fact the same. No refusal by any ocean steamer was proved, as in that case; but it is obvious that no steamship company would want to take on board for an Atlantic voyage a lot of partially burned cotton, recently in a fire, and no merchant would want to send such merchandise to Liverpool. It seems to me to be making impractical distinctions, likely to confuse and embarrass business transactions, to attempt to distinguish the facts of that case from this. In the case referred to it was held in both the district court and in the circuit court of appeals that the Southern Pacific Company, which had brought the cotton to New York from ports in Texas, and had advanced freights to the preceding carriers, who had brought it from the interior,—it all being billed through for shipment from New York to European ports by steamers from New York,—was entitled to be paid pro rata freight on the cotton damaged by fire while on the pier or in lighters at New York, and which was sold because damaged and not fit to be carried forward. It was held that acceptance or acquiescence by those representing the owners of the cotton under such circumstances raised a fair inference that further carriage of the cotton was dispensed with, and implied an agreement to pay pro rata freight. In these commercial cases the rule should be uniform and certain and easily applied, and it is important that the courts should not lend themselves to confusion by subtle distinctions. The rules of general average, and for settling losses arising from disasters, must be somewhat arbitrary; but it is most important that they should be fixed, in order that merchants, carriers, and insurers may make their contracts understandingly. Accepting, therefore, the decision of the circuit court of appeals of the Second circuit as the rule to govern this case, I hold that the petitioner is entitled to receive the back charges for freight paid by it in respect to the cotton not destroyed, and its freight charges on the cotton not destroyed.

These items of freight and back charges nonallowed the petitioner must contribute its proportionate share of the salvage and attendant expenses. In respect to the cotton destroyed, the petitioner can recover neither the back charges nor its freight.

THE JOHN F. GAYNOR.

(District Court, D. Connecticut. June 27, 1898.)

COLLISION—SCHOONER AND TUG.

A schooner and tug colliding in Long Island Sound at night, held both in fault,—the schooner for changing her course, and luffing up into the wind, probably through the inattention of the captain or mate or both, who were the only persons on board, and who had been long on duty without sufficient sleep; and the tug for going for at least half a mile at right angles to the course of the schooner, and then changing course in order to cross her bow, when it was certain the schooner could not avoid the tug's hawser and tow without changing her course.

This was a libel in rem by John B. Eaton and others, owners of the schooner Dreadnaught, against the steam tug John F. Gaynor, to recover damages resulting from a collision.

Alling, Webb & Morehouse and Harrington Putnam, for claimants.
Samuel Park, for libelants.

TOWNSEND, District Judge. At 5 o'clock on the morning of November 22, 1897, the claimant's steam tug Gaynor, 91 feet long, and having a scow in tow, ran into, struck, and sank libelants' schooner Dreadnaught, 39½ tons, at a point in Long Island Sound about one mile west of Bartlett's Reef lightship. The wind was northwest, and blowing a good breeze. The tide was at the last quarter of the flood. The tug was on a voyage from Point Judith, R. I., to Sachem's Head, Conn. The schooner was bound from New York to Westerly, R. I., running free, and each vessel was going at about six miles an hour. Each boat carried the regulation lights. It was a good night for seeing the lights, and each vessel claims that it sighted the other at a good distance away. The libelants contend that the schooner kept about on a due east course, but that the tug failed to keep out of the way of the schooner, and changed her course so as to cross the schooner's bow. The claimants allege that the schooner changed her course, and thereby caused the collision. The evidence was almost entirely in the form of depositions, and is full of inconsistencies and contradictions. The theory of the collision advanced by the claimants receives some support from the admitted facts and other sources. It is admitted or proved that there were only two men on the schooner,—a captain and mate and steward; that the captain had been on duty, pumping, every 20 minutes, or steering the schooner, without rest or sleep, from half past 4 Sunday afternoon until the time of the collision, 5 o'clock Monday morning; that the mate-steward, who was paid extra because he did not have very much sleep when on these trips, either had been without sleep for 8½ hours or was below asleep until the captain called him, just

before the collision; and that the captain of the schooner admitted that he had seen the red light of the tug for a considerable time before the collision. In view of the evidence as to Stewart, the schooner's mate, coming on board the tug without his coat, in view of the long hours of arduous work imposed on the captain and mate of the schooner, and of the whole evidence, I conclude that after the tug had ported her helm, and the vessels were going red to red, the schooner changed her course, and luffed up into the wind, through the inattention of the captain or mate or both, and that this change of course contributed to cause the collision. The question, then, arises as to whether the tug also was negligent. The principal witness for the claimants was Pendleton, the mate, who was steering the tug. According to his testimony, the schooner, when he first saw it, showed both lights, then for a few minutes only her red, and when she was a mile (afterwards changed by him to a half mile) away she luffed to port, showing her green light only, and from that time to the time of the collision kept a northeast course. He admits that for half a mile he thus proceeded at right angles in the then course of the schooner, and that near the close of the half mile he changed his own course to northwest, and struck the schooner amidships. He also admits that if he had simply kept his course after the schooner changed to the northeast, he would have avoided her, and that, although the schooner might have avoided his tug, she could not have avoided the tow without again changing her course. In thus going for a half mile at right angles to the course of the schooner and then changing his course in order to cross her bow, when it was then certain that the schooner could not avoid his hawser and tow without changing her course, was negligence.

Certain testimony as to a conversation between the captain of the schooner and the pilot of the tug was admitted subject to exception with the request that the court would afterwards rule thereon. The testimony as to the admissions of the pilot is admitted only for the purpose of qualifying the statements contained in his deposition. Let a decree be entered dividing the damages, and referring the matter to a commissioner.

THE ROSEDALE.

THE OREGON.

(District Court, S. D. New York. March 28, 1898.)

1. COLLISION—SIGNALS NOT NOTICED—SIGNALS OMITTED—ROUNDING OUT OF SLIP.

The ferryboat O. rounding out of her slip at Broadway, Williamsburg, and going up the East river against the ebb tide, came in collision at a small angle in about mid river off S. Fifth street, with the passenger steamer R. coming down at 12 to 13 knots speed. The R. when about 600 yards away gave one whistle and ported. The O. did not hear that signal and gave no whistle until too late; she claimed that the R. was so close to the Brooklyn shore that the O. was obliged to go to the left, but the contrary was found upon the evidence. *Held*, that the O. was in fault; (1) for lack of lookout and attention to the R.'s signal; (2) for giving no signal, if she designed to cross the R.'s bow, which was on the O.'s starboard hand; (3) for not rounding to pass to the right of mid river as she