

testimony of the three experienced navigators already referred to fully sustains the judgment of the master of the Lipsett as sound, and his course of action as seamanlike. It is clear to us that, save for the bad navigation of the Penrose, no situation would have arisen involving the contingency of the Lipsett's crossing either the bow or the stern of the Penrose. We are of opinion that the sailing course taken by the Lipsett originally was entirely safe for the Penrose, and that the Lipsett was blameless in pursuing it as she did.

Was the Lipsett culpable in not turning to westward at the time she changed her course to eastward? We think not. The evidence convinces us that the then situation of the vessels with respect to each other was such that a change to the westward would have been very perilous to both. It probably would have resulted in a most serious collision. The master of the Lipsett, we think, exercised a wise judgment in keeping off further to the eastward. This move would have prevented any collision had the Penrose even then been rightly handled; but she was not. The evidence is conclusive that the Penrose would have turned around more quickly if her main peak had been dropped. This her master admits. The dropping of the main peak is a common thing, and the work of a moment. Undoubtedly, this simple expedient would have swung the Penrose around to a position of safety. It was not resorted to. The evidence shows that other measures of protection were available to the Penrose. Yet nothing whatever was done by her navigators to avert collision. The Penrose had no lookout. Her officers and crew were engaged in other duties. Her master admits that he gave no close attention to the Lipsett until a collision was imminent. It is not to be doubted, under the proofs, that after the Lipsett's change of course to eastward there was sufficient space and time to have completed the safe turning around of the Penrose if proper attention had been given to her navigation. It is our judgment that the Lipsett was without fault, and that the collision was due altogether to the bad navigation and negligence of the Penrose. The decree of the district court (86 Fed. 696) is reversed, with costs to the appellant, and the cause is remanded to that court, with direction to enter a decree dismissing the libel, with costs to the schooner Lipsett, the respondent, and her owners.

THE ALBERT N. HUGHES.

THE LOTTIE K. FRIEND.

(Circuit Court of Appeals, Third Circuit. January 25, 1899.)

No. 23.

COLLISION—TUG AND TOW—NEGLIGENCE OF THE TOW—PRESUMPTION.

Where a tug, having a heavy schooner in tow, safely passed a schooner lying at anchor at a distance of at least 55 feet, and the officers of the tow admitted that none of them saw the anchored schooner until they were "right into her," it will be presumed that the collision was the result of the negligence of the tow, and the tug will not be liable therefor.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

John F. Lewis, for appellant.

Henry R. Edmunds, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and KIRKPATRICK, District Judge.

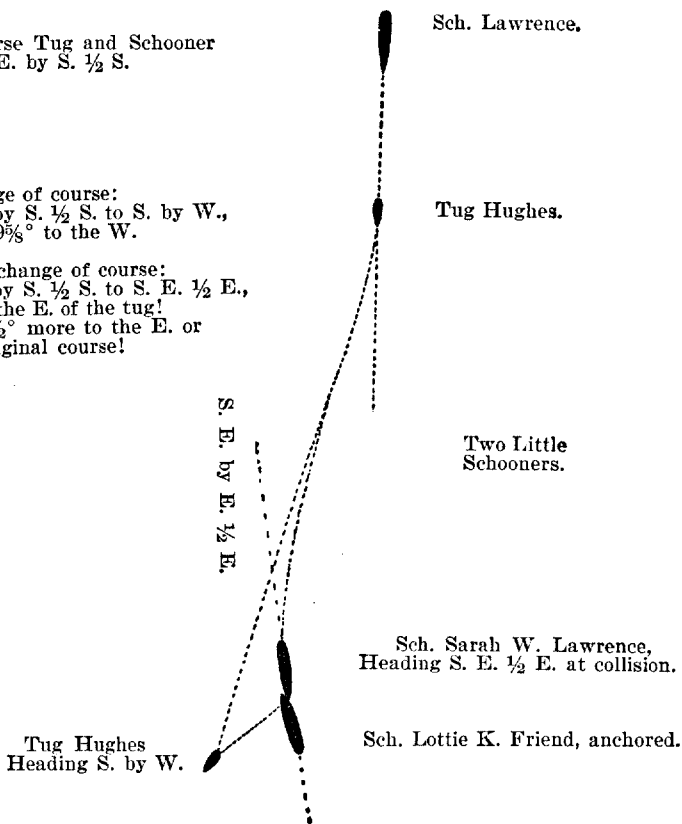
KIRKPATRICK, District Judge. The tug Albert N. Hughes, with the schooner Lawrence in tow on an 85-fathom hawser, was proceeding down the Delaware Bay on the evening of September 21, 1895, when the schooner Lawrence came in collision with the schooner Lottie K. Friend, riding at anchor. The Lottie K. Friend had her lights burning at the time, and is admittedly faultless. The only question presented to the court is whether the tug Hughes is responsible, for she alone has been libeled. The record shows that it was early in the morning, as the tug and tow were proceeding down the bay about in the regular ship channel to the west of Ship John light, on the prescribed course of S. E. by S. $\frac{1}{2}$ S., that the mate who was in charge of the tug sighted the red and white lights of a small schooner getting under way, and the white riding lights of two vessels at anchor, all being about straight ahead. The two small schooners were near together, about in mid-channel; and the other vessel, showing the white anchor light, and the one furthest away from the tug, was the Lottie K. Friend. She was lying to westward of mid-channel, and about a quarter of a mile to the southward of the other vessels. For the tug to have held her course would have resulted in a collision with the nearest vessels, so that, as was his duty, the mate of the tug blew one whistle, ported his helm, and went to the westward side of the channel. That the tug blew one blast of the whistle at this time is testified to by the master, the mate, and the assistant engineer of the tug, and by David Martz, the keeper of the Ship John light; and Calmin, the anchor watch on the schooner Friend, admits having heard a whistle at this time, presumably that of the tug. This whistle was a signal to the vessel getting under way, as well as to the tow Lawrence, that it was the intention of the tug to pass to the westward of the two small schooners. As a fact, both tug and tow did so pass them safely, and at a considerable distance. A quarter of a mile away lay the Friend at anchor, a little to the westward of mid-channel, and on the port bow of the tug. The testimony produced by the libelants tends to show that the tug approached the Friend almost head on, or perhaps on a course to the eastward, and that, unexpectedly discovering the situation, she turned suddenly to the westward, and passed from starboard to port, directly across the bows of the Friend, and distant about 45 feet away; that the tow, up to this time, had been following the tug, but was unable to make the sudden change of course necessary to cross the bow of the Friend; and that, as a result, the tow struck the Friend on the starboard side between the fore and main rigging abreast the main hatch. The version of what took place is contra-

dicted by the testimony of the captain of the tow Lawrence and the men at her helm, all of whom were called on the part of libelants, and say that there was not any such sudden or abrupt change of course on the part of the tug as would be involved in such a maneuver; and also by the captain and mate and assistant engineer of the tug Hughes. These latter testify that the course of the Hughes was changed at the time of the blowing of the one whistle (which was before the little schooners were passed) from S. E. by S. $\frac{1}{2}$ E. to S. by W., and that the Hughes continued going gradually to the westward on that course until the time the tow collided with the Friend. It is apparent from a consideration of the relative situation of the vessels at the time the schooners were first sighted by the tug Hughes (as shown on the annexed diagram) that this was the natural

Original Course Tug and Schooner
S. E. by S. $\frac{1}{2}$ S.

Tug's change of course:
From S. E. by S. $\frac{1}{2}$ S. to S. by W.,
 $3\frac{1}{2}$ points= $39\frac{3}{8}^\circ$ to the W.

Schooner's change of course:
From S. E. by S. $\frac{1}{2}$ S. to S. E. $\frac{1}{2}$ E.,
 $5\frac{1}{2}$ points= $22\frac{1}{2}^\circ$ more to the E. or
port, than original course!



and proper thing for the tug to do, and that, if it had been done by both the tug and tow, no collision would have occurred. To enable them to clear the Friend, nothing was required but to hold the course made necessary to avoid the small schooners. The pathway to the westward was free, and water was plenty. The same conditions pre-

vailed to the eastward of the Friend. The tide was on the ebb, and at this point setting to the southeasterly. If the tug were approaching the Friend nearly head on, and danger of collision seemed imminent, it seems to us that she would have attempted to take advantage of the set of the tide to pass the Friend to the eastward, rather than have tried to pull the heavily laden schooner across the bow of the Friend against its influence.

In *The Sagua*, 42 Fed. 461, the court says that, "when a collision occurs between a vessel in tow and a third vessel, which the tug has passed in safety, the presumption of fault is against the tow"; and this court has held, in *The Invertrossachs*, 8 C. C. A. 87, 59 Fed. 194, that in such cases "the burden of proof is upon the petitioner to establish the tug's alleged negligence." In the case at bar the master and lookout and helmsman of the *Lawrence* had her in charge. Their duty was to exercise reasonable care, prudence, and skill to avoid collision; yet, according to their own evidence, not one of them saw the *Friend* until they were "right into her." They say they were, as in duty bound, following the tug, yet the tug, continuing her course, without, as they admit, sudden change, cleared the *Friend* to the westward by at least 55 feet on a course S. by W., while the *Lawrence* struck the *Friend* on the eastward side while upon a course S. E. $\frac{1}{2}$ E. Whether the cause of the collision was, as has been suggested on the argument, that the persons in charge of the tow *Lawrence* mistook the anchor light of the *Friend*, which they say they did not see,—though it must have been in plain view,—for the lights on the tug, by which they should have directed their course, must be a mere matter of conjecture. Certain it is from their own account that they thought the tug directly ahead of them up to the time of the collision, when in fact she was far to the westward. Upon a consideration of the whole evidence, we are of the opinion that the cause of the collision was not in any way attributable to the fault or neglect on the part of the tug *Hughes*. The decree of the district court (79 Fed. 383), should be reversed, and the record remitted, with directions to dismiss the libel, with costs.

TRUAX v. ESTES.

(Circuit Court, D. Oregon. March 15, 1899.)

No. 2,395.

1. DAMAGES—BREACH OF CONTRACT—RULE IN EQUITY.

A court of equity, in a suit brought to reform a contract for the purchase of cattle, which were not to be delivered for several months after the date of the contract, and to recover damages for its breach, will not enforce the strict rule of law, which permits a party to disregard notice that a contract will not be performed, and to wait until the time for performance, and recover damages as of that date, where the plaintiff was notified within a week from the making of the contract, and before he had suffered any damage, by defendant, that it would be impossible to furnish the cattle at the prices named, of which fact the plaintiff was aware when the contract was made, but the defendant was not.

CONTRACT—ENFORCEMENT IN EQUITY—FRAUD IN PROCUREMENT.

Defendant signed and delivered to plaintiff's assignor a memorandum prepared by the latter, by which defendant proposed to furnish cattle,—the number, price, and date of delivery being stated therein; the option to be accepted within 30 days. Defendant testified that the agreement was that the writing was to be merely a memorandum, to serve as a basis for a future contract; that he was to have 30 days to ascertain whether he could furnish the cattle, and the other party, who was a freight agent for a railroad, and interested only in procuring the shipment of the cattle over his road, to ascertain whether he could dispose of them; that defendant, owing to his defective sight, could read the writing but imperfectly, but, seeing that it provided for 30 days, thought it in accordance with the agreement, and signed it. The other party had in fact previously made an arrangement to dispose of the cattle to plaintiff, and telegraphed his acceptance the following day, following this by a letter stating that he would be there within 30 days "to make the contract, as per our understanding." Defendant replied that he had been through the country, and found the stock could not be bought at the price named. It further appeared that both parties knew at the time the memorandum was signed that it was doubtful whether the cattle could be so bought. *Held*, that the evidence sustained defendant's contention, and that in a suit in equity brought by plaintiff to reform the writing as to the number of cattle therein sold, and to recover damages for breach of contract, the writing would not be enforced against the defendant as a completed contract according to its terms.

This was a suit in equity by Daniel W. Truax against Hardin W. Estes to reform a written contract, and to recover damages for its breach.

A. L. Veazie and Zera Snow, for plaintiff.

John L. Rand and L. R. Webster, for defendant.

BELLINGER, District Judge. This is a suit to reform a written contract for the sale of cattle, and for damages for a violation of the contract. The contract consists of a written offer to one Langley by Estes, and acceptance by the former, who afterwards assigned the contract to the plaintiff. The writing is as follows:

"Baker City, Oct. 23, 1896.

"I, H. W. Estes, agree to furnish B. H. Langley or order five hundred yearlings and five two year old steers, delivered in Baker City stock yards June 1st, 1897, at \$10.00 and \$15.00, respectively. All to be A-1 stock. No Jerseys or Holsteins or lame or diseased animals. Cash on delivery. This agreement to be accepted in thirty days. H. W. Estes."