

Carriers--Liability of Connecting Carrier--Act of God--Federal Rule of Burden of Proof (Standard Brands, Inc. v. M. R. R., 29 F. Supp. 593 (D. Mass. 1939))

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RECENT DECISIONS

CARRIERS—LIABILITY OF CONNECTING CARRIER—ACT OF GOD—FEDERAL RULE OF BURDEN OF PROOF.—Plaintiff delivered a shipment of coffee to initial carrier which in turn transferred it to defendant connecting carrier for interstate shipment, subject to a bill of lading excluding liability for damage caused by an “act of God”. While the freight cars were in defendant’s yard in Springfield, close to the Connecticut River, it became apparent that high water conditions were prevailing in the river. City officials warned the residents to evacuate, and the defendant’s traffic office situated in a town further up the river cancelled all freight movements out of the yard. Later in the day, all communications between the traffic office and defendant’s yardmaster were cut off by the elements, and information available to the former that the river had approached unprecedented flood proportions, could not be imparted to the yardmaster. He did not know of the city’s evacuation warning, but had knowledge of the freight cancellation order, and upon request had removed the cars of another shipper to a warehouse on higher ground. Although a section of the tracks of the initial carrier, located on higher ground, could have accommodated a few of the defendant’s cars, it would have been necessary to obtain permission of a third railroad to use the latter’s tracks in order to remove the cars from the yard. The river rose to a point higher than ever recorded, overflowed a dike surrounding the yards and caused substantial damage to plaintiff’s shipment. Plaintiff contends that the defendant failed in its duty as a common carrier in permitting the cars to remain in the yard under the facts and circumstances disclosed and that such failure constituted the proximate cause of the damage. *Held*, judgment for defendant. The flood which damaged plaintiff’s shipment was an “act of God”, and the defendant is exonerated from liability in the absence of any proof that its negligence intervened to such an extent as to amount to the proximate cause of the damage. *Standard Brands, Inc. v. Boston & M. R. R.*, 29 F. Supp. 593 (D. C. Mass. 1939).

The connecting carrier may be held liable for damages caused by it¹ notwithstanding the statutory right to sue the initial carrier.² The bill of lading issued by the initial carrier upon an interstate shipment governs the entire transportation and fixes the obligations of all

¹ 34 STAT. 593 (1906), as amended, 44 STAT. 835 (1926), 49 U. S. C. § 20(11) (1934); *Georgia, Florida & Alabama Ry. v. Blish Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541 (1916).

² 34 STAT. 593 (1906), as amended, 44 STAT. 835 (1926), 49 U. S. C. § 20(11) (1934); *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164 (1911); *Sanders v. Charleston & W. C. Ry.*, 147 S. C. 487, 145 S. E. 400 (1928). At common law the initial carrier would not be liable if the goods were delivered safely to the connecting carrier. *Railroad Co. v. Pratt*, 22 Wall. 123 (U. S. 1874).

participating carriers.³ Although the Interstate Commerce Act prohibits all contracts exempting the carrier from liability for damages caused by the initial or connecting carrier,⁴ liability for damages caused by an "act of God" may be excluded.⁵

Where the disaster is wholly attributable to causes beyond human control, it is an "act of God".⁶ The policy of the federal court is to treat an "act of God" as the proximate cause of the damage.⁷ The plaintiff assumes the burden of proving that the carrier was negligent and that the negligence intervened to such an extent as to amount to the direct cause of the result.⁸ Notwithstanding the carrier's negligence in failing to apprehend the possibility of danger,⁹ where there were no reasonable means of avoiding the consequences of the "act of God",¹⁰ the carrier will not be held liable.¹¹ In New York, the rule governing the liability of the carrier permits recovery by the shipper where the carrier's negligence concurred with the "act of God", and the burden is on the defendant to show that the "act of God" was the sole and immediate cause of the damage.¹²

In the absence of any precautionary measures which might have

³ 34 STAT. 593 (1906), as amended, 44 STAT. 835 (1926), 49 U. S. C. § 20(11) (1934); *Kansas City Southern Ry. v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391 (1913); *Georgia, Florida & Alabama Ry. v. Blish Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541 (1916).

⁴ 34 STAT. 593 (1906), as amended, 44 STAT. 835 (1926), 49 U. S. C. § 20(11) (1934), *supra*; *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148 (1913). For similar statute governing intrastate commerce in New York, see N. Y. PUBLIC SERVICE LAW § 38.

⁵ *Southern Ry. v. International Vegetable Oil Co.*, 43 Ga. App. 489, 159 S. E. 773 (1931); see RICHARDSON, BAILMENTS (1937) § 157.

⁶ *Merritt v. Earle*, 29 N. Y. 115 (1864).

⁷ *St. Louis, Iron Mountain & Southern Ry. v. Commercial Union Insurance Co.*, 139 U. S. 223, 11 Sup. Ct. 554 (1891); *The Malcolm Baxter, Jr.*, 277 U. S. 323, 48 Sup. Ct. 516 (1928).

⁸ *Schnell v. Vallescura*, 293 U. S. 296, 55 Sup. Ct. 194 (1934); *Empire State Cattle Co. v. Atchison, T. & S. F. Ry.*, 135 Fed. 135 (C. C. Kan. 1905).

⁹ The court in the present case refused to find that defendant's yardmasters were negligent in failing to anticipate the flood; that the warning to evacuate given by the city was addressed particularly to residents in the lower section of the city; that the request by the other shipper for removal of its cars was not unusual; and that word that the river had reached flood limits could not be transmitted from the traffic office, which was first to feel the effect of the flood.

¹⁰ The court found in the present case that in all probability the defendant would have been unable to obtain the permission of the third railroad for the use of its tracks in order to remove the cars to the initial carrier's tracks, in view of the exigencies of the flood, and that there were no other means available to defendant whereby the cars could be removed from the yard.

¹¹ Failure of the carrier to forward or notify the consignee of the arrival of the shipment did not constitute a proximate cause where the shipment was later destroyed by flood waters. *Railroad Co. v. Reeves*, 10 Wall. 176 (U. S. 1869); *Hadba v. Baltimore & Ohio R. R.*, 183 App. Div. 555, 170 N. Y. Supp. 769 (1st Dept. 1918).

¹² *Merritt v. Earle*, 29 N. Y. 115 (1864); *Read v. Spaulding*, 30 N. Y. 630 (1864); the federal rule is adopted by the New York courts as to cases involving interstate shipments. *Barnet v. N. Y. Central Hudson R. R.*, 222 N. Y. 195, 118 N. E. 625 (1918).

been readily at hand to prevent the damage, and by reason of the application of the federal rule in a case of this kind, the decision is not inconsistent with the law as applied to the facts of a case where preventive measures were within reach of the negligent carrier.¹³

C. B. D.

COLLEGES AND UNIVERSITIES—REMOVAL OF A LAW PROFESSOR—MANDAMUS FOR REINSTATEMENT.—James A. Cobb instituted suit in equity against Howard University for a mandatory injunction directing the defendant to reinstate plaintiff as a part-time professor of law and accord him permanent tenure as such. Defendant refused to reappoint the plaintiff after June 30, 1938, because of his action in appearing before a congressional committee in opposition to university appropriations. Plaintiff was hired as a part-time professor in defendant's law school in 1917 for one year during which time he would be on probation and if his work met with the approval of the dean he would be given indefinite tenure. Plaintiff contends that during his second year of employment he was orally appointed by the dean and secretary for a permanent term and that the termination of his services by the defendant's Board was in violation of his contract rights. The defendant justifies its action on the ground that the plaintiff's tenure was from year to year since 1931.¹ The District Court of the United States for the District of Columbia dismissed the bill after a hearing on the merits. On appeal to the United States Court of Appeals for the District of Columbia, *held*, affirmed. The plaintiff is not entitled to reinstatement since the conduct of the Board of Trustees of Howard University in dismissing the plaintiff is sustained by the Act incorporating the defendant which rendered the Board incapable of making such contract as alleged by the plaintiff, and even if such contract were permitted, plaintiff has no right to reinstatement but his remedy lies in an action for damages for wrongful discharge, if the dismissal were without cause. *Cobb v. Howard University*, 106 F. (2d) 860 (App. D. C. 1939).

With the exception of state universities,² colleges and universities are classed as private corporations created by the state in which they are situated.³ If the university is not within a state,⁴ but is

¹³ *Chesapeake & Ohio Ry. v. Walton*, 99 F. (2d) 270 (C. C. A. 4th, 1938).

¹ On June 27, 1931, the Executive Committee of the Board adopted a resolution making all appointments to the law faculty for 1931-1932 to be "for the duration of one year", including that of plaintiff. Thereafter, such resolution was adopted annually.

² *Vinanheller v. Reagan*, 69 Ark. 460, 64 S. W. 278 (1901).

³ *Chegaray v. New York*, 13 N. Y. 220 (1885).

⁴ *Maiatiro Construction Co. v. United States*, 79 F. (2d) 418 (App. D. C. 1935).