CRUMBACKER *vs.* TUCKER & HAMILTON.

Goods were shipped on board of a steamboat, at New Orleans, to plaintiff, at Norristown, Ark.; by mistake, they were delivered to T. & H., at Little Rock, who sold a portion of the goods before they discovered the mistake; after-

wards, they paid the master of the boat for them, and sold the remainder of the goods. HELD, that payment to the master of the boat was no defence, by T. & H., to an action brought by the plaintiff against them for the price of the goods.

A common carrier cannot sell goods so as to divest the title of the consignee, and he may follow up the goods and recover them, or recover the price thereof of one who has purchased of the carrier, and sold them.

Writ of Error to Pulaski Circuit Court.

In April, 1847, E. C. Crumbacker sued Tucker & Hamilton, merchants and partners, before Justice Hutt, on the following account:

Messrs. TUCKER & HAMILTON,

To *E. C. Crumbacker,* *Dr.*

To 16 pieces Virginia Osnaburg muslin, mark [diamond] C., Norristown, Ark.; and sold by Messrs. Tucker & Hamilton, containing 475¾ yards *a* 10c.....$47.58

Carriage, insurance, &c..... 3.00

$50.58

Judgment of the justice in favor of plaintiff, and appeal by defendants to Pulaski Circuit Court, where the cause was submitted to a jury in November, 1847, FEILD, J., presiding.

Chase, witness for plaintiff, testified that, sometime in the spring of 1847, as the agent, and in behalf of Crumbacker, he called on defendant Tucker, and presented to him an account similar to the one copied above, and demanded payment; Tucker informed witness that Tucker & Hamilton had previously received, from the steamboat Uncle Ben, at Little Rock, a bale of domestic goods called Osnaburg muslin, which they supposed belonged to them; they opened it, and sold several pieces thereof, before they discovered their error; and they then found that the bale was not in their own mark, and belonged to some other person; that the Uncle Ben brought up said bale of goods from New Orleans, and delivered it, by mistake, with other goods of like

character, to Tucker & Hamilton. That said boat then went to Norristown, and other ports on the Arkansas river, the same trip; and when she returned again to Little Rock, the clerk of the boat called upon Tucker & Hamilton for said bale of goods, and they found that she was short to them several sacks of coffee on their bills of lading, and, in settling for the same, the boat received full payment of them for the said bale of goods so delivered by mistake to Tucker & Hamilton, and partly used, and as part payment for said deficiency in coffee—that, in that transaction, they fully paid and satisfied the Uncle Ben for said bale of goods. Tucker, moreover, said to witness that they would not pay the bill presented to him, because they had paid, or settled, with the Uncle Ben, for the same bale of goods; that they were not responsible to Crumbacker therefor, and that he must look to the Uncle Ben for the value of his goods. When witness presented the account to Tucker, for payment, as above stated, it was understood, by both Tucker and witness, that the bale of Osnaburgs in question belonged to Crumbacker: it was not disputed by Tucker, nor was there any objection to the amount of the bill; the goods had all been sold. Witness did not know how or when Tucker ascertained that the goods belonged to Crumbacker: but the fact was taken for granted, by both of them, when the account was presented; and the refusal to pay was put upon the ground that Tucker & Hamilton, before the Osnaburgs were all sold, and before witness presented the account, had fully paid the Uncle Ben therefor. Witness further stated that, sometime in the previous spring, Crumbacker had goods shipped from New Orleans to him at Norristown, which passed through a house, in Little Rock, of which witness was a member, and the goods were marked with a diamond C.; he believed that was his mark.

Ash, witness for defendant, testified that he was clerk for Tucker & Hamilton at the time the bale of goods in question was received by them. They were receiving other goods at the time, and thought it belonged to them. He opened the bale, and after a few pieces were sold, the mistake was discovered.

It was received from steamer Uncle Ben, and when she came down the river, Tucker & Hamilton paid her therefor. There was no mark on the bale except some letter in diamond. It contained the number of pieces and yards stated in plaintiff's account, and ten cents a yard was a low price therefor—about the cost of it in New Orleans.

Plaintiff, whilst introducing his evidence, produced the bill of lading for the goods in question, and proved the execution thereof, but afterwards declined reading it to the jury. The defendant then introduced it. The bill of lading is in substance as follows: "Shipped in good order, &c., by T. A. C. Green, on board of the steamboat called Uncle Ben, whereof —— is master, now lying in the port of New Orleans, and bound for Fort Gibson, to say, one bale of domestic goods, &c., being marked, &c., as in the margin [diamond] C. and are to be delivered in the like order, &c., at the port of Norristown, (the damages, &c., excepted,) unto E. C. Crumbacker, or to his assigns, he or they, paying freight, &c. In witness whereof," &c. Dated New Orleans, 11th February, 1847, and signed by the clerk of the boat.

The above is the substance of all the evidence introduced upon the trial. The court charged the jury as set out in the opinion of this court; the jury returned a verdict for Tucker & Hamilton; plaintiff moved for a new trial, which was refused, he excepted, took a bill of exceptions setting out the evidence and charge of the court, and brought error.

S. H. HEMPSTEAD, for the plaintiff, argued that it was a cardinal principle, that the owner of property could not be divested of it without his consent, express or implied, and that if the plaintiff was not entitled to recover in this case, that principle would be overthrown. *Long on Sales,* 166, 167, 168, 2 *Kent.* 323. The owner may maintain an action to recover the value of his property of any one into whose hands soever it may have come and who may have disposed of it. *Ibid.*

The precise question to be decided is, whether a common car-

rier can make a valid sale of property entrusted to him for transportation so as to deprive the owner of it. That he cannot, is plain; for, to sanction such sales would, in effect, legalise gross breaches of trust, and release purchasers from the obligation of looking to the title and purchasing at their peril. The very statement of the proposition is its own refutation. It is by our law actually a crime for any carrier to convert property to his own use, and as such punishable with imprisonment in the penitentiary, (*Digest, sec.* 5, 6, *p.* 339,) and to suppose that he can make a valid sale of it, under any circumstances, without the consent of the owner, is an insult to the understanding and in the face of all law.

In *Arnold vs. Halenbake,* 5 *Wend.* 34, which was similar to this in many of its features, it was expressly held that a common carrier was not clothed with the powers of a general agent, and had no authority to sell articles entrusted to his care for transportation, and that if he did the owner might maintain trover against the purchaser. The same principle is also laid down in 20 *Wend.* 267. A depositary has no authority to sell or pledge goods entrusted to him, and if he does the owner may reclaim them from any one in whose possession they may be found. *Story on Bailments, sec.* 92, *p.* 70. The sale of goods by a bailee to a bona fide purchaser, without authority, conveys no title, and the owner may recover the value from the purchaser. *Wilkinson vs. King,* 2 *Campb.* 335. *Loeschman vs. Machin,* 2 *Stark. R.* 311. 1 *Saund. Pl. and Ev.* 873. *Saltus vs. Everett,* 15 *Wend.* 475. *Pickering vs. Buck,* 15 *East,* 44. *Daubigny vs. Duval,* 5 *Term. Rep.* 604.

Undoubtedly the owners of the steamboat are liable for the failure to deliver the merchandise according to the bill of lading, but that does not affect the plaintiff's remedy against the defendants, for he may pursue either or both remedies until he obtains actual satisfaction. *Tayloe vs. Thompson,* 5 *Peters,* 369. *West vs. Hyland,* 4 *Har. & J.* 200.

BERTRAND, contra. A sale by the boat to the defendants with-

out notice, would have been good against the plaintiff; for if a bailee of goods, having a special property in and possession of them, sell and deliver them to another, bona fide and without notice, the general property of the bailor is divested, (2 *Saund.* 47, *b. n.* 1. 6 *Bac.* 684. *Brook,* 216, 295); and a payment to the boat for goods, delivered by mistake, is a bar to any action by the owner. The carrier, in such case, is responsible for the conversion, (*Story on Bailments, sec.* 545); and having a special property in the goods may maintain an action against any one displacing his possession. (*Ib.*) A payment, therefore, by the defendants, into whose possession the goods came by mistake, and not by sale, to the carrier, who had a right of action for them, is a bar to the plaintiff's recovery.

JOHNSON, C. J. The main points presented in this case arise out of the instructions given by the court to the jury. The court gave three several instructions: 1st. That, unless the jury were satisfied, from the evidence, that Tucker & Hamilton acted as the agents of Crumbacker, they were bound in this action to find for them: 2d. That when the steamboat Uncle Ben failed to deliver said bale of domestic goods to said Crumbacker, she became liable to him upon his bill of lading; and 3d. That if Crumbacker had instituted an action for the specific goods, he might have recovered the goods in whose hands soever he might have found the same. The two latter instructions are doubtless correct in point of law: yet, as they are not applicable to the present case, they cannot be regarded as any thing more than abstract propositions. The first is clearly erroneous, as it falls infinitely short of the principles governing this case. It is true that, in case the defendants in error had sold the goods in question as the agents of Crumbacker, they would have been liable to him for the proceeds of the sale, yet it does not follow, by any means, that this is the only conceivable state of case in which they would have been liable to Crumbacker upon the supposition that he was the real owner of the goods. If the goods in controversy were received by the steamboat Uncle Ben, to be

conveyed to Crumbacker, and a bill of lading to that effect given by a party authorized to bind the boat, there can be no doubt but that the moment the goods were delivered to the boat, the property in the same passed to and vested in Crumbacker. To constitute a delivery in law, it is not necessary that it should be made to the buyer personally, or that the goods came to his corporeal touch; but it will be sufficient if they be delivered to an accredited agent, or servant, of the vendee, or a third person designated by him as the person who would receive them. The delivery should be made either according to the mode prescribed in the agreement, or, in the absence of any agreement as to the person or mode in which they should be delivered, the seller should follow the most usual and convenient practice, so as to give the buyer the benefit of every security which he could reasonably expect. (See *Story on Sales,* 245, and the authorities there cited.) So also the delivery to a common carrier will be a sufficient delivery to the vendee, although the right of stoppage *in transitu* still remains in the vendor. Thus, a delivery, by a consignor of goods on board of a general ship, or of a ship chartered by the consignee, is a delivery to the consignee. Nor does it matter, so far as the title is concerned, which party pays freight for the goods, the carrier being always considered as the agent of the buyer. In case of loss or injury of the goods, while in the hands of the carrier, the buyer alone will be entitled to an action against him, unless the freight be paid by the seller, in which case the latter may bring an action for non-delivery. Of course, if the seller expressly assume the responsibility of carrying the goods, he must bear the loss if they be destroyed or lost. (*Ib.* 246.)

There can be no question but that the steamboat received the goods in the capacity of a common carrier; if so, it now remains to be seen whether she had any power to sell them, and to pass a title to the vendee. If she had no authority to sell the goods, it necessarily follows that a bill of sale by her would be void as against Crumbacker, and as such his right of action against Tucker & Hamilton could not be affected by the question

whether she had received payment or not. There is a marked distinction which obtains between cases where sales are made of property to which the vendor has obtained a title by fraudulent means, and cases where the vendor has no title, and has obtained possession of the goods by felony or chance, or who holds them as a mere bailee. In the former class of cases where the vendor has obtained his title by fraudulent representations, or artifices, he can make a valid sale of the goods to a *bona fide* purchaser for a valuable consideration, so as to deprive the original owner of his power to reclaim them. The reason of this rule is, that where property is obtained with the assent of the real owner, however he may have been deceived, the contract is not void, but only voidable at the instance of the party deceived. A valid title, therefore, passes to the vendee, subject indeed to the avoidance of the contract by the vendor, but being perfectly good until such avoidance is made. If, then, the vendee should, while in possession of the goods and before the nullification of the contract by the vendor, sell to a *bona fide* purchaser for a valuable consideration, the sale would be binding as against the original vendor. If, however, the sale be without consideration, or be made to a person purchasing with knowledge that they were obtained with fraudulent representations, the original owner may follow the goods, or their proceeds, into the hands of such vendee. But where the vendor has acquired possession of goods without the knowledge, connivance, or assent of the actual owner,—as, where he has stolen, or found them; or where he holds them in a fiduciary capacity, with no express or implied right, obtained from the owner, to sell or otherwise dispose of them, as where he is a bailee or trustee, he cannot make a valid sale of them, so as to divest the owner of his right to reclaim them, as where he is a bailee or trustee, he cannot make a valid person may have bought them *bona fide*. The reason which sustains this rule is, that until the owner either expressly or impliedly agrees to part with his rights of property, or does some act which operates to deceive the vendee into a belief that the vendor has a right to make a sale, his property is never divested

from him. Some voluntary act of divestment on his part, or some conduct from which his assent to the sale is legally implied, is necessary in order to enable any other person to make a valid sale of his property. When these principles are applied to the case before us, the result is easily foreseen and is inevitable.

That the property in the goods passed to and vested in Crumbacker, *eo instanti,* upon the delivery to the boat, is too clear a proposition to admit of serious controversy. And if so, by what authority, either express or implied, did the boat, or those having the control of her, make the sale to Tucker & Hamilton? There is certainly no evidence of an express authority, and, if any existed, it must be implied by law from the fact that the property was placed in the hands of the officers of the boat under such circumstances, or in such a manner as that the law would imply a right and power on their part to make a valid sale. Is it the custom and business of common carriers to sell goods, or are they usually employed in their transportation from one point to another? It is readily admitted that if goods should be placed in the hands of an auctioneer, or other person whose business it is to sell property, and that too without any authority expressly given to sell, a sale by such person would be valid to an innocent purchaser, and this upon the ground that the law would imply an authority, and consequently protect the purchaser. But not so with a common carrier. In such cases there is not the slightest ground for a legal presumption of authority, and consequently all persons who make purchases from them must look out for themselves and buy at their peril.

But it is contended that, inasmuch as the boat could have recovered the specific articles, that, therefore, she could also have recovered the consideration money in case of a sale: and that, therefore, Crumbacker could have no right of action against the defendants. The premises are not true when applied to the facts of this case, and consequently the conclusion is unwarranted by the law. If the articles had been taken from the boat without her consent, or delivered to the defendants by mistake

and not actually sold to them, there can be no doubt but that the boat, in virtue of her special property, would have been fully able to recover the specific articles, if still to be found, or their value, if converted; but no such right would exist in case of a sale, as it would be placing it in the power of the boat to take advantage of her own wrong, and at the same time to perpetuate a fraud upon the defendants. If the defendants actually paid the purchase money to the boat, they did so at their peril, and consequently such payment can constitute no defence to this action. But if, on the contrary, the price has not yet been paid, they are under no legal obligation to pay it to the boat, as she had no authority to sell, and consequently could convey no title whatever to the property. When there is a total failure of title on the part of the vendor, but without fraud, the purchaser may avail himself of such fact as a defence to an action for the consideration money, or he may wholly abandon the contract, or he may reclaim any portion of the purchase money which he may have advanced, provided that, within reasonable time after the discovery of the deficiency of title, he give notice thereof to the seller, and offer to return the goods.

It is clear, therefore, that in case the identity of the goods shipped to Crumbacker was established by proof, the verdict should have been for, instead of against, him. From this view of the legal principles applicable to this case, we are of opinion that the judgment of the court below, in overruling the motion for a new trial, ought to be reversed.

The judgment is therefore reversed, and the cause remanded.