

Case No. 4,458.

THE EMILY B. SOUDER.

{15 Blatchf. 185.}¹

Circuit Court, S. D. New York.

Aug. 23, 1878.²

SALVAGE—TOWAGE.

1. The service rendered in this case by a steamer, in towing another steamer, which had lost the use of her steam-power, but was otherwise in good order, and had the use of her sails, and was not in danger or distress, *held* to be a towage service, and not a salvage service.

[Cited in *The Leipsic*, 5 Fed. 113; *McConnochie v. Kerr*, 9 Fed. 53; *The Alaska*, 23 Fed. 607; *The Veendam*, 46 Fed. 491. Distinguished in *The Leipsic*, 10 Fed. 590.]

2. The sum of \$1,000 allowed for such towage, with interest from the time of the rendering of the service.

3. The district court having allowed for a salvage service, the claimant, on appeal, was

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allowed his costs in this court, and the libellant was allowed his costs in the district court.

This was an appeal by the claimants from a decree of the district court [of the United States for the southern district of New York (Case No. 4,455)] in a suit in rem, in admiralty, for salvage. That court awarded \$3,000 to the libellants. This court found the following facts: "The screw steamship Emily B. Souder was built in July, 1864, with steam as her chief motive power, but having sails as auxiliary. She was of about one thousand tons burthen, and rigged with a fore sail, top sail, foretop-gallant sail, jib, mainsail, main gaff topsail, and mizzen staysail. She had good sailing qualities, and was managed, without difficulty, under canvass alone. She left Callao, Peru, on a return voyage to New York, and, when near the equator, on the Atlantic side, lost her propeller, and put into Maranham, under sail, for repairs. Having supplied herself there with a new propeller, she started again upon her voyage, but, the third day out, lost one of the flanges of this propeller, and, when within about eighty miles of St. Thomas, the other. She then made St. Thomas under sail, but, being unable to obtain another propeller, laid in an additional stock of provisions and again started for New York under sail, having on board fifteen or twenty passengers, who had come with her to St. Thomas. She met with no difficulty on her way up, and made from six to eight knots an hour with an open breeze. On the 25th of August, after she had been twenty-eight days out, and when she was between fifty and one hundred miles from New York, she sighted and signalled the steamer Monterey, a steamer of about one thousand tons burtnen, plying regularly between New Orleans and New York, then on her way to New York, with a valuable cargo, and about thirty passengers in the cabin and twenty in the steerage. The vessels were, at the time, from six to eight miles apart, the Souder being to the westward of the Monterey, nearer the land, and making her way slowly, as the wind was light. The land was not in sight, and the water about twelve fathoms. The signal, set by the Souder was not one of distress, but the ordinary saluting flag, set at the forepeak. She was somewhat out of the ordinary track of vessels approaching New York. The master of the Monterey, discovering the Souder, and seeing her signal set, examined her through his glass, and, although he knew the signal was not one of distress, changed his course to go up and speak to her. When he arrived within hailing distance, the master of the Souder asked him to take her passengers to New York. This he declined doing, on the ground that she was from ports that might render him liable to quarantine if he had her passengers on board his vessel. He was then asked what he would tow the Souder in for. He replied that he did not know that he could tow her in, and, consequently, could not make a bargain, but would take hold of her and get her in, if possible. If he did not say that he would charge no more than was right, he purposely left that impression on the mind of the master of the Souder. The Souder was, at the time, in all respects, tight, staunch and strong, and, in no respect, disabled, except in her propeller. She was well manned and provisioned,

and approaching the coast under circumstances which gave no reason to anticipate that she would not, in due time, reach New York in safety. Under these circumstances, the Souder passed her hawser to the Monterey, and was taken in tow. Soon after the vessels got under way, the wind freshened and became more favorable, and both vessels were put under sail, the Monterey being also under steam. They arrived at the lightship about one o'clock at night, and stood off and on until daylight, when they passed Sandy Hook, stopped a short time at the quarantine, and arrived in safety at New York between seven and eight o'clock in the morning. Nothing of importance transpired on the way, and there was no more detention than would naturally occur when one vessel was towing another under such circumstances. The value of the Souder did not exceed \$100,000. That of the Monterey and her cargo was very much more, and estimated by her master to exceed \$500,000. When the Monterey took hold of the Souder, the vessels were outside of the ordinary cruising ground of the tugs from New York, and a little out of the regular track of steamers, but the distance from both was not very great. The Monterey started to the Souder a little after noon, and took her in tow between two and three o'clock in the afternoon. The outside charge of large tugs for towing under such circumstances would not have exceeded \$40 an hour, and, with small tugs, much less. The Monterey had hold of the Souder from sixteen to eighteen hours, and could not have been detained on her voyage, by the deviation and tow, more than eight hours, if as much as that. In point of fact, the Monterey was not placed in any extraordinary peril by what she did. The weather was fine, and the wind favorable. One of the hawsers of the Monterey, used in towing, had to be cut in letting go the Souder, on arriving in port, and was otherwise injured, to the value of seventy-five dollars in all. The vessels arrived in New York August 26th. The next day, the master of the Monterey called upon the agents of the Souder and made known his claim. He was referred to other parties, who asked him to wait a day or two. He then placed the matter in the hands of his owner, and went again to sea August 30th, returning September 23d. He sailed again September 27th, and returned October 19th. On his return, finding that nothing had been done towards a settlement of his demand, he caused this suit to be commenced, which was done October 24th. At the time the service was rendered by the Monterey, the Souder

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was under mortgage to the claimants. Before the suit was begun, this mortgage was foreclosed, and the claimants had become the purchasers of the vessel. A reasonable compensation to the Monterey, for her detention in going to the Souder and making fast, for her towage services, under the circumstances, and for the injury to her hawser, is one thousand dollars.”

Dorman B. Eaton, for libellants.

Welcome R. Beebe, for claimants.

WAITE, Circuit Justice. It is conceded that the Monterey was engaged to tow the Souder, and the only controversy is as to whether the engagement was for salvage or towage service. It is well settled, that, if there is no actual or probable danger, and the employment is simply for the purpose of expediting the voyage, such service is towage and not salvage. Care should be taken, in cases of this kind, not to establish a precedent which will tend to discourage merchant steamers from rendering assistance at sea when there is real or apparent danger, but it is equally important not to encourage claim for salvage remuneration when only towage service is required or contemplated.

In this case, there was no actual or apparent danger. The Souder was not in distress, and she did not represent herself so to be. Her signal did not indicate anything of the kind, and the master of the Monterey did not understand that it did when he bore off towards her. To use his own language, as reported by his engineer, he went “to see what was the matter.” If, when he started, he thought there was distress, his mistake must have been corrected soon after he got to the vessel, for he says he hesitated about taking off the passengers “unless he” (the Souder) “were in actual distress.” The request from the Souder to take off. Her passengers, indicated, in the clearest manner, her desire to expedite their arrival in New York. When this was declined, the next was to propose towage and negotiate about price. There is nothing to show that there was any other reason for this arrangement, than that which led to the application for the transfer of passengers. The weather was fine, but the vessel was proceeding slowly, because the wind was light. While she was nearer the shore than vessels making her voyage usually went, she was not in any actual or apparent dangerous proximity to it. She was new, staunch and strong. Her masts and sails were in good order. Although disabled as to her propeller, she had full use of the same motive power that had brought her in safety from St. Thomas. The cruising ground of pilots and tugs in search of business was not a great way off, and the prospect was fair that she could sail into port in less than twenty-four hours. All this was known to the master of the Monterey. When asked what he would charge to make the tow, his reply was, not that he would not take hold of her under a contract simply for towage, but that he did not know as he could take her in, and consequently could not make a bargain. He said, however, he would take hold and get her in, if he could. All the witnesses on the Souder say that this was accompanied by the further statement, that he

would not charge more than was right, or words to that effect; but, whether that be so or not, it is clear, that he, in no manner whatever, indicated, that, if he did undertake the tow, his charge would be for salvage and not for towage. All the surrounding circumstances go to show, most unmistakably, that the master of the Souder did not suppose that, in what he was doing, he subjected himself or his vessel to a liability for salvage service. What he wanted was to expedite the delivery of his passengers in New York, and he did not, by word or deed, indicate anything else to the Monterey. For this purpose, when he found he could not get them on board the Monterey, the negotiation for towage began. In this connection, it must also be remembered, that, under ordinary circumstances, his vessel would soon be on the cruising ground of tugs seeking towage employment; where all the assistance he required could be obtained at customary rates.

In view of these facts, if the master of the Monterey expected to claim salvage remuneration, he should have so said at the time, in order that the Souder might determine whether she would accept his services on that condition. There is no pretence of any such notice, and on that account, clearly, there could have been no express contract for such service, and, in my opinion, no such service was in fact rendered. Towage only was wanted, and that was the only service rendered or accepted. In law, therefore, the Monterey can only claim reasonable compensation for what she has done in that way.

But, while the employment was for towage alone, it does not necessarily follow that the Monterey is confined, in her recovery, to an amount which would be considered a reasonable compensation for the same service by a tug fitted for and engaged in that kind of business. She is entitled to a reasonable remuneration for what she has done. Her service was an unusual one. The towage was not ordinary but extraordinary. It interfered with the business in which she was engaged. She went out of her way to see what was wanted. This involved delay, and delay increased the expenses of her voyage. To some extent it interfered with her business and incommoded her passengers. Under such circumstances, it is clear, that neither party could have understood that the ordinary charges for towing would be a sufficient remuneration for what was to be done. As the service was to be extraordinary, it is fair to presume that it was expected the compensation would be something more than

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ordinary. This, not because the service was for salvage, but because of its unusual character as towage.

The testimony taken since the appeal has changed the case somewhat, in this particular, from what it was below. Several witnesses have been examined as to the ordinary price of towage and the value of the Souder. It now appears that the value of the vessel was not more than one-half of what was testified to below, and that, if the service had been performed by a tug sufficiently large and powerful to bring her in as expeditiously as the Monterey did, the charge would not have exceeded five or six hundred dollars. Under these circumstances, I think one thousand dollars ample compensation to the Monterey, both for the towage and the damage to her hawser.

As the recovery is upon a quantum meruit for work and labor done, and not for salvage service, interest is allowed at the rate of seven per cent., from August 26th, 1869.

The claimants having been successful, in this court, in reducing the claim of the libellants from salvage to towage, which is all that was asked in the answer, they are entitled to costs in this court. The libellants should recover costs in the district court.

¹ [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

² [Modifying Case No. 4,455.]