

10FED.CAS.—27

Case No. 5,448a.

GILOOLEY v. PENNSYLVANIA R. CO.¹

District Court, S. D. New York.

Dec. 21, 1878.

TOWAGE—NEGLIGENCE OF TUG.

[It is negligence for a tug which has brought a tow of canal boats to port to immediately east off and go away, without inquiring as to the condition of one of the boats, with which she had come in violent contact during the day.]

[This was a libel by William Gilooley against the Pennsylvania Railroad Company to recover damages for injuries to his canal boat.]

E. D. McCarthy, for libellant.

Beebe, Wilcox & Hobbs, for respondents.

CHOATE, District Judge. This is a libel in personam to recover damages for the loss of libellant's canal boat, the Exchange, alleged to have been lost through the negligence of the respondent, in the performance of a towage service. On the 16th of December, 1876, the Exchange was one of thirty-six boats forming a tow, which was made up by the respondent at New Brunswick, on the Raritan river, for New York. The tow started with the tug Bordentown, a large and powerful side-wheel steamer, in advance, followed by two smaller tugs, the Harry and the "Willie, which were connected with the tow by four hawser lines. The Exchange was the starboard boat on the hawser tier. The evidence is that at that time she was seaworthy, and in good condition. The hawser tier was formed of four large canal boats. The tow started at seven in the morning. The day was then fine, but cold. During the forenoon the wind increased, and at ten o'clock it blew a violent gale. About that time the Blue Bonnet, a powerful tug propeller belonging to the respondent, which had arrived at New Brunswick from New York after the tow started, and had been sent down the river to assist it, overtook the tow, and took the place of the Bordentown, being better able to keep the tow in the channel, because she presented less surface to the wind. The tow proceeded without accident till about eleven o'clock, when in turning at a bend in the river at a place called the "Middle Grounds" one of the port hawsers broke, the tow sheered to port, and four of the boats and the tug Harry got aground on the north bank of the river. The tow was completely broken up. The tug "Willie got separated from the Harry, and lay helpless in the river for want of a rudder, which she had lost a few days before. The wind and the tide carried the boats, which were still afloat, down stream, and the Exchange broke away from the other boats in the hawser tier, and drifted down against the "Willie, and received an injury by the collision on her starboard side at and below the water line, the planks being broken and forced in. She was laden with coal. By the assistance of men from the tugs she was listed to port by shovelling the coal to that side, and the injury was temporarily repaired with oakum and tallow, and covered over. A

board was afterwards nailed over the place, and in this condition, so far as that injury was concerned, she remained till her arrival at South Amboy. Meanwhile the Bordentown had gone down the river to a place called "Crow's Mills." The Blue Bonnet took hold of the boats afloat as they drifted down, and reformed the tow, the Exchange being still the starboard boat in the hawser tier; and the tow came down tail first to Crow's Mills without further accident. There they tied up at a pier, and waited for the flood tide, not thinking it prudent to attempt to go through the bridge below Crow's Mills till the change in the tide. Except near New Brunswick, where the new ice had formed, about an inch or two in thickness, the tow had met with no obstruction from the ice up to this point; but from a short distance below Crow's Mills to the bridge drift ice had become packed in so as to make the navigation with the tow difficult and dangerous. It was after dark when the tow left Crow's Mills. The Exchange was still the starboard boat of the hawser tier. They started out with the Blue Bonnet and the "Willie" lashed together ahead, followed by the Bordentown and the tow, now consisting of thirty-two boats. Most of the boats were what are called "chunkers," smaller than ordinary canal boats, and less strongly built. They had only got a few hundred yards from Crow's Mills when they got into the ice, and the Blue Bonnet found it impossible to push through incumbered with the "Willie" by her side and the tow behind. The Bordentown therefore was cast off. The "Willie" was put astern of the Blue Bonnet, and these two tugs made their way through the ice to South Amboy where the "Willie" was left. The object of this movement was to get the Willie out of the way. The Bordentown then undertook to draw the tow through the ice alone, but had not proceeded far when the ice and the tide turned her round to starboard, and drove her against the starboard side of the tow. She struck violently against the starboard side of the Exchange, and inflicted a serious injury to her near the stern and three or four feet from the bottom, partly forcing in the planks, and causing her to leak. The testimony of those who examined the Exchange after she was raised shows clearly that this injury, which was the principal cause of the leaking of the Exchange, was not caused by the ice, but by some blunt point or projection violently pressed and moved along her side, and it cannot be accounted for except as having been caused by this collision; and the evidence I think shows that it was caused by this collision with the Bordentown. The tow was rescued from this immediate peril by the Bordentown's coming to anchor, and waiting for the return of the Blue Bonnet. After a

while the Blue Bonnet returned, and she and the Bordentown succeeded in drawing the tow through the ice, and they arrived at South Amboy between eleven and twelve o'clock that night, without other accident, except that one or more of the hawsers broke while going through the ice. During this passage the Exchange leaked, and the libellant was frequently pumping. At South Amboy the tow was brought around to be moored at a pier, and to be held there by the Bordentown, the Blue Bonnet having cast off; and the tow swung round, heading towards New Brunswick, with the tide. The Bordentown had just got her lines on the pier and made fast, when the captain of the Blue Bonnet called to the captain of the Bordentown to know if he was all right. The captain of the Bordentown replied that he was. The Blue Bonnet then started to go up the river again to bring off the boats left aground, the intention being to leave the tow at South Amboy for the night, and proceed to New York in the morning. The Blue Bonnet left without any inquiry being made by anybody connected with the tugs as to the condition of the Exchange or the other boats. About the time the Blue Bonnet left, the libellant, finding that his boat was making water, hailed the Bordentown, and called for help. He continued to pump, but the water gained on him. He shouted again to the Bordentown that his boat was sinking. They answered that they could not help him, and ordered him to cast off the lines, which was done, and they were fastened to the other boats in the tow. In twenty minutes to half an hour afterwards the Exchange sunk.

Various acts of negligence are alleged and relied on by the libellant,—that the tow was too large; that the hawser lines were insufficient; that the Willie had no rudder; that the Exchange was not fit to leave Crow's Mills that night, with so much ice in the river; that she was especially unfit, in her injured condition, to be put on the starboard side of the hawser tier, the most exposed place in the tow; that the Bordentown improperly attempted alone to draw the tow through the ice; that the injuries to the Exchange, from the effect of which she was lost, were caused by these and other acts of negligence in the management of the tow, and not by the ice; and that the Blue Bonnet was allowed to leave, and no inquiry made as to the condition of the tow, nor any attempt made" to save the Exchange by beaching her.

It is unnecessary to examine in detail all these points, because I am satisfied that it was gross negligence to send away the Blue Bonnet on the arrival of the tow at South Amboy, without any inquiry as to the condition of the Exchange; and that, if she had remained, she could easily have put the Exchange on the beach, within no great distance from where the tow lay, and thus have saved her. The captain of the Bordentown knew, or had every reason and opportunity to know, that she had been in collision with the Borden-town, and was injured. It was no more than a prudent owner dealing with his own property would be expected to do, to see that the boats, and especially the Exchange, thus injured, had sustained no serious injury by being dragged through the ice, before he

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allowed the Blue Bonnet to go away. Instead of this, he contented himself with finding that his boat was all right, and paid no attention to the tow. As soon as he made fast, he banked his fires, so that it was impossible probably for him to rescue the Exchange after he became aware of her danger. It is no defense that the Bordentown alone could not save her if proper foresight would have furnished the means of saving her by the Blue Bonnet.

It is not necessary to consider the effect of the agreement signed by the libellant purporting to exempt the company from damage caused by ice, since the loss of the boat was not caused by ice. Decree for libellant, with costs, and reference to compute damages.

{For a hearing on exceptions to the commissioner's report, see Case No. 5,448b.}

¹ [Not previously reported.]