

THE ATLAS.*

District Court, E. D. Pennsylvania. May 19, 1882.

ADMIRALTY—LIABILITY OF TUG FOR GROUNDING
OF TOW.

It is the duty of the captain of the tug, when he sees his tow steering directly into danger, to warn her against it.

Libel by the owner of the bark *Lena* against the tug *Atlas* to recover damages caused by the grounding of the bark while in tow of the tug. It appeared that on November 1, 1881, the tug took the bark in tow on the Schuylkill river and proceeded down the river. In making a turn near the mouth of the river the bark grounded. Libellant alleged that this was caused by the negligence of the tug in running too near the shore. Respondents claimed that it was caused by the failure of the bark to keep in the wake of the tug.

J. Q. Lane, for libellant.

Theodore M. Etting and *Henry R. Edmunds*, for respondents.

BUTLER, D. J. The respondent was blamable in running too near the Pennsylvania shore. The bark kept in her wake until she found herself running aground, or in imminent danger of it, when she sheered off towards deeper water; but was brought up in the mud before reaching it. The testimony of Captain Keller, of the *Atlas*, that the *Lena* ported her helm, running to starboard of his course, making a shorter turn than the tug, and thus approaching nearer the Pennsylvania shore. is contradicted by all the witnesses on board the *Lena*, and unsupported by any evidence in the cause. If it were true, it is susceptible of being proved beyond doubt. It furthermore seems incredible that the captain of the tug should have seen his tow thus 799 steering directly into danger, and should not have warned her against it, although, as he says, she ran on this course 300 feet before grounding.

It is unnecessary to enlarge upon the subject. The captain of the Atlas was in fault; and his attempt to excuse himself is unavailing. His reason for keeping towards the shore was, doubtless, the one assigned in his conversation with the Lena's crew, immediately after the accident—that he expected the wind, which was from the north-east, and the ebb-tide, to drive him towards the other side. The libel is therefore sustained, with costs.

Contract—Effect of Abrogation.

WARNER *v.* STODDART, U.S. Sup. Ct. Oct. Term, 1882. Error to the circuit court of the United States for the northern district of Illinois. A contract was entered into between a book publisher and a book agent, wherein the agent agreed to canvass for the sale of a certain reprinted work, and the publishers agreed to furnish the work to the agent for the subscribers on certain terms—the remittances to be made, one-half on the seventh and one-half on the twenty-sixth day of the month, in settlement for the previous month's sales. After procuring a number of subscriptions the agent entered into a contract with a rival publishing house to canvass for and sell their edition of a report of the same work, and ceased to canvass for the work under the first contract, but ordered books to be supplied by them under the terms of the contract, which they refused, demanding cash on delivery for the books thereafter supplied to him, and brought suit against him for the value of the books already supplied. The agent, as defendant in that suit, as a set-off, made a claim for damages for loss in not being supplied with the books under the terms of the contract, and from substituting the works of the rival firm in consequence. The case was determined in the supreme court of the United States on April 24, 1882. Mr. Justice *Woods* delivered the opinion of the court, affirming the judgment of the circuit court denying the claim for damages.

Plaintiff in error had no right, upon a refusal of defendant in error to furnish the books on 30 days' credit, to obtain a cancellation of the orders he had taken and substitute therefor orders for the rival edition, and charge the expense of the substitution to defendant in error. The clauses of such a contract are reciprocal, and the performance of one was the consideration for the performance of the other; and when he ceased to canvass for the books he had no right to demand then at the prices or the terms mentioned in the contract. Where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do so, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent. If the defendant in error violated his contract by refusing to 800 fill orders except for cash, the measure of damages would be the interest for 30 days on the amount of cash paid on his orders; and where no cash had ever been paid, he would be in any view entitled only to nominal damages. Defendant in error was not bound by the contract after plaintiff in error had refused to go on under his contract.

Van H. Higgins and Isaac N. Arnold, for plaintiff in error.

Josiah R. Sypher, for defendant in error.

The cases cited in the opinion were: *Wecker v. Hoppack*, 6 Wall. 94; *Miller v. Mariners' Church*, 7 Greenl. 56; *Russell v. Butterfield*. 21 Wend. 304; *Ketchell v. Burns*, 24 Wend. 457; *U.S. v. Burnham*, 1 Mason, 57; *Taylor v. Read*, 4 Paige, 571.

Wharfage—City Ordinance.

CINCINNATI, B. B. S. & P. PKT. Co. v. BOARD OF TRUSTEES OF CATLETTS BURGH, U. S. Sup. Ct. Oct. Term, 1881. Error to the circuit court of the United States for the district of Kentucky. The case was determined in the supreme court of

the United States on May 8, 1882. Mr. Justice *Miller* delivered the opinion of the court, affirming the decree of the circuit court dismissing the bill.

A town ordinance establishing charges upon steamboats and other water craft landing at the public landings within the town, and appointing and establishing certain points at which such landings shall be made, and grading the rates for landing according to their tonnage, and affixing a penalty for violation of the ordinance, is not a tax on tonnage, within the meaning of the constitution of the United States, and if a regulation of commerce it is of that class for which states may prescribe rules in the absence of congressional legislation on the subject; and such an ordinance is not repugnant to the constitution of the United States. The money collected for wharfage under a town ordinance is not taxes, and its collection will not be restrained unless it is shown that the rates are excessive, and that there was a clear abuse of the power properly conferred on the trustees in regard to the wharfage charges, such as would justify the interposition of a court of equity

David Stuart Hounsell, for plaintiff.

Cases cited in the opinion: Wharfage not a tax on tonnage, *Cannon v. New Orleans*, 20 Wall. 577; *Packet Co. v. St. Louis*, 100 U. S. 428; *Packet Co. v. Keokuk*, 95 U. S. 80; *Guy v. Baltimore*, 100 U. S. 434; nor regulation of commerce, *Cooley v. Board of Wardens*, 12 How. 299; *Gilman v. Philadelphia*, 3 Ware, 713; *Crandall v. Nevada*, 6 Wall, 35; *Pound v. Truck*, 95 U. S. 462.

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