

of lading. The stovedore who discharged the cask at New York was not produced as a witness.

*Abbett & Fuller*, for libelant.

*Ullo & Davison*, for claimant.

BENEDICT, J. The bill of lading, stating as it does that the cask therein described was in good order when shipped, coupled with proof that when the cask was delivered the head had been out and replaced, and some of the contents of the cask were missing, casts upon the ship the burden of showing that the bursting out of the head and consequent loss of contents from the cask arose from a peril of the sea. The only evidence tending to show this is testimony to the effect that heavy weather was experienced during the voyage, and that some barrels and boxes of the cargo got loose. There is no direct evidence that the cask in question got loose, or that it was stowed where it could have been injured by other cargo that did get loose, nor is there any testimony from which it can be properly inferred that such was the fact. For all that is proved, the injury to the cask may have been caused by a fall from the slings in discharging. In this state of the proofs, the right of the libelant to recover the damage caused by the breaking of the cask and loss of contents is clear.

Let a decree be entered for libelant, with an order of reference.

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THE GEORGE L. GARLICK. (Two Cases.)\*

*District Court, E. D. New York. April 26, 1883.*

LOSS OF BOATS IN TOW IN A SQUALL—MASTER'S PREVIOUS ERROR OF JUDGMENT AS TO WEATHER.

A tug was held not liable for the loss of boats in its tow in a squall, where the evidence failed to prove the state of the weather a short time before, the time the master determined to proceed on the voyage, to have been such as to make such determination an omission to exercise due care in the management of the tow, instead of an error of judgment.

In Admiralty.

*J. A. Hyland*, for libelants.

*Owen & Gray*, for claimants.

BENEDICT, J. After a careful examination of the evidence in the two cases above named, that of O'Rourke and that of Buckley, I

\*Reported by R. D. & Wyllys Benedict

have arrived at the conclusion that the tug proceeded against cannot be held liable for the loss of the two canal-boats in the libels mentioned. The loss in question occurred while the boats were in tow of the tug on a voyage from New Haven to Bridgeport, in the month of February, 1882. The immediate cause of the loss of the boats was a sudden squall, which the tug encountered after she had passed Stratford Point, and before she had reached Bridgeport. The case, in my opinion, turns upon the question whether, at the time when the master of the tug was called on to determine whether he would proceed around Stratford Point, or turn back and make harbor at Charles Island, the condition of the weather was such as to indicate to a competent navigator that the attempt to pass from Stratford Point to Bridgeport, on the occasion in question, with a tow of five light boats upon a hawser, could not be made without risk of the tow being broken up by the wind and sea before reaching Bridgeport. Upon this question my opinion is that the evidence fails to prove such to have been the state of the weather. The determination of the master of the tug to proceed around the point, instead of turning back to Charles Island, which resulted in the loss of these boats, must upon the evidence be considered to be an error of judgment, and not an omission to exercise due care in the management of his tow.

The libels are therefore dismissed, with costs.

## KERLING v. GOTZHAUSEN and others.

(Circuit Court, N. D. Illinois. June 14, 1883.)

## REMOVAL OF CAUSE—SEPARABLE CONTROVERSY—CITIZENSHIP.

Where an action of trespass is brought in a state court against several defendants, and one of them is a citizen of a different state from that of the plaintiff and the others are not, the citizen of a different state can remove the case to the United States court, on the ground that the controversy is solely between him and the plaintiff, and can be fully determined as between them.

At Law.

*Barker & Green*, for plaintiff.

*Stiles & Lewis*, for defendants.

DRUMMOND, J. This is an action of *trespass de bonis asportatis*, brought by the plaintiff, a citizen of Illinois, against two defendants, citizens of Wisconsin, and two citizens of Illinois. Cotzhausen, a citizen, of Wisconsin, one of the defendants, made an application for the removal of the cause to this court on the ground that there was a separable controversy which could be fully determined as between him and the plaintiff, and in which he was interested. A motion is now made by the plaintiff to remand the cause, for the reason that it was not a removable case. It is claimed in the petition for removal that the defendants, who are citizens of Illinois, are only nominal parties; that the real party in interest, and between whom and the plaintiff the controversy exists, is the citizen of Wisconsin.

The pleas of the defendants are separate, and it is claimed that in each plea there is an issue made between the defendant filing the plea and the plaintiff which is solely between them, and can be fully determined by the court; that it was not necessary, if the trespass was joint, that the plaintiff should sue all the defendants; that he had the right to sue each one separately; and therefore, while others are joined, they are not necessary parties to the suit of the plaintiff against Cotzhausen, as in the case of a contract of partnership or an agreement. This, therefore, is an action of trespass against defendants who may all be severally liable for damages which may have been sustained by the plaintiff, or none or some of whom may be held liable and others not. The question distinctly made in this case has not yet been decided by the supreme court of the United States, and I am not aware it has been decided by any circuit court. It is whether, in an action of trespass brought against