

HASTORF v. MOORE.

(District Court, S. D. New York. February 20, 1899.)

SHIPPING—INJURY TO SCOW—LIABILITY OF CHARTERER.

Defendant's employes, who, under the charter, had control of the movements of a scow hired from plaintiff, for convenience in unloading swung the stern inshore, where she grounded on some spiles and was injured. *Held*, that the presence of a boatman or scowman employed by plaintiff did not relieve defendant from liability, where such man exercised no authority as to the movement of the scow, and had no knowledge of the presence of the spiles.

In Admiralty.

This is a libel in personam to recover damages from respondent, as charterer, for an injury to a scow.

Louis B. Adams, for libelant.

Benedict & Benedict, for respondent.

BROWN, District Judge. The damage done by getting the stern of the scow aground on the spiles above the abutment of the bridge, arose from hauling her stern back and inshore by the men who were unloading her; and this was done no doubt for their convenience in unloading. By the charter or hire of the scow, she was under the direction and control of the respondent in discharging the stone. It was the respondent's duty to give her a safe berth, and any change of position for the purpose of unloading, was within the control of the respondent or of the person or persons with whom the respondent might leave the work of unloading. The plaintiff's man, who was on board the scow, could have had no object in hauling her back and inshore; and he had no previous knowledge of the ground. In view of his contradiction of Mr. McKenzie's statement, I do not feel satisfied to charge him with knowledge of any danger from a little change in the scow's position by the workmen in course of unloading. It is in the highest degree improbable that he would have given any assent or remained silent while the stern of the scow was moved inshore and back, if he had received any proper notice of danger from doing so. Had the scowman not been on board, there could be no question that the respondent would be answerable for the damage done by grounding her on the spiles through change of position in unloading, whether she was moved back by the orders of Mr. McKenzie; or in his absence, by the act of the men in respondent's employ who were unloading her. Story, Bailm. § 400; Schouler, Bailm. 145; Smith v. Bouker, 49 Fed. 954; Gannon v. Ice Co., 91 Fed. 539. The respondent would be responsible for their acts. The presence of the scowman, in my opinion, could make no difference in this responsibility, unless the removal were under his direction or with his acquiescence with clear knowledge of the bottom. It was not his duty to examine the ground, nor was a removal by defendant's men, in the ordinary course of unloading, a change of place for which the scowman or the libelant was responsible.

The libelant is, therefore, entitled to recover the natural and proper damages from grounding. The pumping, I am satisfied from the evi-

dence, was needlessly and irrationally long continued and useless. I think from the evidence \$75 would be a liberal allowance for all pumping that was reasonably necessary. I allow a decree, therefore, for the libelant for that amount for pumping with interest, and for the other items of repair, towage and demurrage \$110, with interest; with liberty, however, to either party to take a reference on the last-named items, such party paying the cost of the reference, unless a more favorable judgment is obtained.

THE LADY WIMETT.

(District Court, N. D. New York. February 27, 1899.)

1. TUG AND TOW—LIABILITY OF TUG FOR INJURY OF TOW—MEASURE OF CARE REQUIRED.

A tug is neither a common carrier nor an insurer, and is bound only to the exercise of ordinary care for the safety of a tow, and when using such care she is not liable for the sudden sheering of the tow.

2. SAME—BURDEN OF PROOF.

The burden is on a libelant seeking to recover damages from a tug for an injury to a tow to prove that the tow was not handled with that degree of skill which prudent navigators usually employ in similar circumstances.

3. SAME—SHEERING OF TOW—USE OF BRIDLE.

The *Lady Wimett*, a steam canal boat, undertook to tow another canal boat from Black Rock Harbor to Buffalo Harbor through the Erie Basin. The vessels met another tug and tow when about entering the basin, which compelled them to keep near the right side of the channel; and when close to a pier the tow took a sudden sheer to starboard, the chock and cleat gave way when the tug attempted to overcome the sheer, and the tow struck the pier and was sunk. There was nothing unusual in the undertaking of the tug, nor in the state of the wind or water, to render it more than usually hazardous. The hawser was of the usual length, and the chock and cleat were, so far as was or should have been known by the *Wimett*, in good condition. Both vessels were properly manned and managed. *Held*, that there was nothing in such evidence to show that the tug was in fault, nor could fault be imputed to her because of a failure to use a bridle, which was not usual, nor required for the towing of a single canal boat.

This is a libel, filed by the Deering Harvester Company and Emile Thiele, as owners of the cargo of the canal boat *Niobe*, to recover damages for the loss of the cargo alleged to have been occasioned by the negligence of the steamer *Lady Wimett* while towing the canal boat from Black Rock Harbor to the harbor of Buffalo.

On the morning of August 10, 1897, the *Lady Wimett*, a steam canal boat, with her consorts, the *Niobe* and two other canal boats, was lying at Black Rock Harbor, having arrived the previous evening. She was destined for Buffalo. The canal was closed between Black Rock and Buffalo, owing to repairs which were being made. It was, therefore, necessary for the boats, in order to reach the port of Buffalo, to take the outside course through Black Rock Harbor and the Erie Basin. When the fleet had reached a point near the southerly end of Bird Island pier the two tow boats were taken in charge by a tug, and the *Niobe* was uncoupled from her position as push boat and taken in tow by the *Wimett*. The line was of the ordinary size, was about 35 feet in length and was fastened to the boats in the usual way. There was a fresh breeze, about 10 or 12 miles an hour, blowing down the lake, which

caused a choppy sea for a short distance in the open space between the ends of the piers. As the Wimett approached the Erie Basin the tug Little with two mud scows in tow was seen coming out of the basin bound down the river. The Wimett passed the Little about 50 or 75 feet to the right, the Little hugging the shore side of the channel and actually passing over the buoy which marks the edge of the channel at that point. When a short distance from the Erie Basin pier the Niobe sheered to starboard. Immediately the Wimett starboarded her helm and opened her engine endeavoring by these means to overcome the sheer. While in this position, the Niobe sheering to starboard and the Wimett pulling to port, the chock on the Niobe broke and immediately thereafter the cleat gave way, leaving the Niobe helpless. She continued her sheer towards the pier, struck against the rocks and sank soon afterwards.

The faults charged by the libelants against the Lady Wimett are as follows: First. Taking a course too close to the end of the breakwater. Second. Not securing the assistance of a tug. Third. Towing with too long a line and no bridle. Fourth. Not having a competent crew. Fifth. Not clearing the breakwater. Sixth. Not noticing the sheer of the canal boat in time. Seventh. Turning and going ahead too suddenly in attempting to correct the sheer. Eighth. Not taking proper steps to keep the Niobe on her course. Ninth. Not approaching the breakwater with sufficient caution.

John W. Ingram, for libelants.

George S. Potter, for claimant.

COXE, District Judge (after stating the facts as above). A tug is neither a common carrier nor an insurer. She is bound to use reasonable skill and care and is liable when the absence of these is established. The Margaret, 94 U. S. 494; Milton v. Steamboat Co., 37 N. Y. 210; The Webb, 14 Wall. 406. A tug, using ordinary care, is not liable for the sudden sheering of the tow. The Stranger, 1 Brown, Adm. 281, Fed. Cas. No. 13,525. The burden is upon the libelants to prove that the tug failed to tow the canal boat with that degree of skill which prudent navigators usually employ in similar circumstances. The Hercules, 55 Fed. 120; Pederson v. Spreckles, 31 C. C. A. 308, 87 Fed. 938; The MacCaulley, 84 Fed. 500. The libelants have failed to prove any of the accusations against the steamer. The fleet, which depended upon the Wimett for propulsion in the canal, consisted of the Niobe, which was pushed ahead, and two other boats which were towed behind. Arriving at the end of Bird Island pier this fleet was broken up. The Niobe was taken in tow by the Wimett and the other boats were given in charge of a tug. This indicated rather unusual care and prudence on the part of the master of the Wimett. A more reckless navigator would have undertaken to handle the entire fleet. The towline was of the usual length, about 35 feet, and was made fast in the ordinary way. It was broad daylight. There was nothing unusual in the condition of the wind or water. The trip was a short one, most of the distance being through channels well guarded by breakwaters and offering no unusual impediments to safe navigation. There was a fresh breeze blowing down the lake and for a short distance between the ends of the piers there was a choppy sea, but there is an entire absence of proof that the conditions were such as to warrant a moment's hesitation in the mind of a prudent navigator as to the safety of the journey. The course which the Wimett took was the usual one, except that the presence of the Little and