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

her tow compelled the Wimett to keep to the right of the channel. When the Niobe encountered the return current near the end of the Erie Basin pier she took a decided sheer to starboard. The Wimett endeavored to overcome this sheer by every means in her power and would, in all probability, have succeeded had not the chock and cleat given way in succession, leaving the Niobe helplessly adrift. The libelants' witnesses are of the opinion that the chock and cleat did not break until the Niobe struck the pier, but the great preponderance of evidence is the other way. The libelants' witnesses were several hundred feet distant, while those of the claimant were on the Niobe and the Wimett or in the immediate vicinity of the disaster. If the collision with the pier were caused by the breaking of the chock on the Niobe it is plain that the Wimett is not liable. The evidence is uncontradicted that both the chock and cleat were staunch and strong, and even if insufficient there is not the slightest proof that the master of the Wimett knew or should have known of any defect.

The court has read the entire testimony, having in mind the allegations of fault against the Wimett, and is forced to the conclusion that none of them has been established. Some of these accusations are of the most vague and general character, others are unsupported by the testimony and others still are positively disproved. The Wimett's course was not too close to the breakwater. It was the course followed by all vessels coming out of or going into the Erie Basin. There was no occasion for the assistance of a tug. The Wimett was entirely capable of towing a single canal boat to Buffalo and there is no reliable testimony to the contrary. The line was the ordinary length, and the pretense that a bridle was necessary seems wholly without support. During an experience of 15 years the court has never known of an instance where a single canal boat was towed with a bridle and has never known or heard of a case where its absence was imputed as a fault. Indeed, the principal reason for using a bridle would seem to be absent in such circumstances.

There is nothing to sustain the proposition that the Wimett and Niobe were improperly manned. On the contrary, the crew was composed of men of more than ordinary experience and intelligence. Two men were at the Niobe's tiller and everything which could be done to overcome the sheer was done on both boats. The proposition that the Wimett turned and went ahead too suddenly after the Niobe began to sheer is not sustained by the evidence. Indeed, it is a matter of common knowledge that a steam canal boat has none of the characteristics of a tug in this respect. They are built to traverse a sluggish waterway at a slow rate of speed and are incapable of executing the swift and powerful maneuvers often required of tugs.

In short, it seems to the court that an impartial mind on reading this record must reach the conclusion that the libelants have failed to establish any fault on the part of the libeled vessel. It follows that the libel must be dismissed.

FLOOD et al. v. CROWELL.

(Circuit Court of Appeals, Fifth Circuit. January 24, 1899.)

No. 730.

SHIPPING—DEMURRAGE FOR DETENTION OF VESSEL—CONSTRUCTION OF CHARTER PARTY.

A charter party fixed the demurrage for each day's detention of the vessel "by the default" of the charterers or their consignees. It made no provision for "dispatch" or "quick dispatch" in loading or discharging the cargo, but fixed the minimum amount to be loaded or discharged each day, and provided that the lay days should commence "from the time the captain reports himself ready to receive or discharge cargo." *Held*, that under the latter provision the lay days did not commence until the vessel was ready and in position to receive or discharge cargo, and that the contract did not bind the charterers for demurrage for a delay of the vessel in obtaining a wharf at which to discharge, notwithstanding a notice of readiness to discharge from the captain, where, as the owners knew or should have known, all the wharves at the port of destination were public, and under the exclusive control of a harbor master, who directed the movements and position of all vessels thereat, and by the rules of the port each vessel was required to wait her turn.[1]

Appeal from the District Court of the United States for the Eastern District of Texas.

The libel was filed December 2, 1896, alleging that the schooner Horace W. Macomber in October, 1896, at Newport News, took on board 1,600 tons of coal, to be delivered at Galveston, Tex., to respondents, Flood & McRae, under a charter party duly signed, stipulating for a discharge of 250 tons of coal per day, and for $90 per day for every day's detention; that on the 4th day of November, 1896, at 9 o'clock a. m., the master of the schooner notified Flood & McRae of arrival and readiness to discharge, and that on said day Flood & McRae directed the captain of the schooner to report to the harbor master for a berth, and that the harbor master told him there was none at the wharf, and that he would have to lie alongside the schooner Swann, which he did until November 8, 1896, when the Swann sailed, and the Horace W. Macomber took her place at the wharf; that his cargo was not discharged until noon of November 16, 1896. Libelant alleged that, by the terms of the charter party, $6\,^2/_5$ days from the notice of readiness to discharge were allowed, and that they terminated at noon on November 11, 1896, wherefore he is entitled to 5 days' demurrage, at $90 per day. The respondents filed an answer and an amended answer, and denied that the vessel arrived on the 3d of November, 1896, and that she was ready to discharge on that date. They denied that they accepted the said cargo on November 4, 1896. They alleged that the vessel was discharged within the time contemplated by the terms of the contract, and therefore no demurrage was due. Answering further, respondents alleged that the master of the Macomber did give notice of his arrival on the 4th of November, 1896, but that in truth and fact he had not arrived, for that he was neither able nor ready to discharge; that his vessel got aground after his notification; that they had no control of any wharf of the city, but that the harbor master had absolute and entire control of the wharves, and that they notified him that they did not and would not accept his notice of arrival until he was berthed alongside the wharf and ready to discharge; and that they were ready at all times to receive the cargo whenever he was ready to deliver it to them, but were prevented from doing so because of the inability of the master of said vessel to deliver it to them. The respondents further answered that the libelant had frequent dealings with the port of Galveston, and had frequently contracted concerning the chartering of his vessel with respect to the port of Galveston, and that he knew at

[1] On question of demurrage, see note to Randall v. Sprague, 21 C. C. A. 337.