

the pleadings of another as to take a course of action which otherwise he would not have taken, and the first party sees fit to amend, thus throwing the other party upon a new line of defence, then costs ought to be imposed upon the party amending; for *non constat*, if the original pleading had been the same as the amended one, that the defendant might have defended at all, or taken a less troublesome and expensive line of defence. We do not see that the respondent has been damnified by the amendment to the libel to such an extent as to entitle him to costs. All the evidence shows that there was no wrongful presentation of the case as regards its substantial merits in the libel as filed originally.

Leaving out of view minor questions of date and form, to which extent the amendments to the libel only went, nevertheless the master refused to pay the wages of his seamen, which he admitted had been earned by their faithful and continuous labor for a period of over six months, if not forfeited for other causes. Thus it will be seen that the objection to amending the libel is not one going to the merits of the action. He is not entitled to have costs by reason of the amendment, and they must be denied.

THE BEN HOOLEY.*

(*District Court, E. D. Pennsylvania.* February 21, 1881.)

1. ADMIRALTY—TOWING VESSEL FROM PIER IN ORDER TO MOVE ANOTHER VESSEL.—RESPONSIBILITY OF TUG FOR COLLISION CAUSED BY DEFECTIVE HAWSER.

A tug which, in order to move a vessel from a pier, moves another vessel into the stream against the protest of her officers, is responsible for a collision caused by the defective condition of the latter vessel's hawsers, with which the towing is done.

2. SAME—EXTENT OF TUG'S DUTY—WHEN NOT RELIEVED BY NEGLIGENCE OF VESSEL IN TOW.

Two schooners were lying at a pier. A tug was employed to tow one of them out, and, in order to do so, undertook to tow the other

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

into the stream, against the protest of her mate, who was in charge. In doing this the hawser of the latter vessel broke, the breaking resulting in a collision with and damage to a vessel anchored in the stream.

Held, that the tug was bound to have ascertained whether the hawser was sufficient, and was responsible for the damage.

Held, further, that the tug was not relieved, because the schooner might have anchored after the first breaking of the hawser, and thus avoided the collision.

In Admiralty.

Libel for collision, by the schooner Galloway C. Morris against the steam-tug Ben Hooley. The facts are as follows: On November 3, 1876, the schooners Ella C. Little and Index were lying at a pier in the Delaware river. The Index employed the respondent tug to tow her into the stream, and in order to do so the tug undertook to first tow the Little into the stream. While doing this the hawser parted and the Little collided with and damaged the Galloway C. Morris, which was anchored in the stream. On behalf of the libellant it was alleged that the tug towed the Little into the stream against the protest of the latter's mate, and in doing so used the Little's hawser, after notice of the mate that it was rotten. On behalf of the respondent it was alleged that the mate of the Little refused to move his vessel, and was compelled to do so by the dock-master; that he then furnished a line to the tug, and the Little was towed out into the stream; that the hawser then parted, but it being a convenient place to anchor, those in charge of the tug requested the mate of the Little to let go her anchor; that he did not do this, and the tug then went along-side, again received a line from the Little, and attempted to tow her; that the hawser again parted, and the collision with the Morris resulted; that those in charge of the tug had no notice or knowledge of the defective condition of the hawser, and that if the Little had anchored after the first breaking of the hawser the collision would not have occurred.

Henry R. Edmunds, for libellant.

Alfred Driver and *J. Warren Coulston*, for respondent.

BUTLER, D. J. The liability of the respondent is plain. The loss resulted directly from his negligence. If he did not

know the rotten condition of the hawser, with which he attempted to move the Little, at the outset, (and the complainant's witnesses swear he did,) he became aware of it, according to the testimony produced by himself, immediately after. The result would be the same, however, if he did not know. Undertaking to move the vessel for his own convenience, against her protest, the responsibility for all that was done rested on him. It was his duty to ascertain whether the hawser was sufficient to control her. The failure to do this was the direct cause of the injury which followed. It is of no consequence that those on board the Little, might possibly have averted the catastrophe by dropping her anchor. As respects the libellant, the respondent cannot complain that somebody did not interfere to save him from the consequences of his folly. He took the Little, in charge on his own account, against her will, and as respects the libellant, was responsible for her management. If unfit to go out because of the condition of her anchors, or on any other account, he should not have taken her. The authorities cited by his counsel relate to questions between the owners of tugs and their tows, and have no application to the case in hand. It is doubtful at least whether the ordinary relation of tug and tow existed between the respondent and the Little; but even if it did, and both vessels might be regarded as in fault, the right of the libellant to recover from the respondent would not be affected thereby.

A decree must be entered for the libellant accordingly.

CITY OF PORTLAND v. OREGONIAN RY. Co. (limited.)

*(Circuit Court, D. Oregon. March 22, 1881.)***1. CAUSE REMOVED—INJUNCTION.**

Upon the removal of a cause to a circuit court, the same has power, before the first day of its next term, to allow or modify an injunction.

2. INJUNCTION.

Where a suit for injunction turns wholly upon the validity of an act of the legislature granting the defendant the exclusive right to the use of certain property, to aid in the construction and operation of its railway, which is claimed by the plaintiff as a public levee or landing, and the use of such property, in a way not materially in conflict with any use to which it is being put, is of great advantage to the defendant, an injunction restraining it from such use will be modified accordingly; and, in the consideration of the matter, weight will be given to the presumption that an act of the legislature is valid, and that the defendant is engaged in a public enterprise in which the public is interested.

3. BOND.

Upon the modification of an injunction the court may require, a condition of such modification, that the defendant give a bond to secure the plaintiff against any injury which may result to it from the same, or to perform the final decree concerning the same.

Julius C. Moreland, for plaintiff.

Ellis G. Hughes, for defendant.

DEADY, D. J. At the last session (1880) of the legislative assembly, an act was passed granting the defendant,—the Oregonian Railway Company, limited,—among other things, the use of the triangular-shaped piece of ground lying between the east line of blocks 112 and 113 of the city of Portland and the east bank of the Wallamet river, the same being, as appears from the map, about 520 feet long and 50 feet wide at the south end and 300 feet at the north end, and known as the "Public Levee," and dedicated to public use as a levee by a map and ordinance of the plaintiff—the city of Portland—recorded March 6, 1869, "to be held, used, and enjoyed for occupation by track, side-track, water stations, depot buildings, wharves, and warehouses," and such other "erections" as may be found necessary or convenient in the
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