

be set down to the exceptions in the bill of lading. It is sufficient to rebut the charge of negligence to show that the stowing was in conformity with the established usage of the port. *Shear. Neg.* § 6; *Baxter v. Leland*, 1 Blatchf. 526; *Lamb v. Parkman*, 1 Spr. 343, 351; *The Titania*, 19 FED. REP. 101, 107, 108; *The Geo. Heaton*, 20 FED. REP. 323; *The Chasca*, ante, 156.

If I were to hold the steamer in this case, she ought to have a remedy over against the lighter in Havana. It would be unjust to charge the steamer upon evidence that would exempt the lighter in a suit there. Much as I may doubt the accuracy of the evidence given concerning the alleged custom of Havana, or, if some such custom exists, whether this lighter was loaded in conformity with it, I cannot feel warranted in disregarding the positive evidence given, in the absence of all other proof to the contrary. I am reluctantly constrained, therefore, to dismiss the libel, leaving the libelants to their remedy against the lightermen in Havana, or to such further proof as they may make upon appeal in the circuit.

THE MARY R. MCKILLOP.¹

(District Court, E. D. New York. October 3, 1884.)

TOWAGE—NEGLIGENCE—BREACH OF CONTRACT—DEVIATION.

A canal-boat sprang a leak while in tow of a tug, and thereafter sank. *Held* that, although the leak was probably caused by the boat's coming into contact with a floating piece of ice, still, as the proofs did not show a failure on the part of the tug to use due care and skill, the tug could not be held liable for the boat's sinking. It was not a breach of the towing contract for the tug to take another barge in tow, and land her at another place, during the same voyage, since it appeared from the circumstances that this was in accordance with the parties' understanding of the contract, and was, therefore, not a deviation. The libel against the tug for the sinking of the boat was therefore dismissed.

In Admiralty.

Carpenter & Mosher, for libellant.

Hyland & Zabriskie, for claimant.

BENEDICT, J. The master of the canal-boat Robert Henry agreed with the master of the tug Mary R. McKillop to be towed by the tug from Newtown creek to Hoboken. The towage was agreed to be seven dollars, because of ice in the rivers. The tug took the canal-boat along-side, and afterwards took a barge astern, to be landed at the Cunard wharf in the North river, and also a lighter to be landed in the North river. After the lighter had been landed in the North river, and when proceeding in the East river, ice was met. The tug proceeded up in the clearest part of the river until she approached

¹Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

the Cunard dock. Then she hauled in towards the New York piers, and on reaching the Cunard dock landed the barge. Thence she proceeded to Hoboken with the libelant's canal-boat.

Before the landing of the barge at the Cunard dock the libelant's canal-boat sprang a leak, from what her master supposed, and no doubt correctly, to have been contact with a piece of ice. The leak increased, and finally after the boat had been landed at Hoboken she sank.

Assuming that the cause of the boat's sinking was coming in contact with ice while the tug was hauling towards the New York docks in order to land the barge, it is still necessary, in order to charge the tug with the sinking of the boat, that it be proved that the canal-boat was brought in contact with the cake of ice by some negligence on the part of the tug. The proofs show no such negligence. There is no evidence of any failure on the part of the tug to exercise due care and skill throughout the voyage. If, then, any liability on the part of the tug exists, it must arise from a breach of the towing contract. The libelant contends that the towing contract was for a voyage from Newtown creek to Hoboken direct; that the tug deviated from this voyage to land the barge at the Cunard wharf; and that the sinking of the boat was owing to injuries received by her in the course of this deviation, for which the tug is consequently responsible. But I am unable to hold that to take the barge in tow and land her at the Cunard wharf was a breach of the towing contract made with the libelant. When the contract to tow the canal-boat to Hoboken was made, nothing was said about going direct, nor about taking other boats in tow at the same time, and although the barge, as well as a lighter, were taken on immediately after the canal-boat was alongside, no objection was made by the captain of the canal-boat to the taking of these boats. From these circumstances I infer that the taking of the barge in tow was in accordance with the parties' understanding of the contract made to tow the libelant's boat, and if so, it was not a deviation to land the barge at the Cunard dock.

The libel must therefore be dismissed, and with costs.

THE WISCONSIN.¹

(District Court, E. D. New York. January 6, 1885.)

COLLISION—STEAMER AND BARK—MISTAKE AS TO LIGHTS—FLARE-UP—BLUE LIGHT
—PILOT SIGNAL.

Where a steamer was approaching a bark in the night, and the bark exhibited a flare-up light, which was seen on the steamer, and those on the steamer supposed the other vessel to be a pilot-boat desiring to put a pilot on board, and the steamer showed a blue light, to which the bark replied by a flare-up, and the steamer did not discover her mistake until too late to avoid a collision, *held*, that, besides the fact that the green light of the bark was proved to be so dim as to render it invisible to the steamer at a distance sufficient to enable her to avoid the bark, which of itself was sufficient to prevent a recovery by the bark, it was also a fault on the part of the bark to exhibit the flare-up after the steamer had burned the blue light; and as there was no fault proved on the part of the steamer, the bark's libel against the steamer was dismissed.

In Admiralty.

Scudder & Carter and Owen & Gray, for libelants.

Beebe & Wilcox, for claimants.

BENEDICT, J. The cause of the collision which gave rise to these actions was the opinion formed by those in command of the steamer that the lights exhibited by the bark were the lights of a pilot-boat desiring to put a pilot on board the steamer, when in fact the lights were those of a bark holding her course. The night was dark, but good for seeing lights. The bark exhibited a flare-up light, which was seen by those in charge of the steamer in abundant time to avoid the bark, and from that time the lights of the bark were watched with the aid of glasses as well as with the naked eye by several competent persons on board the steamer, including the master, and all supposed the light to be the flare-up of a pilot-boat until the bark was too near to enable the steamer to avoid the collision.

The case is not one of an inattentive lookout on the steamer, but one where the lookout saw the light, and was misled by it; and the question of the case is whether the opinion that the approaching vessel was a pilot-boat, which was formed and acted upon by those in charge of the steam-ship, was justified by the circumstances. If so, the steam-ship cannot be held in fault.

In addition to the flare-up light shown, the bark carried a green side light. This light was seen by those on board the steamer, but not until it was too late to correct their mistake in regard to the character of the approaching vessel, and when collision was inevitable. The testimony in regard to the green light of the bark, in connection with evidence of the lantern itself, warrants the conclusion that the light was so dim as to render it invisible to the steamer at a distance sufficient to enable the steamer to avoid the bark. This condition of the bark's green light is of itself sufficient to prevent a recovery by the bark.

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