TORONTO ADMIRALTY DISTRICT.

THE MONTREAL TRANSPORTATION COMPANY, LIMITED ..... } PLAINTIFFS; 1908 Nov. 10.

AGAINST

THE SHIP *BUCKEYE STATE*

AND

THE ATLANTIC COAST STEAMSHIP COMPANY ..... } PLAINTIFFS;

AGAINST

THE MONTREAL TRANSPORTATION COMPANY, LIMITED, AND THE SHIP *MARY ELLEN*..... } DEFENDANTS.

Shipping—Contract of Towage—Principal and Agent—Damages.

In cases of towage where the tow is damaged by the unskilful navigation of the tug, quite apart from the contract of towage the duty is imposed on the part of the tug to observe such ordinary care and skill in the towage as will avoid any possible damage or injury.

In a continuous contract for towage where part of the work is performed by a tug not the property of the contractor, and where damage is caused to the tow by the unskilful navigation of the tug, the owners of the tug are responsible to the tow, and not the original contractor.

IN the first of the above named actions the plaintiffs sue to recover from the defendant in respect of towage and salvage services, and the owners of the defendant barge dispute the claim on account of alleged damage said to have been occasioned to their barge while being towed under a contract made with the plaintiffs.

In the second of above mentioned actions, the plaintiffs, who are the owners of the defendant barge in the first mentioned action, seek to recover from the defendants for damages occasioned to their said barge while being

1908

THE MONTREAL TRANSPORTATION CO. v. THE THE SHIP BUCKEYE STATE.

THE ATLANTIC COAST STEAMSHIP CO. v. THE MONTREAL TRANSPORTATION CO. AND THE SHIP MARY ELLEN.

Statement of Facts.

towed under contract with the defendants, the plaintiffs in the first mentioned action.

Additional facts of the case are set out in the reasons for judgment.

The matters in dispute in both actions being almost identical an order was made for the joint trial of said actions, which took place at Kingston on the 28th, 29th and 30th April, and the 1st, 2nd, 25th 26th and 27th days of May, and the 6th day of November, 1908, when after argument judgment was reserved.

F. King, for the Montreal Transportation Company.

C. H. Cline, for the Atlantic Coast Steamship Company, and the Ship *Buckeye State.*

G. I. Gogo for John Jessmer, and the Ship *Mary Ellen.*

HODGINS, L. J., now (November 10th, 1908) delivered judgment.

The oral evidence on the contract of towage and the documentary evidence in the letters and accounts put in by the respective parties respecting that contract of towage, prove conclusively that the contract for the towage of the barges of the Atlantic Coast Steamship Company was for a continuous towage of such barges by the Montreal Transportation Company from Lachine in the Province of Quebec to Port Dalhousie in the Province of Ontario; and that there was no independent or special contract with the defendants John Jessmer and the ship or tug *Mary Ellen*, other than that in the "duty" of ordinary care and skill as hereinafter specified, and that the towage by the tug *Mary Ellen* of the ship *Buckeye State* was performed as agent of the said Montreal Transportation Company.

The evidence warrants me in finding that the barge *Buckeye State* met with two accidents during her towage from Lachine through the St. Lawrence Canals,—one at

1908

THE MONTREAL TRANSPORTATION CO. v. THE SHIP BUCKEYE STATE.

THE ATLANTIC COAST STEAMSHIP CO. v. THE MONTREAL TRANSPORTATION CO. AND THE SHIP MARY ELLEN.

Reasons of Trial Judge.

Lock 17 of the Cornwall Canal on the 28th November, 1907, and the other on the following day outside the lock of the Morrisburg Canal.

Taking the evidence as a whole, it is specially remarkable for the mass of contradictory and unsatisfactory evidence it has produced, and which, from judicial experience, and many published reports of cases, is regretfully usual in Admiralty cases; and in this case it merits the observation made by Dr. Lushington in a similar case before him that "the evidence is most conflicting." So in a judgment in 7 Bened. 11, the Court appears to have struggled with a mass of testimony with which the case had been loaded but from out of the "contradictions and bold statements" it endeavoured to draw reasonable conclusions of fact. And but for the evidence of two inarticulate operations of canal water on the barge *Buckeye State*, which have neither been disproved by contradictory oral evidence, nor accounted for by any reasonable explanation, I would have found it extremely difficult to decide on which side the balance of credibility lay.

Before, however, reviewing the evidence of the two accidents above referred to, it will be proper to consider what a contract of towage involves.

The ordinary contract of towage has been defined to be aid in the propulsion of one vessel by the employment of another vessel having within her the motive power which is used to expedite the voyage of the first mentioned vessel which requires the acceleration of her progress through the water: *Princess Alice* (1).

An amplified illustration of this definition is given in *The Merrimac* (2) (1874); where it was stated that the contract to tow a barge, and her cargo, is one in the line of carriage, or transportation for compensation; and is therefore a bailment of the kind denominated *locatio operis mercium vehendarum*, in which the master of the

(1) 3 W. Rob. 138. (2) 2 Sawy. 586.

1908

THE MONTREAL TRANSPORTATION CO. v. THE SHIP BUCKEYE STATE.

THE ATLANTIC COAST STEAMSHIP CO. v. THE MONTREAL TRANSPORTATION CO. AND THE SHIP MARY ELLEN.

Reasons of Trial Judge.

tug is bailee, and responsible for ordinary skill and diligence; and that the tug is responsible for the navigation of both vessels; and her duties as tower are those of an ordinary carrier for hire; just as if she had the tow on her deck instead of astern at the end of the two-line. And so when a tug negligently places a tow in peril, and she is thereby lost or damaged, it is no excuse on the part of the tug to allege that the tow might have been saved from such loss or damage but for a mistake of, or want of skill in, the crew of the tow.

The evidence of the damage caused to this barge *Buckeye State*—which is a large ship of 179 feet long,—at the wing wall of Lock 17 of the Cornwall Canal, shows that she was towed to that lock by the small tug *Mary Ellen*. The barge having no motive power of her own had to take her course and speed through the canal from the tug. I find on that evidence that the tug's course was north-westerly, and about forty feet from the north bank of the canal which narrows on the wing walls of the lock. The speed was about five miles an hour. This course I find would cause her bow to strike the north wing wall of the lock, which it did, and Captain Hansen of the barge stated (Q. 163) that to counteract the course taken by the tug he put his helm hard a-starboard. And when I asked him (Q. 1057) "When you saw your vessel pointing that way by the towing of the tug, did you use your rudder to counteract her pulling you to the north wall? A. Yes. "Q. Keeping her stem to the gates? A. Yes." "Q. And could you if the rudder had been more effectively used, have kept your stem straight for the gates of the lock? A. Not the way the tug was pulling us." I also accept the evidence of the captain and the mate of the barge calling out to the tug "to take care," (Q's 152-162), and that they had two boys of the crew on the south bank of the canal with lines, one line attached to the stern, and the other line attached to the bow of the barge;

1908

THE MONTREAL TRANSPORTATION CO. v. THE SHIP BUCKEYE STATE.

THE ATLANTIC COAST STEAMSHIP CO. v. THE MONTREAL TRANSPORTATION CO. AND THE SHIP MARY ELLEN.

Reasons of Trial Judge.

but that owing to the course taken by the tug so close to the north bank of the canal the lines became strained, and had to be let go. The striking of the wing wall then took place and is thus described. "Q. 183. Then what happened? "A. We had too much headway, and he could not pull us over and then we struck." "Q. 198. Now how did your boat strike? A. The stem first." "Q. 200. And then what effect had that on her? A. It split the stem and shoved it over to the port side. It struck like on the starboard corner of our stem, and split the stem and shoved it over to our port side. Then she glanced off that, and broke the cat-head and railing."

There were witnesses called by the defence who swore that the stem was not damaged or that they did not see any damage to the stem as had been sworn to by those on board the *Buckeye State*. But against their evidence one fact has been proved by unimpeached evidence, and that is after leaving lock 17 the barge began to leak more than ordinarily, which necessitated more frequent pumping than had been customary, and that such pumping had to be continued up to the time she reached the Morrisburg Canal.

But apart from this evidence of the extra leakage and pumping, it is a reasonable deduction that the resulting damage caused by the barge striking the wing wall of the lock, would necessarily be better known to those personally on board the barge, and who therefore would be more particular in investigating and realizing the details of the damage and leakage; and therefore more reliable than the casual examination and opinions of bystanders; and besides they would have a personal interest in making the investigation, and their memory would generally be more lasting and reliable, than the memories of mere bystanders.

1908

THE MONTREAL TRANSPORTATION CO. v. THE SHIP BUCKEYE STATE.

THE ATLANTIC COAST STEAMSHIP CO. v. THE MONTREAL TRANSPORTATION CO. AND THE SHIP MARY ELLEN.

Reasons of Trial Judge.

In *Sturgis* v. *Boyer*, (1) the Court said: "Assuming that the tug is a suitable vessel, properly manned and equipped for the undertaking, so that no degree of negligence can attach to the owners of the tow, on the ground that the motive power employed by them was in an unseaworthy condition; the tow under the circumstances supposed, is no more responsible for the consequences of a collision than so much freight; and it is not perceived that it can make any difference in that behalf, that a part, or even the whole, of the officers and crew of the tow are on board, provided that it clearly appears that the tug was a sea-worthy vessel properly manned and equipped for the enterprise, and from the nature of the undertaking, and the usual course of conducting it, the master and crew of the tow were not expected to participate in the navigation of the vessel, and were not guilty of any negligence or omission of duty, by refraining from such participation"..... "Owners appoint the master and employ the crew, and consequently are held responsible for their conduct in the management of the vessel." "By employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute the master and the crew of the tug their agents in performing the service. Their contract for the service, even though it was negotiated with the master, is, in legal contemplation, made with the owners of the vessel, and the master of the tug, notwithstanding that the contract was negotiated with him, continues to be the agent of the owners of his vessel, and they are responsible for his acts in her navigation."

And similarly in the *Steamboat Deer* (2), it was held that a tug is liable for damages, resulting from negligence in her navigation to a vessel in tow, whether she is towing under a contract or not.

(1) (1860) 24 How. 122. (2) (1870) 4 Ben. 352.

1908

THE MONTREAL TRANSPORTATION CO. v. THE SHIP BUCKEYE STATE.

THE ATLANTIC COAST STEAMSHIP CO. v. THE MONTREAL TRANSPORTATION CO. AND THE SHIP MARY ELLEN.

Reasons of Trial Judge.

In the case of the tug boat *Francis King* (1) it was proved that the parting of the badly joined hawser of the tug caused the pounding and consequently damaging of the barge, and the court held that such parting of the hawser cast upon the tug the responsibility of the loss of the barge; and that tug-boats engaged in that business must be competent in power and equipment and of sufficient strength to hold their tows in navigation.

But the case which bears some analogy to the present, is the case of *Jackson* v. *Easton* (2), where the contractors who had contracted to tow a barge, hired a tug for that service. During the towing, the boiler on the tug exploded, whereby the barge was damaged. In disposing of the case, the court said: "They (the contractors who were respondents) merely hired the tug to tow the barge. The tug was apparently a proper vessel, and one usually employed for such service. On the facts of the case, the respondents were no more than agents of the libelant (plaintiff) to hire an apparently proper tug to tow the boat. If the tug towing this boat in the employment of the respondents (the contractors), or even of the libelliant himself, had negligently caused the barge to collide with another vessel, certainly the tug and its owners, and not the respondents, would be liable for the damage." "No contract, express or implied, of the respondent with the libellant has been broken."

And as disclosing a somewhat similar damage to that alleged in this case, the case of *The Workman* (3) is instructive. There, by the action of the tug, the bark *White Wing's* stern came in contact with a wharf, and was broken off; several of the timbers of the bark's stern were rotten, and it was contended that the blow was very slight and not such as could injure a seaworthy vessel, and that the state of the timbers was the sole

(1) (1873) 7 Ben. 11.
(2) (1874) 7 Ben. 191.
(3) [1870] 1 Lowell 504.

1908

THE MONTREAL TRANSPORTATION CO. v. THE SHIP BUCKEYE STATE.

THE ATLANTIC COAST STEAMSHIP CO. v. THE MONTREAL TRANSPORTATION CO. AND THE SHIP MARY ELLEN.

Reasons of Trial Judge.

cause of the accident. But it was held that the bark was swung around in such a way as to bring her stern against some part of the wharf, and that the tug was liable; the undisputed fact showing that the tow had been brought against the wharf with greater or less violence, called upon the tug for sufficient explanation which had not been given.

These cases seem to affirm a doctrine that the relation between tug and tow, where a damage occurs by a collision by which the tow is damaged by the unskilful navigation of the tug, is not so much that which arises directly from the contract of towage, but rather that which imposes a duty on the part of the tug towards the barge, to observe such ordinary care and skill in the towage as will avoid any possible damage or injury. See further on this point, the *Julia*, quoted in *Smith* v. *St. Lawrence Tow Boat Company* (1); *Spaight* v. *Tedcastle* (2); *Heaven* v. *Pender* (3); *Sewell* v. *British Columbia Towage and Transportation Company* (4).

The defence to this claim of the barge *Buckeye State* contends that the barge had no lines out as required by the Government Canal Regulations; but on the evidence, I find that such lines were out and in the hands of two of the crew on the south side of the canal; but that owing to the course of the tug in keeping the barge too close to the north side of the canal the lines were so strained that they had to be let go. Besides, the case of *Jacques* v. *Nichol* (5), decided that the bare infringement of the canal regulations by the defendant's ship in that case would not of itself give any cause of action to the plaintiffs, and no negligence on the defendants' part which would give such a cause of action to the plaintiff had been alleged.

(1) [1874] L. R. 5 P. C. at p. 314; See *The Julia*, 14 Moore P. C. 210.
(2) [1881] 6 App. Cas. 217.
(3) [1883] 11 Q. B. D. 503.
(4) [1883] 9 S. C. R. 527, per Strong, J. at p. 547.
(5) [1866] 25 U. C. Q. B. 402.

1908

THE MONTREAL TRANSPORTATION CO. v. THE SHIP BUCKEYE STATE.

THE ATLANTIC COAST STEAMSHIP CO. v. THE MONTREAL TRANSPORTATION CO. AND THE SHIP MARY ELLEN.

Reasons of Trial Judge

I must therefore find that the defendants John Jessmer and the ship *Mary Ellen*, are liable to the Atlantic Coast Transportation Company for the damage caused to their barge the *Buckeye State*, striking the wing wall of Lock 17 of the Cornwall Canal, which damage I assess at the sum of $460.

But as to the damage caused to the barge *Buckeye State* outside the lock of the Morrisburg Canal, I find on the evidence that such damage was caused by the barge striking the stone steps outside the lock when being drawn out of the lock by the power of her own winch, and that her so striking the said stone steps made the hole which caused the excessive leakage which was developed within half an hour arter leaving such lock, and necessitated the beaching of her at Iroquois, and the subsequent salvage services rendered by the tugs of the Montreal Transportation Company. And I find that the Montreal Transportation Company is not liable for such damage.

But the charges proper to be allowed for towage and salvage must be regulated by the actual work done under each such service. For towage the rate as established by the letter of the manager of the Montreal Transportation Company is $4 per hour; but for salvage services (including towage) where syphoning was done, the rate will be $10 per hour. And the parties on this ruling agree to assess the value of the salvage services performed by the Montreal Transportation Company to the barge *Buckeye State* at $2,428.75.

After carefully considering the several allegations made by the parties in their pleadings, and the difficulties caused by the general character of the evidence I think the fairest way to dispose of the question of costs is to allow to the Montreal Transportation Company against the defendant barge *Buckeye State* the usual costs of the pleadings in their (the first) action, and also one

1908

THE MONTREAL TRANSPORTATION CO. v. THE SHIP BUCKEYE STATE.

THE ATLANTIC COAST STEAMSHIP CO. v. THE MONTREAL TRANSPORTATION CO. AND THE SHIP MARY ELLEN.

Reasons of Trial Judge.

half of the taxable costs of the pleadings in the second action and of the consolidated trials; and to allow to the Atlantic Coast Steamship Company against the defendants John Jessmer and the ship *Mary Ellen* one half of the taxable costs of the pleadings in their (the second) action, and of the consolidated trials. No costs to the defendants John Jessmer and the ship *Mary Ellen*.

*Judgment accordingly.**

Solicitors for Montreal Transportation Company: *Smythe, King & Smythe.*

Solicitors for Ship *Buckeye State* and the Atlantic Coast Steamship Company: *Maclennan, Cline & Maclennan.*

Solicitors for John Jessmer and Ship *Mary Ellen*: *Gogo & Harkness.*

* On appeal to the Judge of the Exchequer Court this judgment was varied. See *post.* p. 429.