

exceeding the limit, as the affidavits show it is doing, when the defendant must pay royalty on the excess, and leaving the market to be supplied by infringers who pay no royalties, and who are at large everywhere, and without restraint or attempted restraint? It is clear to me that the complainant is in a position for which it may properly charge the responsibility upon itself, and where it can suffer no damage by having this injunction refused. At all events, its application for a preliminary injunction does not commend itself to my approval, and the motion is therefore overruled.

THE MONTANA.

INSURANCE Co. OF NORTH AMERICA *v.* LIVERPOOL & GREAT WESTERN STEAM Co.¹

PHENIX INS. Co. *v.* SAME.¹

(*Circuit Court, E. D. New York. July 31, 1884.*)

1. STRANDING OF VESSEL—JURISDICTION—COMMON CARRIER—EXEMPTION IN BILL OF LADING FROM LIABILITY FOR NEGLIGENCE.
(See head-note in same case in the district court, 17 FED. REP. 377.)
2. SAME—NEGLIGENCE IN NAVIGATION—BURDEN OF PROOF—SUBROGATION OF INSURERS.
(See 17 FED. REP. 377.)
3. SAME—CASE STATED.
(See 17 FED. REP. 377.)
4. SAME—NEGLIGENCE IN NAVIGATION—ERROR OF JUDGMENT.
Held, that the master, in determining on the course to run on changing from E. $\frac{3}{4}$ S., was bound not to ignore the fact that he had taken no cross-bearings of the South Stack light; and that, though failure to take such bearings might not, alone, be enough to convict him of negligence, still, the recollection of that fact, coupled with the recollection of the fact that he first saw the South Stack light in so unexpected a direction, and believed he passed it at so unusual a distance, together with the failure to see the Skerries light on losing the South Stack light, and the hearing the North Stack gun abaft his starboard beam, stamp his action after hearing the gun as negligence and not error of judgment.
5. SAME—BILL OF LADING—BENEFIT OF INSURANCE.
The provision in the through bills of lading that "the carrier so liable shall have the benefit of any insurance that may have been effected upon or on account of said goods," applied only to the transportation to New York and not to the ocean transit.
6. SAME—ACT OF 1851—REPEAL OF PROVISIO.
The proviso in section 1 of the act of 1851, (9 St. at Large, 635,) that nothing in that act contained should prevent parties from making such contract as they pleased, extending or limiting the liability of ship-owners for negligence of their employes, is repealed by force of section 5596 of the Revised Statutes.

The three cases named above were tried and argued together. In the first case (*Insurance Co. of North America v. Liverpool & Great*

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

Western Steam Co.) the court (BLATCHFORD, Justice) made and filed the following findings of fact:

The respondent, the Liverpool & Great Western Steam Company, Limited, is a corporation organized under the laws of Great Britain, and in the month of March, 1880, and for a long time prior thereto, was the owner of the steamer *Montana*. The libellant, the Insurance Company of North America, has been for many years, and still is, a corporation duly organized and existing under and by virtue of the laws of the state of Pennsylvania, for transacting the business of insurance, including marine risks. During said time it had an agency in London, England, for the adjustment and settlement of losses, and the losses referred to herein, except the losses on the *Logan* and *Preston* shipments of grain, were adjusted by said agency, and were paid through it in London. The *Montana* was an ocean steamer built of iron, and performed regular service as a common carrier of merchandise and passengers between the ports of Liverpool, England, and New York, in the line commonly known as the *Guion Line*. By her and by other ships in that line, the respondent was such common carrier. On the second of March, 1880, the *Montana* left the port of New York, on one of her regular voyages, bound for Liverpool, England, with a full cargo, consisting of about 2,400 tons of merchandise, and with passengers. She stopped at Queenstown on the afternoon of the twelfth of March, and thence proceeded on her voyage. She passed *Tuskar rock*, on the extreme south-eastern portion of Ireland, at about 8 o'clock in the evening of the twelfth of March, and thence took a course up and across the Irish channel. The course she took would obviously have carried her outside of the range of the *South Arklow light* on the east coast of Ireland, but, with the winds, tides, and currents as they were that night, she passed within range of that light, and about nine miles off, at 9:45 P. M. On passing the *South Arklow light*, the next light which those in charge of the navigation of the *Montana* expected to make was the *South Stack light*, on the coast of Wales, at the entrance of *Holyhead bay*. The master of the *Montana* was on the bridge, and in charge of her navigation.

The light-house on *South Stack* carried two lights. One, the high light, was about 170 feet above high water. It was white in color, and exhibited in all directions at sea, with a range of from 20 to 30 miles in clear weather. It was a revolving light, making one complete revolution in six minutes, and it showed a white flash light every minute. The other light was also white. It was about 40 feet above high water, and was a semi-revolving light, exhibiting every minute and a half in all directions between E. N. E. and W. by N. Its range in clear weather was from three to four miles, but it was regularly lit only in foggy or thick weather. Both of these lights were lit and burning all through the night of March 12th. A fog-bell was regularly sounded at *South Stack* from 10 o'clock in the night of March 12th until 6 o'clock in the morning of March 13th. The bell weighed two and a quarter tons, and was operated upon by a hammer weighing about 96 pounds, which struck the bell on the outside at intervals of 15 seconds, and was worked by means of clock-work and a caloric engine. The sound was a powerful one, and its range was from three to four miles. The high light on the *South Stack* was established in 1809, and has ever since been regularly maintained. The fog-bell had been established for about 20 years, and has since then been regularly sounded in foggy weather. About E. N. E., magnetic, from *South Stack* and distant about one mile therefrom was a fog-gun station, known as *North Stack*. The fog-gun station had been established about 20 years, and from midnight of March 12th until 4 o'clock in the morning of March 13th the fog-gun was fired regularly every 10 minutes. The gun was a 24 pounder, and was each time charged with three pounds of powder and a large junk wad, to give extra sound, the range of the sound being between five and six

miles, when the fog was thick, with the wind, and about seven miles when the fog lifted. The fog-gun station, since it was established, has been regularly maintained, and the fog-gun fired regularly in foggy weather. About two miles E., magnetic, from North Stack was the Holyhead Breakwater light-house. This light-house was at the outer end of Holyhead Breakwater, and it carried a fixed red light at a height of from 60 to 70 feet above high water, with flashes every seven and a half seconds. The range of the light in clear weather was from three to four miles, and the range of the flash was about 14 miles. The light was established in 1873, and has since been regularly maintained. At the Breakwater light-house was a fog-bell weighing about 500 pounds, which was operated upon by two hammers, worked by clock-work, and striking the bell on the outside three times in quick succession, at intervals of 15 seconds. The range of the sound was from a mile and a half to two miles. The bell was established in 1873, and was regularly rung in foggy weather. It was in operation from midnight of the twelfth of March until 5 o'clock in the morning of the thirteenth of March. About five miles N. N. E., magnetic, from Holyhead Breakwater light-house, and across Holyhead bay, was the Skerries light-house. The Skerries light-house was about N. E., magnetic, from North Stack light-house, and distant therefrom between seven and eight miles. It was situated on a small island about two miles off Carmel Head, and about two or three miles N. N. W., magnetic, from Church bay. It carried a stationary white light between 80 and 90 feet above low-water mark, exhibiting in all directions at sea and in Holyhead bay, with a range of about 16 miles. It was burning all through the night of March 12th. It was established between 70 and 80 years ago, and has been regularly maintained since. There was at Skerries light-house a fog-horn or siren, worked by two powerful caloric engines at a pressure of 40 pounds to the square inch. The sound made was shrill and powerful, and had a range of eight miles in foggy weather, and the sound was regularly given from 10 o'clock at night of March 12th until half past 4 o'clock in the morning of March 13th, at intervals of three minutes. This fog-horn or siren had been established for several years, and it has been regularly maintained ever since.

All through the night of March 12th, until 5 o'clock in the morning of March 13th, a fog overspread the land surrounding Holyhead bay, and extended at times and to some extent into the bay and out to sea. The proper course of the Montana was to keep three or four miles off the land at the South Stack, and on a course about N. E. by E., magnetic, until she had the Skerries abaft her beam, and then to take a course about E. by S., magnetic, to Liverpool. There was a westerly variation of about two points between magnetic courses and true courses in the Irish channel and adjacent waters. The Montana, on a course about N. E. by E., magnetic, passed within a short distance of South Stack light-house, and saw the high light there between 1 and 2 o'clock in the morning of March 13th. It came into sight, bearing about S. E. by E., and about one point forward of the starboard beam of the Montana. Her officers expected to see it at a distance of about 20 miles off, bearing from E. N. E. to N. E. by E. When they saw it first they thought it to be 15 miles off, and they remained of that opinion. It passed out of sight abaft their beam, they supposing it was hidden by the horizon. The master of the Montana did not ascertain by cross-bearings (which he might readily have made) the distance at which he was from the light. He lost the light because it was shut out from him by a fog which intervened between it and the Montana, and thence he continued with his engines working at full speed, and giving the Montana a speed through the water of about 14 knots an hour, and on an E. $\frac{1}{4}$ S., magnetic, course, to which he had changed, which took him directly into Holyhead bay, until after half past 2 o'clock. Before this time a man had been stationed at the fog-whistle of the Montana, who regularly blew it. At about half past 2 o'clock the mas-

ter of the Montana heard the fog-gun on North Stack off his starboard quarter, abaft his starboard beam, and he thereupon changed the course of the steamer again to N. E. by E., magnetic, but he continued his engines at full speed until 2:45 A. M., at which time the engines were put at half speed, which gave the steamer a speed through the water of between nine and ten knots per hour. Five minutes later the shore loomed up through the fog on the starboard bow, and orders were given to slow and stop the engines, and to put them full speed astern. But before these latest orders could be executed, the Montana ran ashore at Clegyr Point, in Church bay. After leaving Tuskar, and up to 1 o'clock in the morning of March 13th, the Montana was running with a flood-tide. Then there was slack water, and she afterwards encountered an ebb-tide, which ran from three to four knots an hour. At no time that night were any soundings taken on board the Montana, though soundings would have indicated to her master that he was running rapidly on to the shore. The lights at Holyhead Breakwater and the Skerries were not seen by those in charge of the navigation of the Montana, and her lookouts and those in charge of her navigation did not hear the fog-bell at South Stack, or that at Holyhead Breakwater, or the siren at the Skerries, and they did not hear the fog-gun at the North Stack until it was on their quarter. When they lost sight of the South Stack light they were within range of the Skerries light, and ought to and would have seen it unless it was shut out by a fog. The water outside of Holyhead bay ranged from 20 to 80 fathoms in depth, while the water in Holyhead bay ranged from 5 to 17 fathoms in depth, regularly shoaling as the shore was approached. Almost immediately after the Montana ran ashore she commenced filling with water, and thereby her cargo was in large part destroyed or damaged. Portions of it were thereafter taken from the steamer and forwarded to Liverpool, and there delivered. The Montana was then floated and taken to Liverpool for repairs. Those in charge of the navigation of the Montana were negligent, in that, without having taken cross-bearings of the light at South Stack, and so determined their distance from the light, they took an E. $\frac{3}{4}$ S. course before passing the Skerries and without seeing the Skerries light; and in that they continued at full speed after hearing the fog-gun at North Stack; and in that they took a N. E. by E., magnetic, course, on hearing said fog-gun, instead of stopping and backing and taking a westerly course out of Holyhead bay; and in that they did not ascertain their position in Holyhead bay by means of the lights and fog signals, or by the use of the lead, or by stopping until they should by those means, or otherwise, learn where their ship was.

Part of the cargo of the Montana consisted of 16,190 15-60 bushels of wheat in bulk, and 251 15-60 bushels of wheat in bags, all of which had been shipped in good order and condition on board of the Montana, on the twenty-eighth of February, 1880, by Logan & Preston, merchants of the city of New York, to be delivered to their order at Liverpool, England, under a bill of lading which is Exhibit C to the consent signed by the proctors for the respondents herein, dated November 8, 1882, contained in the apostles. At or about the time of shipment, the libellant, on a policy of insurance issued by it to Logan & Preston, and their report thereon, insured the said Logan & Preston in the sum of \$27,500 upon the said wheat, which sum was the true value of the said wheat, against all dangers and perils of the sea. Said policy of insurance, No. 52,059, is Exhibit A to said consent, and said report is Exhibit B to said consent. The said wheat was in part lost, and the remainder thereof damaged, by the stranding of the Montana, and on the fifteenth of March, 1880, Logan & Preston, who, at all times from the time of shipment and insurance, had been the owners of said wheat, abandoned the same to the libellant, which abandonment was accepted, and thereafter the libellant paid to Logan & Preston, on the fifth day of June, 1880, the sum of \$15,000 on account of said loss, and on the twenty-first day of June, 1880, the sum of

\$12,500, the balance of said loss. The libelant, after paying the necessary expenses of saving and marketing the wheat, received, as net proceeds of salvage thereof, the sum of £630, British sterling, on May 31, 1880, and the further sum of £436.15.10, on July 30, 1881. Part of the cargo of the Montana consisted of 245 boxes of meats, owned and shipped by Jacob Dold, a merchant of Buffalo, New York, under through bills of lading from Buffalo to Liverpool, England, there to be delivered to his order, which bills of lading are Exhibits H and I to said consent. The libelant insured said Jacob Dold under a policy and certificate of insurance, which policy is Exhibit G to said consent, and which certificate No. 31,024 is Exhibit J to said consent; said certificate being payable to the order of said Jacob Dold, upon the said boxes of meat, in the sum of \$7,500, which was their value, against the dangers and perils of the sea. The said meats were consigned by Jacob Dold to Watson, Dunn & Co., of Liverpool, for sale on his account and risk. He at the same time forwarded to Watson, Dunn & Co. the said bills of lading and certificate of insurance. The said meats were shipped on board of the Montana at New York, in good order and condition, and were in part damaged, and in part totally lost, by the stranding of the Montana, and a portion thereof was abandoned to the libelant, and the abandonment was accepted. The libelant thereafter paid to Watson, Dunn & Co., on account of said loss and damage as correctly adjusted, £1,250, British sterling, on the eighteenth of May, 1880, and the further sum of £227.4.8, on the thirtieth of June, 1880, for which sums Watson, Dunn & Co. duly accounted to Jacob Dold. The libelant, after paying the necessary expenses of saving and marketing the meats abandoned to it, received, as net proceeds of salvage, on the twenty-sixth of May, 1880, the sum of £676.14.1, British sterling. Part of the cargo of the Montana consisted of 200 bales of cotton, shipped on board of the Montana at New York, by Samuel B. Jones, general agent, on account of Alexander Burgess, a merchant of Nashville, Tennessee, who owned the cotton, to be transported to Liverpool, and to be delivered there to order, under bill of lading which is Exhibit N to said consent. At or before the time of shipment, the libelant, under its policy No. 51,122, and its certificate No. 21,141, issued to said Burgess, said certificate being payable to his order, said policy being Exhibit L to said consent, and said certificate being Exhibit M to said consent, insured said Burgess, on said 200 bales of cotton, in the sum of \$13,500, which was the value of said cotton, against all dangers and perils of the seas. The said Jones indorsed said bill of lading in blank, and delivered it to said Burgess, and said Burgess consigned the said bales of cotton to Brancker, Boxwell & Co., of Liverpool, England, for sale on his account and risk, and at the same time forwarded to them said bill of lading and certificate of insurance. The said bales of cotton were shipped on board the Montana, at New York, in good order and condition, and were partly lost, and partly damaged, by the stranding of the Montana, and a portion of the consignment was abandoned to the libelant, and it accepted the abandonment, and paid to Brancker, Boxwell & Co., on account of the correctly adjusted loss of and damage to the said bales of cotton, the sum of £319.19.9, British sterling, on the eleventh of June, 1880, and the further sum of £118.17.1, on the twelfth of September, 1881, for which sums Brancker, Boxwell & Co. duly accounted to said Burgess. The libelant, after paying the necessary expenses of saving and marketing the bales of cotton abandoned to it, recovered, as net proceeds of salvage, the sum of £157.19.6, British sterling, on the first of September, 1880.

And the court also found the following conclusions of law:

The stranding of the Montana, and the consequent loss of and damage to her cargo, having been the direct result of the negligence of the master and officers of the steamer, the respondent is liable therefor. The libelant was

duly subrogated to the rights of the insured against the carrier for the loss of and damage to the cargo insured by the libelant, and is therefore entitled to recover from the respondent the amount of such loss and damage. The libelant is entitled to a decree against the respondent for the following sums, according to the report of the commissioner contained in the apostles: On account of the wheat, the sum of \$27,500, with interest thereon from June 12, 1880, less the sum of \$5,191.52 salvage, with interest thereon from September 1, 1880; on account of the meat, the sum of \$3,895.77, with interest thereon from May 26, 1880; on account of the cotton, the sum of \$3,313.39, with interest thereon from September 1, 1880; and for its costs in the district court, taxed at the sum of \$201.08; and for its costs in this court, to be taxed.

In the second above-entitled case (*Phoenix Ins. Co. v. Same*) the court made and filed findings of fact and conclusions of law similar to those in the first above-entitled case. And the court also made and filed the following opinion in the two cases mentioned above.

William Allen Butler and Thomas E. Stillman, for libelants and appellees.

Franklin A. Wilcox, for claimants and appellants.

BLATCHFORD, Justice. The libels in these cases allege the shipment of the goods on the *Montana* in good order, and the agreement of the respondent to deliver them in like good order at Liverpool; that she was one of a line of steamers that the respondent ran between New York and Liverpool; that the respondent was a common carrier of passengers and cargo between those ports; that the respondent received the cargo and passengers of the *Montana* on this voyage as a common carrier; and that the respondent failed to deliver the goods as agreed, but they were lost or destroyed and damaged by the stranding of the *Montana*. The particulars of the voyage and stranding are set forth, and it is alleged that the stranding and loss were due to the negligence of those managing the steamer in proceeding at too high a rate of speed, in not having a sufficient lookout, in going upon an improper and dangerous course, in not making due allowance for the influence of the ebb-tide, in not having or in not using and properly using the usual and proper outfit and appurtenances of an ocean steamer, and, among others, the lead and the compass, and in not so heeding the shore lights and signals as would have indicated to them her dangerous position, and would have enabled them to regain and keep in a position of safety. The libels allege insurance by the libelants on the goods to amounts equal to or less than their value, payment of or liability for moneys as and for the total loss or damage of the goods, damage equal to or greater than the amount of the insurance, and the subrogation of the libelants to the rights of the assured for the breaches of contract by the respondent.

The answers deny that the respondent was a common carrier. They set up as defenses that the *Montana* was registered at Liverpool, which was her home port, where the respondent carried on its business, having an agency at New York; that the goods were received under bills of lading, which constituted the contracts; that the respond-

ent assumed no greater risks than are expressed in the bills of lading; and that the loss or damage to the goods was by perils of the sea, and by causes in respect of which the respondent was exempt from liability by law and by the bills of lading. The answers set forth the particulars of the voyage and the stranding, and deny negligence, and allege that in respect to the employment of a skilled and licensed master and officers, and the careful observation by them of the elements, and everything which would, in the exercise of ordinary human skill, enable them to determine and judge the position of the vessel, and to navigate her accordingly, and in respect to her seaworthiness and outfit, and everything within the reasonable limits of skill and foresight, the respondent complied with its contracts, and with all the requirements of law.

The bill of lading, Exhibit C, in the first-entitled case, is a through bill of lading issued at Nashville, Tennessee, headed, "Overland and Ocean Bill of Lading, Louisville & Nashville and South & North Alabama Railroad, and the Williams & Guion Steam-ship Company, from Nashville, Tennessee, to Liverpool, England." It covers 300 bales of cotton, stated to be "shipped in apparent good order," and "to be delivered in like good order and condition, * * * under the following terms and conditions, viz.: That the said L. & N. and So. & No. Ala. Railroads, and their connections which receive said property, shall not be liable for * * * loss or damage on any article or property whatever by fire or other casualty while in transit, or while in deposit or places of transshipment, or at depots or landings at all points of delivery; nor for loss or damage by fire, collision, or the dangers of navigation while on seas, rivers, lakes, or canals. * * * It is further agreed that said L. & N. and So. & No. Ala. Railroads and connections shall not be held accountable for any damage or deficiency in packages after the same shall have been received for in good order by consignees or their agents at or by the next carrier beyond the point to which this bill of lading contracts. * * * It is further stipulated and agreed that in case of any loss, detriment, or damage done to or sustained by any of the property herein received for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods. And it is further agreed that the amount of the loss or damage so accruing, so far as it shall fall upon the carriers above described, shall be computed at the value or cost of said goods or property at the place and time of shipment under the bill of lading. This contract is executed and accomplished, and the liability of the L. & N. and So. & No. Ala. Railroads and their connections as common carriers thereunder terminates on delivery of the goods or property to the steam-