

therefore this breakage was one of those accidents of the sea and of the machinery of the ship from the consequences of which the charter party exempted the ship.

The evidence shows that while the custom of this banana trade was universal to order the bananas in Jamaica in advance of the arrival of steamers sent for them, yet that in no known instance, except in the case now before us, were bananas ordered to be actually cut off and brought to the places of shipment before the steamer which was intended to receive them was positively known to have arrived at or in the immediate vicinity of the places where they were to be received. Captain Manuel, master of the *Curlew*, testified that he had commanded that steamer in that trade for more than a year; that the custom was to cut the fruit after the ship had arrived at Jamaica; and that he knew of but a single instance in which it had been cut before such arrival, and that was the instance of the cargo under consideration. Diligent endeavor was made by counsel for the owners of the cargo to prove that orders to cut in advance of arrival had been given, but without success. The conclusion is irresistible from the evidence that the order to cut before arrival, given by Henry Bros. & Co. on the 24th of June, for this cargo, was contrary to the custom of the trade, extremely hazardous in the hot season, was the cause of the premature ripening of the fruit by the time it reached the port of Baltimore, and of the loss sustained by its owners.

We are of opinion, from all the evidence shown in the voluminous record in this case, that the breaking of the junk ring of the *Curlew*, which produced the delay of three days to which she was subjected, was an accident of the sea and machinery, from which she was exempt from liability by the charter party.

We are further of opinion that the order of the 24th of June, sent by appellees to Jamaica, that the bananas should be cut and brought to the places of shipment in advance of the steamer's actual arrival, was imprudent, contrary to the custom of the trade, and was the real cause of the premature decay of the fruit, and of the loss which resulted to them, for which loss the steamer is in no manner responsible.

The decree below is affirmed.

ANGEL et al. v. CUNARD STEAMSHIP CO.

(District Court, E. D. New York. June 2, 1893.)

SHIPPING—DAMAGE TO CARGO — BILL OF LADING — STIPULATIONS — NOTICE OF DAMAGE.

Where a case of feathers showed signs of damage on being landed from respondent's steamer, and the bill of lading provided that "the shipowner is not liable for any claim of which notice is not given before removal of the goods," but libellant gave no notice until four or five days after the case had been removed from the warehouse, it was held that the provision in the bill of lading was reasonable, and under it libellant could not recover.

In Admiralty. Libel by Emanuel M. Angel and others against the Cunard Steamship Company for damage to cargo. Dismissed.

Julian B. Shope, for libelants.

Larned, Warren & Knapp, for claimant.

BENEDICT, District Judge. This is an action to recover for damage to a case of feathers, which, when landed in New York, were found to be damaged by water. The case was one of a shipment of 23 cases, made in Liverpool, under a bill of lading containing many exceptions, several of which are relied on by the claimant. One only of these exceptions need be noticed on this occasion, namely, the provision as follows: "The shipowner is not liable * * * for any claim of which notice is not given before the removal of the goods." This provision seems to be a reasonable provision in a bill of lading. The validity of such a provision has been upheld by the courts of England. *Moore v. Harris*, 34 Law T. (N. S.) 519. Under it the steamship is exempted from liability for the claim in question. It is proven that the case was hot on the outside when it was landed, and the libelants gave no notice of the claim of damage on that account until four or five days after the case had been removed to the warehouse. The libel must be dismissed, and with costs.

THE BATTLER.

SCHRADER v. THE BATTLER.

(District Court, E. D. Pennsylvania. June 2, 1893.)

1. TOWAGE—NEGLIGENCE—ANCHORAGES—CUSTOM AND USAGE.

A tug with two barges in tow left Philadelphia on a voyage to Boston, but when near the ocean the indications of bad weather were such that she deemed it unwise to proceed to sea, and anchored her tow near Brown shoal, in Delaware bay. She left them there on Thursday evening, and, engaging in other towage services, did not return until Saturday. At this time the signs of bad weather had increased, so that the tug left the barges for other towage services, and never returned to them, for the wind increased to an unusually violent gale, and on Tuesday they sank. *Held*, that though the tug followed an established custom in anchoring her tow to await a change of weather, and engaging in other towing, it was her duty to provide a safe anchorage, and to keep such watch over the tow as to enable her to render whatever assistance it might need.

2. SAME—NEGLIGENCE—EVIDENCE.

Several experienced mariners testified that Brown shoal, owing to its exposure to the ocean swell, was not a proper place for a vessel to ride out a gale at anchor, and that it was never resorted to for that purpose. It was shown that there were several safe anchorages further up the bay, where vessels had ridden out the gale in question; and there was evidence that the tug might have moved the barges thither before they were lost, had she not been otherwise engaged. *Held*, that she was guilty of negligence that rendered her liable for the loss of the barges.

In Admiralty. Libel by John Schrader, owner of the barges *Tonawanda* and *Wallace*, against the steam tug *Battler* (Clarence

L. Tingle, master) for the loss of the barges by the alleged negligence of the respondents. Decree for libellant.

Edwd. F. Pugh and Henry Flanders, for libellant.

J. Rodman Paul and Morton P. Henry, for respondent.

BUTLER, District Judge. On September 4, 1889, the tug Battler took the barges Tonawanda and Wallace, loaded with coal, in tow at Philadelphia, in pursuance of a previous contract, to convey them to Boston, and proceeded down the Delaware river and bay until near the sea. Deeming it unsafe to go further, in view of the weather prevailing there, she anchored the barges in the mouth of the bay at Brown shoal, about 4 o'clock of the same day. Leaving them immediately thereafter, she engaged her services to the bark Hickman (just arrived from sea) for a voyage to Philadelphia; from which place she returned on Saturday morning. By this time the indications of bad weather had materially increased. The tug rendered no further service to the barges, but employed her time in assisting others, who hired her aid. The wind continued to increase; on Monday it was very high and threatening, and on Tuesday had become an unusually violent gale. On the latter day both barges sank, and were lost—the crews being saved by another tug while the Battler was still absent.

Stopping here a very plain and very gross case of carelessness would be made out against the tug. In explanation of her conduct, however, she avers and produces evidence to prove that in towing on this voyage it is customary, on reaching the mouth of the bay and encountering an easterly wind, with indications of bad weather at sea, to anchor the tow there, as the Battler did; and, while awaiting change of weather, for the tug to engage in such other service as may offer; that the anchorage ground selected was proper for the occasion, and as good as any in the vicinity.

I find that it is customary to anchor and await change of weather, under such circumstances; and that tugs engaged in this service do in the mean while generally accept other employment. I also find that the condition of the weather justified the Battler in declining to proceed further on Thursday evening. There were such indications of bad weather as might have rendered her responsible for any loss sustained by going to sea at that time. The testimony on both sides sustains this view; and the fifth article of the libel virtually admits its correctness. Whether the voyage might have been resumed with propriety the next morning is not clear. I incline to believe that its resumption at that time would have been unwise.

The inquiry is thus reduced to the question: Did the tug select an anchorage suitable for the occasion, and exercise proper care for her tow thereafter? It was her duty to select a place suitable to ride out the anticipated storm. She could not foresee a tempest such as came. It was very extraordinary. But she

was bound to anticipate a storm of more or less violence, and to leave the tow in a place of comparative safety during its continuance. She was furthermore bound to keep watch over it—not constantly, but occasionally and seasonably—to ascertain whether assistance was needed. A custom at variance with the exercise of such care would be unreasonable and should be condemned. Such tows are virtually helpless in bad weather; and their loss involves not only property, but human life as well.

Was the place at which the tow was left throughout the storm proper for the occasion? If none better could be found within reach it was. A few miles higher up are several other anchorage grounds, among which are Fourteen-Foot bank, Miah Maule, and Middle anchorage. A careful examination of the testimony has satisfied me that either of these places, and especially Fourteen-Foot bank, affords a much safer place for such an occasion than the one below; and that the latter is very unsafe during the prevalence of severe storms. The evidence is conflicting and irreconcilable; but its weight sustains the view expressed. A discussion of the subject would amount to little more than arraying the testimony on one side and the other, and this would be of no value. The situation, customary use, and relative safety of the several places named are in my judgment correctly described by Capt. Albertson, apparently a very intelligent man, who for 20 years was master of Reading Railroad coal steamers and had much experience of the waters in this locality. He says:

"I do not know of any good anchorage whatever at Brown shoal. I never considered that place a harbor. It is too bleak, and is open to the full sweep of the ocean. There is a general cross current there that makes it very rough with the wind blowing, and vessels lay very badly. * * * Between the currents a great deal of water will come aboard. As soon as you get below the Brandywine shoal (which is between Brown shoal and Fourteen-Foot bank) you begin to take the sea that comes in there, and it boards the vessel at a fearful rate. I have gone down when it has been quite smooth until I got to the lower end of Brandywine shoal, where the sea has boarded us so that it has not been safe to go around on deck. The water has a great sweep from the ocean down there, but before it gets up to Brandywine shoal it meets with a great deal to break it off. It has such a roll from the ocean down there and produces such a heavy undertow that it is hard for vessels to lay there. I have never seen vessels anchored at the Brown shoal, south of the Brandywine, for harbor in heavy weather. I have seen vessels there temporarily. I never anchored there for harbor, nor saw a vessel anchored there for harbor. Vessels anchored there temporarily, when 'tide nipped,' or in fog, but never in heavy weather outside. Of choice I would rather take the open sea to ride out a gale than an anchorage at Brown shoal. Miah Maule we always considered a good safe harbor."

He further testifies that vessels of all sizes and descriptions and in all kinds of weather, anchor there, and at Fourteen-Foot-bank. The same in substance is the testimony of Henry C. Burge, an old experienced shipmaster, Capt. Smith, Capt. Hatch, Capt. Naylor, Capt. Willits Miller and many others. It is a significant fact that the Tonawanda's master, when starting upon the voyage, requested the tug's captain not to take him below Fourteen-Foot bank, if the

weather should prove unfit for going to sea. That the request was made I have no doubt whatever. Both the master and his mate testify to it. While the tug's master remembers conversation on the subject he does not remember that it referred to this shoal. The request leaves no doubt in the mind that the captain of the Tonawanda, who was familiar with the locality, believed that it was unsafe to anchor lower down. There is no doubt whatever that many vessels anchor at Brown shoal, but the weight of the evidence fully justifies a conclusion that such anchorage is for short periods, to meet such emergencies as Capt. Albertson speaks of; and that it is not resorted to as a refuge from storms, when points higher up can be reached. Directly in the mouth of the bay, it feels every motion of the sea, and naturally would be avoided by vessels seeking harbor.

The tug was therefore clearly wrong in leaving the barges where she did. It was a mistake to anchor there even for a single night, under the circumstances; but it was wholly inexcusable to leave them there during the continuance of the storm, until they were lost. Up to Monday they could have been removed with safety; and I believe they would have been removed if the tug had felt as much care for their protection as she felt for obtaining money by other employment. I attribute her conduct entirely to her greed. Going off on Thursday evening and remaining away until Saturday morning, under the circumstances, was inexcusable; and her failure to tow the barges higher up or attempt anything for their safety afterwards, was gross negligence. But for the friendly assistance of others the crews would have been lost, as well as the vessels. To say nothing could have been done—that to have moved the barges higher up would not have saved them—is simply to speculate about what cannot be known, and does not even tend to excuse the fault. The barges were entitled to her efforts for their protection; and having failed to make any such efforts her answer that nothing available could have been done is entitled to no consideration. I scarcely doubt that they would have been saved if they had been taken to one of the anchorages above. They were at least entitled to the chance of safety there. Other vessels rode out the storm without damage at Fourteen-Foot bank. It is of no consequence if some anchored there did not; the barges might have been as fortunate as those that did. I am not satisfied however that any vessel was lost there. I think the evidence justifies a conclusion that none was. For these reasons the libel must be sustained; and a decree may be prepared accordingly.

THE E. D. HOLTON, THE ALICE M. CAMPBELL, and THE ANNIE O. HANSEN.

BANKS v. THE E. D. HOLTON AND THE ALICE M. CAMPBELL.

PENFOLD v. THE E. D. HOLTON AND THE ANNIE O. HANSEN.

(District Court, W. D. Michigan, S. D. May 2, 1893.)

1. TUGS AND TOWS—RIVAL TUGS—NEGLIGENCE—LIABILITY.

A schooner, coming into harbor, signaled for a tug. Rival tugs, the H. and the C., started on a race to secure the job. There was some wind, and the sea was rough, but navigation was not perilous or difficult. The services of the H. were accepted, and she made three unsuccessful attempts to throw her heaving line to the schooner, occupying 20 minutes, during which the schooner was drifting on a lee shore. To prevent grounding, the schooner's captain ordered the H. off, and called on the C. The C. responded, but the H. backed up in her way, obliging her to stop and reverse to avoid collision. The C. again tried to approach, when the H. a second time backed into her course. At the third attempt the C. got the towing line aboard, the schooner secured it to her bow, and attempted to back out. Meantime the schooner had grounded. The tow line was about 100 feet in length, too short for the C. to turn about with. In backing, the C., on reaching the end of the tow line, was brought up suddenly, and was thrown to port and grounded by the motion of her screw. Both the schooner and the C. sustained damage. *Held*, that the C. was not at fault, and that the libel of the schooner against her must be dismissed.

2. SAME—TOWLINE—NEGLIGENCE—DEGREE OF CARE IN PRESENCE OF PERIL.

The schooner had two toelines. The longer one was used only in stormy weather, when the strain was severe, and at other times was stowed below. The shorter line was the one usually used in taking her into harbor. It also appeared that, if the H. had not obstructed the C., the latter would have swung around, quartering to the schooner's bow, and thence out into safe water, thus presenting her stern for the toeline, which would then have been long enough. On a libel by the owner of the C. against the schooner, it was claimed that the damage to the C. was caused by the use of the short line. *Held*, that the libel must be dismissed, the master of the schooner having no reason to suppose that the long line would be required, and parties in peril not being held to so strict a rule of conduct as when in a situation for calculation and forethought.

3. SAME—WANTONLY OBSTRUCTING RIVAL TUG—LIABILITY.

The C. was justified in continuing her attempts to reach the schooner, notwithstanding the obstruction of the H., and the proximate cause of the damage to the C. was the wanton conduct of the H., and not voluntarily going into a perilous situation. The H. was therefore liable for the damage sustained by the C.

In Admiralty. Libel by Albert E. Banks, owner of the schooner Annie O. Hansen, against the steam tugs E. D. Holton and Alice M. Campbell. The claim of the libelant against the E. D. Holton was settled out of court before hearing. Cross libel by Jonathan Penfold, owner of the tug Alice M. Campbell, against the Hansen, and the Holton. Libel dismissed. Cross libel dismissed as to the schooner, and sustained as to the Holton.

Markham & Kerwin and D. G. F. Warner, for libelant.

Phillips & Jenks, for the E. D. Holton.

Smurthwaite & Higgins, for the Alice M. Campbell and Jonathan Penfold.