

construction, although latent and unknown to the owner, he is not excused. The shipowner must show affirmatively that his ship was seaworthy at the beginning of the voyage.

The question then arises whether this obligation on the part of the shipowner has been qualified by the clause in the bill of lading which exempts the shipowner from damage caused by a latent defect, which is this case. This was an English ship. The contract was signed in a port governed by English law, and it has been held in this circuit that such a case is to be governed by the law of the place where the contract was made. It was a British vessel, governed by the laws of England. *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469; *The Majestic*, 9 C. C. A. 161, 60 Fed. 624; *Bank of Edgefield v. Farmers' Co-op. Manufg Co.*, 2 U. S. App. 282, 295, 2 C. C. A. 637, 52 Fed. 98. The law of England, as declared in the case of *The Laertes*, 12 Prob. Div. 187, is to the effect that by the laws of England such an exception as that contained in the bill of lading sued on, if it does not abrogate, at all events limits, the warranty which the law would otherwise imply, that the ship was seaworthy at the beginning of the voyage, and exempts the ship if due diligence is exercised by the shipowner. Applying that law to this case, it follows, from the fact that the weak condition of the iron rivet could not be discovered by the exercise of due diligence, that the ship cannot be held liable for the injury to the libelants' cargo, because the danger arose from a latent defect in the rivet which gave way, within the exception in the bill of lading under which the merchandise was carried. Upon this ground the libels are dismissed, and with costs.

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### THE HERCULES.

#### GENTHUER v. THE HERCULES.

(District Court, E. D. New York. September 28, 1894.)

#### 1. WITNESSES—IMPROPER INFLUENCES—THREATS OF CRIMINAL PROSECUTION.

The conduct of claimant's agent, in causing it to be made known to a witness who had given damaging testimony that he was in danger of prosecution for a criminal offense, whereby the witness was moved to offer himself as a witness for claimant, and thereupon gave a deposition contradicting many of his previous statements, strongly disapproved by the court, and considered to cast a doubt upon the testimony of another, witness produced from the same source.

#### 2. TOWAGE—LOSS OF TOW IN STORM.

Tug *held* in fault for taking barges out of the protection of the Delaware breakwater, and starting on a voyage to Boston, in the face of strong indications of an approaching storm, contrary to the judgment of other tug-boat captains in the breakwater at the time, and for refusing to turn back until it became impossible to proceed, and until one of the barges had sprung a leak, from which she sank.

This was a libel by Philip C. Genthuer against the steam tug *Hercules* to recover for the loss of the *Saugerties* while in tow of the tug.

Benedict & Benedict, for libelant.

Robinson, Biddle & Ward, for claimants.

BENEDICT, District Judge. On the 2d day of March, 1893, the steam tug Hercules took in tow in the Delaware river the barge Saugerties and the barge Moonbeam, under a contract to tow them, one to Boston, Mass., and the other to Providence, R. I. In the afternoon of the 2d of March the tug left the Delaware breakwater and put to sea with these two barges, in the face of evident signs of approaching storm. The heavy weather indicated was encountered outside. On the 4th of March, while in a heavy sea, the Saugerties sprung a leak, and shortly afterwards sank in about 17 fathoms of water, and became a total loss. Thereafter the tug turned back with the Moonbeam, which was disabled in the storm by the breaking of her tiller, and with her arrived in safety at the breakwater. The owners of the Saugerties now sue the tug to recover for the loss of their barge, charging the tug with negligence in putting out from the refuge of the breakwater into the storm then threatened, and also in failing to turn back after the storm was encountered. The claimants contend that the sinking of the Saugerties arose from her being unseaworthy, and that there was no negligence on the part of the tug.

Upon these issues a mass of evidence has been presented, in which there is to be found testimony supporting either contention. I have examined all this testimony, but I do not feel it incumbent on me to comment on its particular features, further than to say that the conduct of Harry Hull, assistant superintendent of the line to which the Hercules belongs, in connection with the testimony of the witness William Kendrick, cannot be passed over without notice. The witness Kendrick was the master of the Hercules. He was examined in behalf of the libelant by deposition, and gave testimony favorable to the libelant's contention. At the taking of this first deposition the information was conveyed to the witness that it was known to the claimants that there was foundation for a criminal charge against him, arising out of his naturalization papers obtained by him in Boston. Thereafter the witness was made to understand that he was in danger of prosecution for that offense, and was brought in connection with the superintendent, Hull, by means of his brother-in-law. Thereafter, acting under the idea that he would thereby avoid a criminal prosecution in connection with his naturalization, he offered to be examined in behalf of the claimant. At this last examination he contradicted many of the statements he had made in his first deposition. After that both he and his brother-in-law were given employment by the claimants. This method of dealing with a witness who gives damaging testimony is strongly disapproved of, and tends to raise a doubt in regard to the testimony of the witness Johnston, produced from the same source, to support the statements of Kendrick.

The testimony in the case, taken together, seems to me to require the conclusion that the master of the Hercules, contrary to the judgment of other tugboat captains in the breakwater at the time, put out with his heavy tow from the protection of the breakwater, in the face of strong indications of the approach of a storm; that the storm was encountered outside the capes, and was dangerous, not-

withstanding which the tug proceeded on her way, until finally it became impossible to make any noticeable progress with the tow. Instead of turning back, as she could have done, and as she afterwards did with the Moonbeam, the tug subjected the Saugerties to the force of a severe storm for many hours. The result was that the Saugerties sprung a leak, and her pump became disabled by the storm, so that she filled with water and sank. Upon these conclusions of fact I find that the tug was guilty of continuing to face a dangerous storm after she experienced its force, when common prudence required the master to turn back, and seek the shelter of the breakwater. The failure to exercise this measure of prudence was, in my opinion, negligence, and rendered the tug liable for the loss of the libellant's barge. There must be a decree for the libellant, with a reference to ascertain the amount of the loss.

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THE ALFRED J. MURRAY.

THE ALFRED J. MURRAY v. AMERICAN TOWING & LIGHTERING CO. et al.

(Circuit Court of Appeals, Fourth Circuit. October 2, 1894.)

No. 85.

MARITIME LIENS—INNOCENT PURCHASER—TAKING VESSEL FOR DEBT.

One who takes a barge in payment of a debt is not an innocent purchaser, so as to release him from claims against the vessel contracted by the vendor. 60 Fed. 926, affirmed.

Appeal from the District Court of the United States for the District of Maryland.

This was a libel by the American Towing & Lightering Company against the barge Alfred J. Murray, in which Edward Tunison and Richard Roser, material men, intervened, and claimed liens. There was a judgment for libellants and interveners, and Engle & Co., claimants of the barge, appeal. Affirmed.

Richard M. McSherry, for appellants.

Robert H. Smith, for the towing company.

Thomas C. Butler and D. E. Monroe, for interveners.

Before GOFF and SIMONTON, Circuit Judges, and HUGHES, District Judge.

SIMONTON, Circuit Judge. The barge Alfred J. Murray was engaged in trade between New York and Chesapeake bay. She had no means in herself of locomotion, and the American Towing & Lightering Company was under contract with one of her owners to do all necessary towage between Chesapeake City, in the state of Maryland, to a port or ports on Chesapeake bay, usually Piankatank, in Virginia. While this towage service was being performed, in 1892, to April, 1893, the barge was owned by J. A. and G. Griffin, and was covered by a mortgage to Alfred J. Murray in the sum of \$6,000. The barge cost about two years before 1893,