

clean bills of lading had been issued in his behalf, and that the shipper was entitled to rely thereon for the usual security of under-deck cargo. Yet he took no steps, he says, to notify the shippers that the 10 bales must go on deck, or remain behind. There is nothing in the testimony concerning notice of this fact given, or designed to be given, by the charterers to the shipper.

I do not think it is any defense to the ship that the bill of lading signed by the master recited the shipment of all the cargo as having been made by the charterers. The ship is not entitled to claim from that circumstance that it was dealing with the charterers alone, and had no privity with the actual shippers. For the master knew to the contrary. His own bill of lading recited the actual shippers, and he knew that the usual bills of lading had been given to those shippers on the ship's account. To suffer the ship, therefore, to deny any privity with the actual known shippers, under cover of a single bill of lading given to the charterers as sole shipper, would be to uphold a mere subterfuge, and a virtual fraud upon the shippers; since the ship's bills of lading were given to shippers with the master's knowledge and concurrence, and on his account. The master, knowing that clean bills of lading had been given for the 163 bales, knew that the charterers had no authority to ship them on deck at shipper's risk. His own bill of lading to the charterers with that exception inserted, is therefore, no protection to him or to the ship; and if he repudiates the bill of lading signed in his behalf by the charterers, as respects goods other than the charterers' goods, he is in the situation of a master who has received goods for transportation without giving any bill of lading for them at all; and upon that theory he would be bound to carry the goods in the customary manner, that is, under deck. *The Delaware*, 14 Wall. 579.

The goods damaged below were damaged by sea water through heavy gales. That was a sea peril. The evidence does not show any such negligence on the ship's part as to charge her with fault in not avoiding this damage. It was not negligence, nor any breach of duty, to carry deck cargo. The after hatch was considered the safest place on deck. It was a usual place, and I do not find any customary and reasonable precautions against injury omitted.

Decree for libelant for the damage only to the 10 bales carried on deck, with a reference to compute the amount, if not agreed upon, with costs.

THE EARNWELL.

THE EARNWELL et al. v. MARSHALL.

(Circuit Court of Appeals, Third Circuit. October 31, 1895.)

No. 10.

1. PILOTS—OFFER OF SERVICES—OBLIGATION TO ACCEPT.

A steamship coming into Delaware Bay by way of Cape Henlopen, and bound for Philadelphia, is obliged, under the Delaware statute (April 5, 1881, § 5), to accept the first available pilot who offers his services; and if she refuses him, and takes another, who at the time was further

away, she is nevertheless liable to the former for his fees. 68 Fed. 229, affirmed.

2. SAME—FOREIGN VESSEL ON HIGH SEAS.

The question whether a foreign vessel is bound by the compulsory pilotage laws of a state, where the tender of services is made upon the high seas, does not arise where the evidence conclusively shows that the offer was made within three miles of the shore.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

This was a libel by William F. Marshall, a licensed pilot, against the steamship Earnwell, to recover pilotage fees, alleging that she refused to accept his services when offered. The district court rendered a decree in favor of libelant for the sum claimed (68 Fed. 229), and the Earnwell Steamship Company, Limited, claimants of the vessel, appealed.

Henry R. Edmunds, for appellants.

Henry Flanders, for appellee.

Before ACHESON and DALLAS, Circuit Judges.

ACHESON, Circuit Judge. William F. Marshall, a pilot duly licensed under the laws of the state of Delaware, filed a libel in the court below against the steamship Earnwell to recover for pilotage due under an act of assembly of the state of Delaware approved April 5, 1881, which provides as follows:

"Sec. 5. That every ship or vessel, propelled by steam or sails arriving from or bound to any foreign port or place, except American vessels whose cargoes are exclusively of coal mined in the United States, passing in or out of the Delaware Bay, by the way of Cape Henlopen, shall be obliged to receive a pilot * * * and if the master of any of the said ships or vessels after she is spoken or a pilot offered shall refuse or neglect to take a pilot, the master, owner, or consignee of such vessel shall forfeit and pay to any such pilot suing for the same a sum equal to the pilotage of such ship or vessel; * * * or such pilot may pursue his remedy therefor by a libel in admiralty in any United States district court, either in personam or by proceeding in rem to enforce the lien hereby given him on such ship or vessel * * *."

"Sec. 6. That the pilot who shall first offer himself to any inward bound ships or vessels, shall be entitled to take charge thereof."

The libel charged, that on the morning of the 3d day of February, 1894, the libelant offered himself to pilot the Earnwell, a foreign vessel, passing into the Delaware Bay by the way of Cape Henlopen, on a voyage from Matanzas, Cuba, and bound to the port of Philadelphia; that the Earnwell neglected and refused to take the libelant as her pilot, and proceeded on her voyage, and to her destination, without allowing him to board her. The original answer, upon which the case went to hearing, raised the single issue whether the libelant withdrew his offer of service, thus releasing the Earnwell. The answer alleged as follows:

"At about 5:45 o'clock a. m. of the 3d day of February, A. D. 1894, the steamship Earnwell passed Fenwick's Island light, bound in, and her course was set for Cape Henlopen. At daybreak there were three pilot boats in sight,—one about six miles to the eastward; another about four miles north-eastwardly, and the third about north, distant about four miles; the latter

standing directly across the track of the steamer. The libelant was on the boat named above as being northeastwardly, and was out of the track of the steamer. That, shortly after sighting the said boats, libelant's boat signaled by hoisting her flag, and continued coming towards the steamer; but when within one and a half miles from the steamer, for some cause unknown to deponent, she hauled down her signal, and sailed away, thus preventing the Earnwell from accepting the service. The steamer continued on her course until she intercepted the boat whose course was above given as north, from which a duly-licensed pilot was taken."

The defense that the libelant thus withdrew his offer of service wholly failed. It was unsupported by any evidence. It was shown that the libelant's pilot boat kept her signal flag up until after the Earnwell had passed across her bow, and practically had refused the libelant's offer. Such was the finding of the court below. The court, however, did not hold the respondent strictly to the pleadings, but examined the proofs to see whether they afforded the Earnwell any justification for her conduct. The court found that the libelant's pilot boat (the Bayard) and the pilot boat (the Cope) from which the pilot was taken were similarly situated with respect to the Earnwell, and alone were available to her; that the Earnwell could have taken a pilot as readily from one as from the other; that she would not have suffered materially more delay in taking the libelant than she did in taking a pilot from the Cope; that the libelant tendered his services by the usual signal, which the Earnwell understood; and that the Cope did not tender a pilot at all, not expecting to be employed, because of the tender of a pilot already made by the Bayard. These findings were fully warranted by the evidence, and certainly they brought the libelant's case within the provisions of the statute of Delaware, as the court below held.

After the opinion of the court was filed, but before decree entered, an amendment to the answer was allowed, which avers as follows:

"That this respondent has been advised, and now alleges, that the pilotage law of the state of Delaware cannot affect the rights of respondent's steamer to accept or refuse pilots at a place upon the high seas, and that the alleged place of hail or speaking was upon the high seas. That the said steamship Earnwell being a British steamer, upon the high seas, outside the limit of any particular state, no law, either of the United States or of any of the individual states, can affect her right to accept or reject a pilot at the place mentioned."

We are of opinion, however, that the question presented by this amendment does not arise upon the proofs, for it clearly appears therefrom that the offer of services as pilot by the libelant was made within the three-mile limit. The positive and uncontradicted testimony is that at the time the Earnwell passed the bow of the pilot boat, the Bayard, the latter was not over three miles distant from Cape Henlopen, and the Earnwell was from one-quarter to one-half mile nearer the cape than the Bayard. We find no error in this record, and accordingly the decree of the court below is affirmed.

THE HERCULES.

CROSSLEY v. THE HERCULES.

(District Court, E. D. Virginia. November 6, 1895.)

COLLISION—STEAMER AND SAIL—MUTUAL FAULT.

Where a tug with tow collided with a schooner in a fog on the open sea, *held*, that both were in fault; the schooner for not using a proper mechanical fog horn, and the tug for not standing by after the collision, notwithstanding that the schooner was in a sinking condition.

This was a libel by W. W. Crossley, master of the schooner Morgan, against the steam tug Hercules, to recover damages resulting from a collision.

Whitehurst & Hughes, for Crossley.
Sharp & Hughes, for The Hercules.

HUGHES, District Judge. The Morgan is a three-masted schooner of 553 tons; W. W. Crossley, the libelant, master. She set sail from Hampton Roads, with a cargo of 1,038 tons of coal, about noon of the 24th of March, 1893, bound for New Haven, Conn. It grew foggy about 3 o'clock, but the fog partially lifted about 4 o'clock, when the schooner passed Cape Charles light. She was then sailing under her three lower sails, two topsails, and four jibs. After passing the Cape Charles lightship she took in the two topsails. The wind and fog afterwards increased until 7 o'clock, when the spanker and one of the jibs were taken in; and she then sailed with her foresail, mainsail, and three jibs up. After 7 o'clock p. m. there was a strong wind from S. S. W., and a heavy sea from S. E. and E. The fog was thick, and the vessel on a N. E. course, under sail, until nearly 9 o'clock p. m., when the wind became moderate and was so until 10:30, up to which time she had her lights up and burning, with a lookout stationed forward, sounding a fog horn, a seaman at the wheel, the mate on deck amidships (it being his watch), and also the captain. She had no mechanical fog horn. Before sails were taken in,—about 7,—the schooner had been making seven knots an hour. Afterwards, until 9, she made six knots. After 9 the wind moderated, and she made five knots. The proofs of the libelant show that at about 10:30 p. m. the captain, having previously gone down into the cabin to check off his course, was coming up on deck, when a steamer's whistle was reported to him. This steamer proved to be the steam tug Hercules, Taylor, master, coming south on a course S. S. W., bound for Norfolk, having in tow the barge Charter Oak on a 200-fathom hawser, the barge being without load, and moving light on the water. The tug's lights were in place and burning. Her master was in the pilot house, in charge of her navigation, and at the same time blowing her fog whistle, and acting as lookout on the starboard side of the tug. A foreign-born young man was at the wheel, obeying the directions of the master. The foreman and engineer were on duty. These were the only persons on duty at the time on the tug. On the barge the master and a seaman were on