and to make a new one to be towed through the ice solely at his own risk. The captain denies that he made any such undertaking at all, and it certainly could not have been understood as a wholly new contract by the pilot of the Packer. No new compensation was to be paid. At most, then, the case would seem to be one in which the tug and the captain of the canal-boat agreed to venture upon a hazardous undertaking by setting out at an improper time in the discharge of the original contract of towage. Both knew, or ought to have known, that the attempt was dangerous, and at the peril of the boat and cargo, and both concurred in the attempt. In this point of view the cases of *The William Murtagh*, 3 FED. REP. 404, 17 FED. REP. 259, and *The William Cox*, 3 FED. REP. 645, 9 FED. REP. 672, would seem to be applicable, and each party must therefore be charged with one-half of the loss.

If, however, the voyage were regarded as, in effect, made upon a new contract for towage, amid the hazards of expected ice, at the master's risk, still, in the language of WAITE, C. J., in the *W. E. Gladwish*, 17 Blatchf. 77, 83, "the contract was for such a degree of caution and skill as was required for towage under such circumstances. * * * The tug undertook to bring to this work such prudence and such nautical skill as was ordinarily required in such navigation. More was not contracted for, and more was not expected. * * * To make her liable, the error must be one which a careful and prudent navigator, surrounded by like circumstances, would not have made. The master of the barge, in legal effect, assumed for the barge and her cargo all the risks of towage in the ice not caused by neglect or unskillful navigation of the tug." Judged by this standard, I find no negligence or want of skill or caution in the Packer, until upon her return she encountered the field of floating ice. The libelant's witnesses testify that they thought it would have been safer for the Packer to have maintained her position in the ice near the dyke until the ebb-tide had loosened it, and enabled the barges and tugs ahead to proceed and the Packer to keep on in their wake. This is evidently a judgment formed after the event, and is entitled to little weight. It involved perseverance in a dangerous attempt; would have subjected the Packer to all the dangers of thick ice coming down with the tide, and to the probable chance, and even the great likelihood, that the Packer would be unable to keep so near to the barges ahead as to derive any protection from them.

I am satisfied that the most prudent course, the bay being apparently clear below, was to do what the Packer did, with the evident concurrence of the libelant's captain, namely, to attempt to return. This appeared to be without danger. When the large field of ice, however, was encountered below, it seems to me to have been the clear duty of the Packer to attempt to break a passage through, before entering it, and subjecting the canal-boat to its cutting pressure. Such precautions are usual where any dangerous ice is encountered.

These precautions were taken in the case of *The Gladwish, supra.* One reason now suggested for not having adopted them in this case is that the tide was already ebb, and any delay might have been followed by a crush of ice from above. Had this been the real reason, the pilot of the Packer would naturally have consulted the captain of the canal-boat, considering the alleged agreement to go according to his directions, as to which of these alternative risks he would take. It does not appear that any ice from above was in sight. The captain was not consulted; neither did the captain, as he had the opportunity to do, and as he ought to have done if he intended to object to it, make any objection, or require the ice field to be broken up first. Both were negligent in this matter. The Packer had already several miles the start of the thick ice above. A short time would have sufficed for at least something to have been done in aid of the barge by breaking up the thin field which lay between her and the draw. The failure of the Packer to do anything to avert this immediate and present danger is not answered by the mere apprehension of a more remote danger behind. From either point of view, the Packer must be held also in fault, and must be charged, therefore, with one-half of the damages to the boat and cargo, with costs.

NORWICH & N. Y. TRANSP. CO. *v.* NEW YORK BALANCE DOCK CO.[1]

(*District Court, E. D. New York.* July 2, 1884.)

1. NEGLIGENCE — RAISING VESSEL ON DRY-DOCK — APPROVAL OF BLOCKING — AGENT.

   The owners of a large steamer, who were making repairs on her, in the course of which they desired to put some bolts through her engine keelsons, applied to the owners of a floating dry-dock to take the steamer out of the water on their dock, on blocking high enough to allow of putting in bolts seven feet long without bending. This was an extraordinary height to raise a vessel on such a dock. The employes of the owners of the dock arranged the blocking, making a single tier of blocks, each pile of blocks being fastened together by iron dogs, and between some of the piles they put cross-braces. The steamer was then taken on the dock and raised out of the water, but before the raising was complete the blocking gave way, the steamer falling backwards, and she was seriously injured. *Held*, that the evidence did not show that the blocking was prepared according to the directions of the steamer's agent, but at most that it was approved as of sufficient height.

2. SAME—CONDITION OF VESSEL—NOTICE.

   That the fact that the steamer was in a condition needing repair was not shown to have caused her fall; that the contract of the owner of such a dock is, in the absence of representation or special agreement, to raise the vessel as she is,—the care and skill required of him in each case depending on the condition of the vessel he undertakes to raise; that in this case there was no representation, and it was practicable to raise the steamer safely in her actual condition, and therefore, if her condition had caused her fall, the dock-owner would not thereby have been relieved from responsibility, because there was in

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

the facts shown abundant ground to put the dock-owner on inquiry as to her condition, and therefore ignorance of her condition would have been negligence.

3. SAME—DEGREE OF RESPONSIBILITY OF OWNER OF DRY-DOCK.
That the nature of the employment of an owner of such a dock and the character of the service are abundant reason for holding him to a high degree of responsibility as regards the sufficiency and management of the dock; and that such responsibility must extend to a warranty of the sufficiency of the blocking which he employs.

4. SAME—FALL OF STEAM-BOAT ON DRY-DOCK—NEGLIGENCE—DAMAGES.
That even if the liability of the dock-owner was only for negligence, still he would be liable in this case, because the unusual height in this case required unusual care, and by cribbing the blocks instead of laying them single, (the method of cribbing blocks, though never resorted to on this dock for many years previous, being a method well known in raising vessels,) all danger of the steamer's fall would have been avoided, and the choosing the less safe of two methods for performing this work was negligence; that there having been a sag in the floor of the dock, by reason of which it retained a body of water some 15 or 20 inches deep at the deepest part, if, as it seemed not unwarranted to infer, a jar sufficient to topple the steamer over was given to the dock by some movement of that body of water upon it, the dock-owner would be liable on account of the unsafe condition of the dock for raising this steamer as she was raised; that the dock-owner was liable for the damages sustained by the steamer.

In Admiralty.

Bristow, Peet & Opdyke, (*Robert D. Benedict,* of counsel,) for libelants.

Owen & Gray, (*William G. Choate,* of counsel,) for defendants.

BENEDICT, J. This is an action to recover damages for injuries done to the steam-boat City of Boston while being raised by the defendants upon a balance dock. The libel avers that on May 16, 1882, the defendants agreed with the libelants to receive the libelants' boat, the City of Boston, upon its balance dock, in the city of New York, and carefully raise her out of the water in such a way as to avoid injury to her, to retain her so raised until the libelants could do certain specified repairs upon her, and upon the completion of such repairs, and when so requested, to return the boat to the water; that in accordance with such contract the defendants received the boat from the libelants and commenced raising her upon the dock, but when the dock had risen almost to the surface of the water the boat fell from the blocks upon which she had been placed in the dock and received serious injuries. These injuries the libel charges to have been caused by the defendants' negligence in the preparation of their dock, and in the raising of the boat, and by their failure to properly perform their contract. The answer admits an agreement to raise the boat, but leaves the terms of the agreement to be proved by the libelants. It also admits receiving the boat from the libelants, and that while being raised upon the dock she fell. It avers that the defendants prepared the dock according to the instructions of the libelants; that such preparation was done carefully and skillfully, and was approved by the libelants, and that the dock so prepared was approved by the libelants. It also avers that the boat was in an un-

fit condition for raising, of which the defendants were ignorant, and it charges that the fall of the boat was caused by the carelessness, negligence, and interference of the libelants, and the unfit condition of the boat, and not by any negligence or want of care on the part of the defendants. Upon these pleadings the point has been taken that they leave the defendants without a defense, because they admit a contract to raise the boat and a failure to perform that agreement. This point will, however, be passed, and the case determined on the facts disclosed by the testimony. In so considering the case, it will be convenient first to dispose of the issue raised by the averment of the answer, that the blocking upon which the boat was resting when she fell was prepared according to the direction of the libelants, and was accepted by the libelants as satisfactory. This averment is not sustained by the testimony. The most that can be said is that the blocking was approved as sufficient in height to give the boat the required elevation above the floor of the dock. Upon the evidence the libelants are in no way responsible for the means which the defendants adopted to give the boat the requisite elevation from the floor of the dock.

Next will be considered the issue raised by the averment of the answer, that the condition of the boat rendered her unfit for raising, and that the fall of the boat was a result of that condition. The evidence fails to show that the fall of the boat was caused by her condition. Nor would it avail the defendants to hold that it was so caused. Dry-docks are, in general, not employed for the purpose of raising vessels of sound condition. Vessels loaded and light, broken and sound, water-logged vessels, hogged vessels, vessels out of shape from stranding, vessels too old and weak to run longer without repairs, are the vessels requiring the services of a dry-dock; and, as was said on a former occasion, (*Howes* v. *Balance Dock*, 9 Ben. 232,) the contract of the dock-owner is, in the absence of representation or special agreement, to raise the vessel as she is; the care and skill required of him in each case depending upon the condition of the vessel he undertakes to raise. In this case no representation by the libelants, respecting the condition of the boat, is claimed to have been made. Nor is it contended that it was impracticable to raise the boat safely in the condition she was. If, then, it had been shown that the condition of the boat rendered her fall inevitable, blocked as she was, it is not seen how the defendants' liability for the injuries resulting from the fall could be disputed. Nor, if such were the case, would it avail the dock-owners to hold that they were ignorant of the condition of the boat. The boat was dismantled. Her walking-beam was out, much of her engine was out of position, and the known object of having her raised upon the dock was to bolt down her engine keelsons. In these and other circumstances there was abundant cause to put the dock-owners upon inquiry as to the boat's condition. A failure by the defendants, under such circumstances, to be informed in regard to the actual con-

dition of the boat does not constitute a defense. Ignorance under such circumstances was itself negligence.

Passing now to consider the testimony offered in support of the averments of the libel, I find it proved that the libelants applied to the defendants to raise the City of Boston out of water upon the defendants' balance dock, the boat to be sufficiently elevated above the floor of the dock to enable bolts seven feet long to be passed up through the bottom and the engine keelsons without being bent. The defendants agreed so to raise the boat, and in pursuance of such agreement proceeded to construct upon the floor of the dock the blocking upon which the boat's keel was to rest when raised. The elevation of the boat from the floor of the dock, called for by the contract, was unusual. No boat of the size of the City of Boston had ever before been blocked to such a height upon this, nor, so far as appears, upon any other floating dock. Two methods of constructing this blocking were open to be adopted: one by placing single blocks of timber one upon the other till the requisite height should be reached; the other to arrange the blocks of timber crib fashion. Cribbing the blocks is a method well known, and often employed in constructing blocking for vessels. By adopting it, all danger of falling is avoided. This method had never, previous to the fall of the City of Boston, been employed on the defendants' dock, where many vessels have been raised in safety without cribbing.

After the City of Boston fell she was raised by the defendants upon the dock with the blocks fore and aft cribbed, and then she was raised in safety. When the first attempt to raise her was made, however, the blocks were not cribbed, but placed one upon the other single until the requisite height was reached. The blocks were then dogged together, and between some of the piles of blocks at each end, and also between an uncertain number of the piles in the center, cross-braces of spruce plank were placed, running from the foot of one pile to near the top of the next. The blocking having been thus prepared by the defendants and the dock lowered, the boat was taken by the defendants into their possession and placed in position in the dock, and the work of raising her, by pumping out the water from the sections of the dock, begun. As the dock rose the keel of the boat took the blocking over which it had been placed, and thereafter as the dock rose the boat rose until the keel was four or five feet out of the water, when the boat and blocking on which it was resting toppled over backwards, and the boat fell heavily upon the floor of the dock.

These facts are not in dispute, and it is contended by the libelants that they afford ground for a decree against the defendants for failure to discharge the obligations assumed in making the contract stated. The question thus presented is novel. Adjudged cases where courts have been called on to consider the obligations assumed by the owner of a dry-dock who undertakes to raise a vessel upon his dock are rare, and no case has been referred to on this occasion which can be fairly