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

claimed to furnish authority for a decision of the case at bar. The extent of the responsibility assumed by the defendants when they undertook to raise the libelants' vessel upon their dock must therefore be ascertained by a due consideration of the character of the employment, and the legal relation of the contracting parties naturally and justly resulting therefrom.

If it is true—and the fact is not easy to deny, upon the evidence—that the libelants' vessel when injured was within the exclusive control of the defendants, and had been placed in the defendants' exclusive possession to enable the defendants to perform their agreement to raise the boat, there might, as it seems to me, be difficulty in finding ground upon which to base a sound distinction between the obligations assumed by the defendants and those of a carrier in respect to goods intrusted to him to be carried. But assuming in favor of the defendants that all the reasons upon which the liability of a carrier of goods is supposed to rest do not exist in the case of a dry-dock owner having possession of a vessel intrusted to him for the purpose of being raised, still there is, as it seems to me, abundant reason to be found in the nature of the employment and the character of the service for holding the dry-dock owner to a high degree of responsibility as regards the sufficiency and management of his docks. The service to be rendered relates to property peculiarly situated, namely, vessels constructed for the purpose of floating upon the water, and, as already remarked, either weakened by age or accident, or from some other cause requiring instant repair upon the land; and, while it cannot be said that the dock-owner possesses a franchise, yet by reason of the cost of constructing and erecting a structure like a dry-dock, the location necessary for the use, and the character of the service to be rendered, the dry-dock owner has what is nearly, if not quite, equivalent to an exclusive privilege. A refusal of employment made by a dry-dock owner, without cause, would, in the majority of cases, work irreparable injury, and be unjustifiable. Moreover, docks of this character, when employed, must always be operated by those who own them. The conditions and capacity of the dock are unknown except to the owner. In general, the employment of the dock is compelled by necessity, and must be contracted for by the master of the ship in the absence of the ship-owner, who is forced by circumstances to intrust his vessel, greater in value it may be than the dock, upon a structure, the condition of which is necessarily unknown to him, or to his agent, the ship-master, and which is to be operated by persons whose character and skill are likewise unknown, and where a slight relaxation of care or a defect of skill may result in a fatal straining of his ship, or, as here, in a serious fall.

The employment of the dry-dock owner is therefore of necessity confidential. It is in a substantial sense a public employment, and while it may be that due protection of the public can be secured without attaching to this employment those several obligations which the law

has found it necessary to attach to the employment of a carrier of goods, I have no hesitation in saying that public policy requires that to this employment a high degree of responsibility must be attached by the law. Within the range of that responsibility it seems entirely reasonable to bring the sufficiency of the blocking upon which the vessel rests for support when raised from the water by the dock; for blocking sufficient to bear up the vessel is a necessity of the undertaking. It must be and is prepared by the dock-owner. What blocking will be sufficient to support a particular vessel upon a particular dock comes within the experience of the owner of the dock, and is not within the ordinary experience of the owner of the ship. The dock-owner, and he only, can know the action of his dock when rising under the burden of a given ship. The obligation to provide a sufficient blocking is therefore an obligation naturally attaching to the dock-owner, and with reason and justice may be held to be one of the implied obligations assumed by a dock-owner when he agrees to raise a ship.

It will be observed that the case here is not that of the giving way of the blocking through some latent defect. The boat did not fall because the blocking under her gave way by reason of some latent defects in the blocks, but because the method adopted by the defendants in building up the blocks rendered the blocking unstable and insufficient when subjected to the weight of the boat, and the movement necessarily incident to the raising of the dock. Such, at any rate, was the fact, if, as the defendants contend, the dock was raised evenly, and no motion imparted to the vessel. The case, therefore, in this aspect is one of damages resulting from the use of blocking which proved insufficient for the purpose to which it was applied; and if I am right in the opinion that the defendants warranted the blocking as sufficient to support the ship, liability for the damages resulting follows, of course. In support of this conclusion reference may be made to the somewhat analogous case of a carriage being transported on a ferry-boat, and damaged because of a defective chain placed behind it to prevent its running off the boat. In such a case the ferry-master, although held not to be a common carrier, was held responsible for the damages resulting from the employment of defective iron in a link of the chain. *Clark* v. *Union Ferry Co.* 35 N. Y. 485; *Wyckoff* v. *Queens Co. Ferry Co.* 52 N. Y. 32. So, in the case of *Cook* v. *Floating Dry-dock*, 1 Hilt. 436, the dock-owner was held chargeable with the obligation to make the stanchions of the dock sufficiently strong to support a stage, and liable for damages arising from insufficiency of the stanchions; such liability being there placed upon the ground of a warranty against all such faults and defects as would render the contemplated use of the dock dangerous. That the defendants' dock was defective in the blocking, and dangerous to be used as it was used because of that defect, is shown by the result.

The decision of this court in *Howes* v. *Balance Dock*, 9 Ben. 232,

has been cited by the defendants as inconsistent with such a conclusion as above stated. But in the case referred to the question was one of delay in carrying out a contract to raise a vessel, and the question of warranty did not arise. If, however, any inference is to be drawn from the decision in that case, it seems adverse to the defendants here. In opposition to this view it is contended in behalf of the defendants that there is no bailment in the case; that the liability of a dock-owner for injuries sustained by a vessel while being raised, always depends upon the question of negligence, and the defendants cannot be held responsible for the injuries to the libelants' boat, because it has not been proved that the fall of the boat was caused by the defendants' negligence. If this be the law of the case, still the decision must in my opinion be adverse to the defendants.

As already remarked, the work undertaken by the defendants was attended with unusual risk of the vessel's falling, owing to the elevation of the vessel's keel from the floor of the dock at which, according to the agreement, the boat was to be placed. The care demanded in constructing the blocking is to be measured by the risk of the falling involved in the operation as it was to be conducted, taken in connection with the character and value of the property to be subjected to danger. It is, therefore, not too much to say that it was incumbent upon the defendants to employ all means at command to reduce that risk to the minimum, and failure in this respect was negligence. Means were at hand by which to remove all danger of the vessel's falling. To secure absolute safety it was only necessary to crib the blocks. This method of avoiding danger of a fall was well known in connection with the raising of vessels, and the fact that this method had never been resorted to in this dock during many years prior to the fall of the City of Boston does not prove the expedient to be unavailable or unnecessary, for no such vessel as the City of Boston was ever thus raised at such an elevation from the dock, while the other fact, that cribbing was employed when the City of Boston was next raised immediately after the fall, goes far to prove the necessity, as well as the reasonableness, of the precaution in question. Instead of adopting this precaution, known to be sufficient to remove all danger of falling, the defendants adopted a method of arranging the blocks necessarily involving a risk of the vessel's falling, and endeavored to diminish the risk by dogging the blocks piled single, and, for the first time in the use of this dock, by putting braces between the blocking. So far as the evidence discloses, the decision to pile the blocks single was not arrived at because of any difficulty or expense attendant upon cribbing the blocks, nor because single blocking, secured by dogs and braces, was supposed to be more secure than cribbing. The only reason for the course pursued, suggested to me by the testimony, is that cribbing would require a greater number of blocks than those at hand. But, whether impelled by this reason or some better one, the fact remains that between two methods of constructing the block-

ing open to be adopted, the defendants chose the one involving risk, as against one that would have involved no risk. This was negligence, and the negligence that caused the disaster.

But it is said the defendants judged the blocking, as constructed, to be sufficient, and the reasonableness of this conclusion is confirmed, it is said, by many experts who have testified here that they would have judged the blocking, as constructed, to be safe. The liability of the defendants does not, however, depend upon the question whether the error of judgment which they committed was committed in good faith, but whether they were justified in committing that error under the circumstances as they were. Without sufficient cause they made the safety of the libelants' vessel while on the dock, and the safety of the lives of the men who were to be put to work under her, depend upon the soundness of their judgment in regard to the sufficiency of blocking, up to that time untried in similar circumstances, when there was open a method well known to them, although not employed by them, as to the safety of which there could be no question whatever. To commit such an error under such circumstances was culpable, and renders the defendants guilty of negligence. The books contain many cases where the selection of the most dangerous of two methods has been held to be negligence. I recollect none where the choice made seems to me more indefensible than the choice made by the defendants on this occasion.

In the case of *The Louisiana*, 3 Wall. 173, a ship which broke from her moorings was prosecuted for damages caused by her drifting upon another vessel, and there the supreme court of the United States held that to escape conviction of negligence it was incumbent on the defense to show an accident which human skill and precaution, and a proper display of nautical skill, could not have prevented; and expressly declared that belief in the sufficiency of the ship's fastening was no defense. In the case at bar there was no accident. According to the contention of the defendants, nothing unforeseen or unexpected occurred in the management of the dock during the raising of the boat, save only the boat's fall, and that, as all concede, would not have occurred if the blocks placed under the boat had been cribbed instead of piled single. Judged according to the principle applied by the supreme court in the case of *The Louisiana*, I do not see how the defendants can escape liability for the injuries in question, even if the extent of the obligation resting upon them was to raise the vessel without negligence.

There is still another aspect to the case deserving of notice. It is proved and not denied that by reason of a sag in the dock, the dock, when raised, retained a very considerable body of water upon its floor, some 15 or 20 inches deep in the deepest part, and there is evidence tending to show that motion was imparted to this water upon the floor during the raising of the City of Boston. I do not think the inference unwarranted that a jar was given to the dock sufficient to top-

ple the boat over, as she was blocked, by some movement of the water upon the floor of the dock. If this inference be correct, the liability of the defendants must follow, upon the ground that the condition of the dock, by reason of the presence of this body of water, was not safe for raising such a vessel as the City of Boston, when elevated as she was from the floor of the dock. I am content, however, to rest my decision of this case upon the other grounds above stated, and upon these grounds I must hold that the libelants are entitled to a decree.

MARX and another *v.* NATIONAL STEAM-SHIP. CO.

(*District Court, S. D. New York.* November 29, 1884.)

1. SHIPPING—THROUGH BILL OF LADING—CONSTRUCTION.
   A ship's contract is to be strictly construed in favor of the shipper, in respect to the vessel designated to carry the goods, and any change of vessel not permitted by the bill of lading will be at the risk of the carriers.
2. SAME—TRANSHIPMENT—CHANGE OF VESSEL.
   The respondents gave a bill of lading at Marseilles for goods shipped on the steamer E. for London, to be there transhipped for New York "on the steamer C., or by other steamer, or following steamer of this line, for which the goods shall arrive in time; * * * and if said steamer be prevented, from any cause, from proceeding in the ordinary course of her voyage, to have liberty to tranship the goods by any other steamer; * * * the carriers not to be liable for any loss or damage done while the goods are not actually in their possession." On the arrival of the E. at London, the C. had left three days before, and the respondents, having chartered two of their other vessels to the government, would have no steamer ready to sail for New York for three weeks, and they accordingly transhipped the goods upon a steamer of a different line, upon which the goods were injured. By the usage in London it was understood to be obligatory to send goods by vessels of another line if there was likely to be a detention of more than a week after the ordinary sailing days. *Held*, that transhipment on the vessel of another line was justifiable under the terms of the bill of lading, though the C. sailed on her usual voyage some two weeks afterwards; and that the defendants were not liable for the damage.
3. SAME—CONSTRUCTION.
   Particular clauses of a bill of lading should be construed with reference to its general purposes, as indicated by its various clauses, taken together, as well as the surrounding circumstances and the usages and customs of business.

In Admiralty.

Scudder & Carter and *Geo. A. Black*, for libelants.

John Chetwood, for respondents.

BROWN, J. This libel *in personam* was filed to recover for the damages done to 35 drams of glycerine in the course of transportation from Marseilles to New York, for which the respondents had issued a through bill of lading. The goods were shipped at Marseilles on board the steamer Euphrate. The bills of lading, dated February 17 and February 23, 1881, provided that the goods should "be forwarded by the steamer Euphrate to London, and to be then transhipped in and upon the steam-ship called the Canada, whereof is master, for the

present voyage, Robinson, or whoever else may go as master, in said ship lying in the port of London, and bound for New York, * * * and failing shipment by said steamer, then by other steamer, or following steamer of this line, for which the goods shall arrive in time, * * * and are to be delivered subject to the following exceptions and conditions, viz.: * * * The National Steam-ship Company, limited, or its agents, or any of its servants, are not to be liable * * * for any claims for loss, damage, or detention to goods under through bills of lading, when the loss or detention occurs, or damage is done, while the goods are not actually in the possession of the National Steam-ship Company, limited, or shipped on board the National Steam-ship Company's, limited, steamers. * * * In the event of said steamer being prevented from any cause from commencing or pursuing this voyage, or putting back to London or into any port, or otherwise being prevented, from any cause, from proceeding in the ordinary course of her voyage, to have liberty to tranship the goods by any other steamer."

On the margin of the bill of lading was a statement that a vessel sailed every Wednesday from London to New York. Six steamers were usually employed in the respondents' line, sailing from London, as the proof shows, not with entire regularity at specified intervals, but usually one in every week or 10 days. About this time, however, three of the respondents' vessels, the Queen, the France, and the Holland, were chartered to the British government for the transportation of troops, to-wit: on December 29, 1880; February 15, 1881; and March 8, 1881, respectively. The Euphrate arrived in London on March 7th. The steamer Greece, of the respondent's line, had left London for New York on March 3d. The Canada was absent on her voyage to New York; she subsequently arrived, and sailed from London to New York on March 29th. The respondents, after the charter to the government of the three vessels above specified, had no other steamer that they could dispatch between the third of March and the sailing of the Canada on the 29th. The evidence on the trial showed that it was usual and customary, when goods were received at London, to be dispatched under a through bill of lading, to forward them by a steamer of some other line in case the goods were likely to be detained upwards of a week beyond the next usual sailing day. The respondents, accordingly, finding that they would have no vessel of their own for some three weeks after the Euphrate arrived, transhipped the goods in question on the thirteenth of March to the steamship City of London, belonging to another line, on board of which it is conceded that the negligence complained of and the loss in question arose. The City of London was not immediately libeled for the recovery of the damage to the glycerine; and upon her return trip she is supposed to have been lost, as she has never since been heard from. In seaworthy qualities and in her rating she was superior to the steamers of the respondents' line.

The case turns wholly on the question of the authority of the respondents, under the circumstances stated, to tranship the goods in question on board any other steamer than one of their own line. This question depends upon the proper construction of the bill of lading. The exception that the respondents' company should not be liable for any damage done while the goods were not actually in its possession, or shipped on board its steamers, is a valid exception, and absolves the respondents from liability for this loss, provided the goods were lawfully transhipped on board the City of London. The libelant contends, however, that the conditions specified in the bill of lading, under which alone the respondents were authorized to put the goods upon the steamer of any other line, did not arise. If that contention is correct, then the respondents were bound by the contract of the bill of lading to retain the goods and to transport them to New York upon one of their own steamers; and for their violation of this contract, in shipping them on the City of London, they would be responsible for the loss. *Bazin* v. *Steam-ship Co.* 3 Wall, Jr., 229; 5 Meyers, Fed. Dec. 521; *Goddard* v. *Mallory*, 52 Barb. 87; *Goodrich* v. *Thompson*, 4 Robt. (N. Y.) 75; *Trott* v. *Wood*, 1 Gall. 443.

The libelant's counsel, in support of this contention, relies upon the fact that the Canada was the first steamer that sailed after the arrival of these goods in London; that she is the only steamer referred to by the words, "in the event of *said steamer* being prevented," etc., in the last clause of the bill of lading above quoted; and that the Canada was not "prevented, from any cause, from commencing or pursuing her voyage;" that the respondents were therefore bound to retain the goods in London for the 22 days that elapsed between their arrival by the Euphrate and the usual sailing of the Canada; and, consequently, that the transhipment on the City of London, on the 13th, a week after their arrival, was unauthorized, and at the respondents' risk. This reading of the bill of lading is not, I think, justified by a comparison of its various parts with one another, and still less, when interpreted in the light of the prevailing usage in regard to transhipment by other lines, established by the evidence. The general object designed to be secured by the various provisions of this bill of lading is obviously the dispatch of the goods to their destination, without unnecessary or unreasonable delay in the transhipment. Upon a bill of lading like this, given at Marseilles, and containing various clauses providing for the substitution of some other vessel for the Canada in London, there is no reason to suppose the parties contracted with any special reference to transportation upon the Canada. Her name was doubtless put in the bill of lading at Marseilles, simply as one of the vessels of the respondents' line, without any intent to limit the transportation to her. The words following the Canada's name in the bill of lading clearly show the general intention to promote dispatch, by the express provision, that "failing shipment by said steamer, [*i. e.*, the Canada,] then [to be transhipped] by other

steamer, or following steamer of this line, for which the goods shall arrive *in time*." The same purpose is further shown in the last clause above quoted from the bill of lading, to-wit, "in the event of said steamer being prevented, from any cause, from proceeding in the ordinary course of her voyage, to have liberty to tranship the goods by any other steamer."

The words "said steamer," in the clause just quoted, cannot reasonably be construed as referring to the steamer Canada alone; for, upon that construction, if, when these goods arrived in London, the Canada had just sailed, the goods would be obliged to wait until she had reached New York and returned to London and was ready to sail again. On the contrary, the earlier clause in the bill of lading, above quoted, clearly provides for transhipment upon the earliest steamer for which the goods should arrive *in time*. The fair meaning of this clause, I think, renders such shipment upon the "following steamer of this line" obligatory, without waiting for a return of the Canada. The words "said steamer" in the last clause refer, therefore, not merely to the Canada, but to any other steamer of the respondents' line upon which, under the preceding clause in the bill of lading, the goods might lawfully be transhipped. If, with this construction, we take into further consideration the notice upon the margin of the bill of lading, that a steamer of the line sailed every Wednesday, and the further presumption that the shipper at Marseilles shipped his goods upon the faith of the ordinary course of departure previously in use by the respondents, as well as on the faith of this printed notice, it seems clear that the intention of this bill of lading was to provide that the goods in question should be forwarded in the ordinary course of shipment, and without any unnecessary delay, from any cause whatever, and be transhipped upon the Canada, or upon whichever other vessel of the respondents' line would, in the usual course of departure, sail next after the arrival of the goods in London; and that if, from any cause, the steamer that would ordinarily sail upon the next usual sailing day, after the arrival of the goods, should be "prevented from commencing or pursuing her voyage," etc., then that the respondents were to have liberty to tranship the goods by "any other steamer," for the purpose of expediting the goods to their destination.

When these goods arrived in London, the two steamers that in the respondents' usual course of business would have followed upon their regular trips to New York, had been chartered to the government for military purposes. It does not, indeed, appear whether the charter was voluntary or involuntary; but, whether the one or the other, their being chartered to the government prevented their sailing for New York upon the usual days. One of them would ordinarily have sailed on or about the thirteenth. The charter prevented her sailing, and "proceeding in the ordinary course of her voyage," and the respondents, therefore, had liberty to tranship the goods by any other

steamer. If the charter were the respondents' voluntary act, it was not unlawful as respects the libelants, nor any breach of the implied terms of the bill of lading. The respondents were not bound, under the alternative provisions of this bill of lading, to keep all their vessels in use on this line. These various alternative provisions seem to me clearly to indicate that they were to have the right to substitute other steamers, whatever might be the cause that should prevent any of their vessels from sailing on the sailing days, even though that cause were a diversion to other employments upon some special occasion on which the respondents' interest might make it expedient to employ their ships.

Again, the evidence shows that the customary mode of business in regard to the transhipment of goods on through bills of lading in London at this time was to require diligence in the dispatch of goods; and if there was likelihood, through any irregularities in the sailing of the steamers, of a detention above a week in the usual time of sailing, to forward the goods by some other line. The testimony on the part of the respondents shows that this usage was regarded as obligatory. In construing bills of lading, as in construing other commercial instruments, it is the right and duty of the court to look not only to the language employed, but to the subject-matter, and to the surrounding circumstances, in order to determine the proper effect of the language used, by putting itself, so far as possible, in the place of the contracting parties. It has regard, therefore, to all the prevailing usages and customs of business. *Mobile & M. Ry. Co.* v. *Jurey*, 111 U. S. 584, 592; S. C. 4 Sup. Ct. Rep. 566; *Nash* v. *Towne*, 5 Wall. 689, 699; *Robinson* v. *U. S.* 13 Wall, 363; *Hostetter* v. *Gray*, 11 FED. REP. 179. The forwarding of goods, also, with reasonable dispatch is at the present day a recognized obligation of common carriers. The various provisions of the bill of lading seem everywhere to imply a recognition of this obligation, and to be drawn with reference to it. In the light of this obligation, and of the proved usages of business, the provisions of this bill of lading are consistent; and, as it seems to me, they required the respondents to do precisely what they did do, in this case, namely, to ship the goods by some other steamer of at least equal rating, on or about the time when the next following steamer of their own line, after the arrival of these goods in London, would have sailed, had she not been prevented from pursuing her ordinary voyage through her charter to the British government. Under the provisions of the bill of lading alone, and more emphatically in connection with the usage proved, the respondents would have been guilty of a dereliction of duty, and would have been, as I think, responsible for any damages that might have happened to these goods, had they been detained in London until the sailing of the Canada some two weeks after they were forwarded by the City of London. *Broadwell* v. *Butler*, 6 McLean, 296; 1 Newb. 171; *Dorris* v. *Copelin*, 5 Amer. Law Reg. (N. S.) 492.