

and used long before defendants patented it, and cannot now make the difference between the two combinations which shall prevent infringement. It is further urged that the tongue form of bifurcation permits the whole width of the anchor to be applied to holding down the hem of the wider flange, while in the split form only one half of the anchor is so applied. In practical operation, it will probably be found that, in the split form of anchor, the parts of the joint will be so pressed together that the shorter leg of the anchor would press down on the lip of the higher flange, and thus that the whole width of the anchor would be applied to holding down the fold of the higher flange. However this may be, the difference in operation, if any, is simply one of degree, which might have been compassed in the split form of anchor by widening the anchor used. Moreover, this change, if it be one, does not remedy any known defect in the complainant's device. In the use of the latter there never has been any complaint that the holding-down strength of the split anchor was not ample for all purposes. In our opinion, therefore, the defendants' devise is, in effect, the same combination as that patented to the complainant's assignor. The variations are produced by merely slight changes in form, without any real difference in function or operation or result. The decree will be for a perpetual injunction, and, as it is in evidence that actual infringements have taken place since the filing of the bill, there will be a reference to a master to take evidence, and report on the damages to complainant.

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THE MASCOTTE.

CARTER *et al.* v. THE MASCOTTE. (No. 1.)

(Circuit Court of Appeals, Second Circuit. July 20, 1892.)

No. 76.

**SHIPPING—DAMAGE TO GOODS—BURDEN OF PROOF—BILL OF LADING.**

Where a ship gives a bill of lading reciting that the goods were received on board "in good order and condition," and afterwards delivers them in a damaged condition, the burden is on her to show that the damage arose from an excepted peril; and, if she is unable to explain the cause of the damage, she is liable. 48 Fed. Rep. 119, affirmed in part.

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Libel by Carter and others against the steamship Mascotte for damage to cargo. The cause was tried, together with another suit between the same parties, to recover the extra cost caused by discharging certain tea in Brooklyn instead of within the "tea district," on the New York side of the East river. Decree for libelants. 48 Fed. Rep. 119. Claimants of the vessel appeal. Affirmed.

The opinion below, in so far as it concerns this suit, was as follows:

"As respects the claim for damage to tea caused by oil, the bill of lading, as well as the master's testimony, shows that the chests were received on board in good condition. Some of the chests on delivery were, beyond doubt, oil-stained and defaced. All that the claimants can do to exonerate the ship has doubtless been done; but, after all, the evidence shows nothing more than that they cannot explain how the stains and defacing occurred. It negatives certain causes that might, under some circumstances, have produced the damage; but this is not, I think, sufficient to release the ship from her legal obligation. The ship has possession and control of the goods from the time they are delivered into her custody. If the goods were received in good condition, as this bill of lading shows they were, she warrants their delivery in like condition, unless damaged through the act of God, public enemies, the dangers of the seas, or through some other excepted cause. *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 97, 437, 9 Sup. Ct. Rep. 469. The burden of showing that the damage arose from such an excepted cause is upon the ship. *Nelson v. Woodruff*, 1 Black, 156. As the Mascotte's evidence does not show this, but merely leaves the damage unexplained, I must therefore hold the ship liable for this item."

*Convers & Kirkin*, (J. Parker Kirkin, of counsel,) for appellants.

*Edward L. Owen*, for appellees.

Before WALLACE and LACOMBE, Circuit Judges, and SHIPMAN, District Judge.

WALLACE, Circuit Judge. We agree with the learned district judge who decided this cause in the court below, that the libelants have a sufficient case for the recovery of their damages, by reason of nondelivery of their cargo in good order and condition. The burden of proof is on the steamship to overcome the effect of the acknowledgment in the bill of lading of the reception of the goods on board "in good order and condition," and the evidence introduced on her behalf is not sufficient to overcome the effect of this recital. The decree is affirmed.

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### THE MASCOTTE.

CARTER & al. v. THE MASCOTTE. (No. 2.)

(Circuit Court of Appeals, Second Circuit. July 20, 1892.)

No. 78.

#### SHIPPING—PLACE OF DELIVERY—CUSTOM OF PORT.

The custom of the port of New York requiring cargoes of tea to be discharged in the "tea district," on the New York side of the East River, does not apply to a general ship, a minor portion of whose cargo consists of tea; and where such a ship endeavored for nearly three days, without success, to obtain a berth in such district, and afterwards secured a berth elsewhere, which was acceptable to the consignees of the rest of the cargo, she was not liable for the increased cost caused by discharging the tea there. 48 Fed. Rep. 119, reversed in part.