is conflict of testimony as to the exact hour of giving this notice. There is no dispute that it was given before 12 m., and that, if the vessel was not at that instant in her berth, she was in it before 12 m. The notice bears date 22d November, but that is manifestly a clerical error, and is satisfactorily explained in the testimony of the master. The body of the notice reads:

"Sirs: I beg to inform you that the Germ. S. S. Etna, under my command, has arrived, discharged her inward cargo, and is ready to receive her outward cargo of cotton, according to charter, dated the 11th Octbr., 1888, London."

No surveyor's certificate accompanied this written notice. In reference to the giving of this notice, and what then and immediately thereafter occurred, the respondent G. Vaughan testifies:

"I got to the office of G. Vaughan & Co. about a quarter past 10 o'clock on the morning of the 23d of November, 1888. The captain was sitting there, and the first thing I did was to sign a check to get money to pay his entrance fees. When the clerk came back, I said to the captain, 'Captain, if you are ready, you can go down and enter the ship;' and he got up, and then put a note on the desk. I said, 'What is that?' And he said, 'That is my notice.' And I said, 'What notice?' And he said, 'The notice of readiness to receive cargo.' And I said: 'Captain, you are rather previous with that. Your ship is not ready for cargo.' And he said, 'How is that?' And I said: 'Your ship is not in her loading berth. Your ship is not entered at the customhouse, and she has not finished discharging cargo.' And he said: 'I asked you for a loading berth last night, and you did not give me one.' And I said: 'I cannot give you a loading berth until your cargo is discharged.' He said: 'My cargo is discharged now.' I said: 'Captain, I doubt that very much, but I will take your word for it. You can take your ship up alongside Viola at the head of Jackson street.' He then went out with my clerk to enter his ship at the customhouse, and that is all I saw of him that day."

The master called at the office of the respondents every day except Sunday from the 23d to the 30th of November. He saw the respondents, each of the partners, several times. Was told by them at one of his first interviews that Clague was selected as stevedore, and was told from time to time that they were not ready to furnish cargo. The stevedore named went aboard the ship, and took breakfast there with the officers. Clague's partner, Gilmore, also went aboard the steamer. After what occurred when the notice was given, no suggestion was made to the master by either of the respondents or by either of the stevedores or by any one else that the ship was not ready to receive cargo. After 12 m. on November 30th, the respondents gave the master this notice:

"New Orleans, Nov. 30th, 1888.
"2 P. M.

"Captain Pape, S. S. Etna—Dear Sir: Your canceling date expired at 12 m. to-day. Not having received notice of readiness to receive cargo in accordance with charter party, dated London, October 11th, 1888, we hereby notify you same is canceled.
"Yours, very truly, G. Vaughan & Co."

The district judge correctly held:

"By receiving the within notice without the certificate, and, when subsequently questioned by the master as to cargo, remaining silent about the absent certificate, the respondents must be considered to have waived that condition."

He further held that to make the notice in question effective in law the vessel must, at or near the time of the service, as matter of fact have been ready according to the terms of the charter party. He found from the proof that the vessel was not in fact ready at or near the time when the notice was given, and therefore he rendered judgment dismissing the libel. We cannot concur in his finding of fact just indicated, but our view of the question of law to which this finding of fact is applied to support the judgment is such that it is unnecessary for us to review the testimony on that point.

If the matter of the surveyor's certificate must be held to have been waived by the conduct of the respondents, it can only be so held on the ground of estoppel, for the respondents did not expressly waive it, and it is manifest that they did not intend to waive anything, but to stand on the letter of their bond. The reason for holding the certificate waived is well stated by the district judge:

> "Where time is running against the party, and the notice of defect is so easily given of a document which might be easily supplied if the party receiving the notice wishes to rely on the omission, he must, in fairness, be required to signify it to the other party."

In our own view, this sound reasoning will extend the application of the rule to the want of readiness in the ship, if any existed in this case. If any did exist, there is certainly proof of none that could not have been remedied in a short time, much within the seven days the ship lay in her berth awaiting cargo. As suggested above, the proof satisfies us that the ship was in substantial readiness to receive cargo by 12 m., 23d November. By the terms of the charter party, lay days commenced on the following morning.

Giving the utmost credit and weight to the testimony of the respondents' witnesses, Clague and Gilmore, three men could have put the vessel in readiness in two days. The libelants' witnesses say that the dunnage, the presence of which is the only unreadiness suggested by the proof, could have been removed in a few hours. The law does not favor forfeitures, and it is not so bound and helpless that it must suffer such a defense as that offered by the respondents to avoid the contract on which libelants sue. The decree of the district court should have been in favor of the libelants. The attention of the district court on the trial below, and of the parties while the case was pending in that court, having been engrossed with the question as to the respondents' liability, and that court having held they were not liable, we find the condition of the case and of the proof as to the extent of the damages to be now such that we cannot satisfactorily render the decree for damages which the district court should have rendered. It is therefore

Ordered that the decree of the district court is reversed, and this cause is remanded to said court, with direction to enter a decree in favor of libelants, with a reference to a commissioner to find and report the damages.

THE E. E. SIMPSON.

ROGERS v. MOORE.

(Circuit Court of Appeals, Fifth Circuit. February 27, 1894.)

No. 184.

TOWAGE—GROUNDING OF TUG—NEGLIGENCE.

A tug with a tow was going out of Mobile bay at night, where the channel is about a mile wide. The mate, who had no knowledge of the channel, suggested that they were too near Sand island on the west, and the master authorized him to hold off until the lights at Ft. Morgan were nearly on. This was done, but shortly after resuming her course the tug grounded. The master at first thought that they had struck on the west side, but on going to the wheelhouse he discovered, by the compass and the lights, that they were on the east side, whither the wind and tide both strongly tended to carry them. *Held*, that the ability to thus discover his position was proof of negligence in not using the compass and lights before, and the tug was liable for the consequent loss of the tow.

Appeal from the District Court of the United States for the Southern District of Alabama.

This libel was filed by Rittenhouse Moore against the steam tug E. E. Simpson (Isaac H. Rogers, claimant) to recover for the loss of the dredge boat Lutin, which resulted from the alleged negligent grounding of the tug in Mobile bay. There was a decree for the libellant in the court below, and the claimant appeals.

The following opinion was delivered below by TOULMIN, District Judge:

There is no conflict in the evidence as to the material facts of this case; and the admitted law being that the tug was bound to bring to the performance of the duty she assumed reasonable skill and care, and to exercise them in everything relating to the work until it was accomplished, the question is whether the master of the tug was guilty of a want of reasonable care and skill in the management of his tow in any respect, as charged by the libelant. The want of reasonable care and skill is the want of ordinary care and skill,—such as would be exercised by a person of ordinary prudence under like circumstances. The want of either is a gross fault, and the tug would be liable to the extent of the full measure of the consequence. The Margaret, 94 U. S. 496. If the proof establishes that in what was done there was a lack of the usual care and skill, and that what was omitted to be done was within the power of the tug to do, and should have been done by any master of competent skill and experience, and that different conduct would probably have prevented the disaster, then the tug would be liable. "An engagement to tow does not impose either an obligation to insure or the liability of common carriers. The burden is always upon him who alleges the breach of such a contract to show, either that there has been no attempt at performance, or that there has been negligence or unskillfulness, to his injury, in the performance. Unlike the case of common carriers, damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services. But there may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it." The Burlington, 137 U. S. 386, 11 Sup. Ct. 138; The Isaac H. Tillyer, 41 Fed. 477. The burden of proof is upon the libelant to establish a case of negligence against the tug; but in some cases the facts may constitute a prima facie case of negligence which will impose on the tug the duty of explanation and exoneration. The L. P. Dayton, 120 U. S. 337–351, 7 Sup. Ct.