

NELSON, District Judge. The only question raised on the argument of the exceptions to the libel upon which the court is in doubt is whether the libel, having set forth a discharge of the cargo, should have also stated, in order to preserve a lien for freight and demurrage, the further fact that there was an understanding that such discharge was not a waiver of the lien. It is set forth in the libel that before such discharge a notice was served upon the consignee that the libelants would look to the cargo for freight and demurrage, and also that the consignee eventually discharged the cargo after such notice. I think this is a sufficient allegation that the delivery was not unqualified and absolute, but made with the intent to retain the lien. If it be true that before the cargo was discharged, or when the boat was at the dock of the consignee, notice of a claim and lien for freight and demurrage was given, an action in rem against the cargo can be maintained; and some authorities hold that notice even before the commencement of the suit is sufficient to sustain an action against the cargo to enforce the lien. Upon full consideration of the exceptions to the libel, they are overruled. Ordered accordingly.

THE FLAMBOROUGH.

SWITZERLAND MARINE INS. CO. v. THE FLAMBOROUGH.

(District Court, S. D. New York. May 23, 1895.)

INJURY TO FREIGHT—INSPECTION UNDER HARTER ACT.

Cargo having been damaged through defects of the carrying steamer which could have been ascertained by proper inspection and examination, *held*, that the inspection that was made was not such as "due diligence" under the "Harter Act" requires; and *held*, that the shipowners were chargeable with any negligence of their agents appointed to inspect the steamer.

This action was brought by the Switzerland Marine Insurance Company to recover losses sustained by its assured through jettison to and damage of cargo occasioned by a leak in the steamer Flamborough.

The Flamborough had taken cargo at New York for transportation to West Indian ports and when two days out encountered bad weather, and a few hours later began to leak. Thereupon some goods were jettisoned, but the leak continuing the steamer returned to New York. She was then docked for examination and it was found that 17 of her plates were worn out and that the leak had occurred through one of the plates wasting. The steamer was 27 years old and had been purchased from her former owners five months previous to the voyage. Her new owners were not familiar with shipping and at the time of purchase caused the steamer to be examined by an inspector on their behalf. After purchasing, they placed her under the management of an experienced agent in New York and did not themselves take part in such management. The steamer was not docked at the time of purchase, nor at any time subsequent thereto before the voyage upon which the damage arose. The condition of the plates was such that an examination upon a dock, or a careful examination while the vessel was afloat would have disclosed their weakness.

Butler, Stillman & Hubbard and Mr. Mynderse, for libelant.
Wing, Putnam & Burlingham, for the Flamborough.

BROWN, District Judge. The condition of the vessel, 27 years old, is proved by Mr. Congdon's examination to have been so worn in her plates and unserviceable that I find the inspection theretofore made could not be such as "due diligence" under the "Harter Act" requires. 27 Stat. 445.

I also find the owners chargeable in this respect with any negligence of their agents appointed to inspect.

Decree for libelants, with costs.

THE MANHANSET.

BACCUS v. THE MANHANSET et al.

(District Court, S. D. New York. June 6, 1895.)

SHIPPING—INJURY TO STEVEDORE—NEGLIGENCE OF OFFICER.

A stevedore's laborer working in the hold cannot recover against the ship for injuries occasioned by the fall of one of its officers upon him, through carelessness in walking upon an unguarded beam while in the discharge of his duties.

This was a libel by Rosario Baccus against the steamship Manhanset (Francis Duck, claimant), impleaded with Charles Hogan and others, respondents.

The libel was for injuries sustained by a stevedore's laborer, occasioned by the mate of the steamship falling down on him from an orlop deck beam. There was no flooring on the orlop beams, which were about 10 inches wide. In the course of his duties the mate was walking across one of the beams and testified he was in the exercise of care. Libelant's evidence was that the mate was in liquor. The mate lost his balance, and falling on the back of libelant, who was slinging tin, crushed him to the floor, damaging his kneecap.

Francis L. Corrao, for libelant.

Convers & Kirlin, for claimant.

BROWN, District Judge. There is not sufficient evidence of any negligence in the duties of the ship. Libelant's injury arose from the personal carelessness and fault of the officer in walking along the beam. I find no case in which a ship has been held for such a secondary result from the fall of a careless officer or member of the crew.

Libel dismissed, without costs.

THE FLINTSHIRE.

ULLMANN et al. v. THE FLINTSHIRE.

(District Court, S. D. New York. July 22, 1895.)

SHIPPING—DAMAGE TO CARGO BY SWEATING—EXCEPTED PERILS—BURDEN OF PROOF.

Where damage by sweating is expressly excepted in the bill of lading, the shipper, in order to recover for damage due to that cause, has the bur-