

cast on a ship lying at the dock or in the water, and receives additional injury; would this court have jurisdiction? It seems that both inquiries should be answered in the negative. So, in *The H. S. Pickands Case*, if it could be said that the injured man was on the ship, by being on the ship's ladder, and received any actionable injury thereon, this court would have jurisdiction, although the greater injury was received from contact with the dock. But the facts in that case are not sufficiently detailed to admit of accurate inquiry. It is said above that, in addition to the breach of duty, there must be an injurious effect from it upon the person or property of a person on the water, to give this court jurisdiction. What is injurious effect? If the libel showed that only injury entitling to nominal damages were received, it may be conceded that this court would not entertain jurisdiction; but it cannot be assumed that, when a person is thrown from a ladder, there would be nothing more of injury while falling than would be compensated by nominal damages.

In the present case it has been assumed that the libelant, while stepping on the ladder, was still on the ship; and, if that inference be correct, then he received the effect of the wrongful act on the ship. The libel alleges neglect in fastening the ladder to the ship, and therefore it may be inferred that the breach of duty arose on an appliance of the ship. The libelant was thrown from the ladder, and it cannot be assumed that, through nervous shock or otherwise, he received no injury until he struck the dock. But even so, the whole wrongful agency was put in motion and took effect on the ship, and thereby the libelant was hurled from his position on the ship, and, before he reached the dock, was subjected to conditions inevitably resulting in physical injury, wherever he finally struck. Therefore, may it not be concluded that a cause of action arose before the physical injury had been completed? This question does not require present decision, and is reserved, as it may be inferred that the libelant received some personal injury before striking the dock, although, upon striking, his injury was enhanced. It is intended to be decided at this time that if the libelant received any physical injury before striking the dock, although the sum of his injuries was not complete until he did reach the dock, this court has jurisdiction. In reaching this conclusion the court has been limited by the meager statement of facts in the libel. Upon the hearing of the merits, the facts may receive such modification or change as to demand, by the force of previous authority, a different holding. The exceptions should be overruled.

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THE HENRY B. HYDE.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1898.)

No. 431.

SHIPPING — LIBEL FOR INJURY TO GOODS — EXCEPTION IN BILL OF LADING — BURDEN OF PROOF.

Where a libel for injury to goods in shipment alleges that the injury consisted of breakage, the case is *prima facie* within an exception in the

bill of lading against liability for loss or injury from breakage, and the burden rests on the libelant to prove that the breakage occurred through the negligence of the carrier. 82 Fed. 681, affirmed.

Appeal from the District Court of the United States for the Northern District of California.

This was a libel by W. W. Montague & Co. against the ship Henry B. Hyde and its owners, Benjamin F. Pendleton and others, to recover for breakage of goods in shipment. From a decree dismissing the libel, the libelants appeal.

Linforth & Whitaker, for appellants.

Andros & Frank, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The appellants filed a libel against the ship Henry B. Hyde, whereof the appellees were the owners, to recover damages claimed to have been sustained by the libelants by reason of the breakage of certain goods which they had shipped by said vessel at the port of New York in December, 1892, for delivery at the port of San Francisco. It was admitted that the goods were received upon the ship in good order and condition, and that they were damaged while on the voyage. No evidence was introduced by either the libelants or the owners to show from what cause the breakage occurred. The bills of lading which the ship issued for the goods when it received them at New York contained the stipulation, "Not accountable for leakage, rust, or breakage." It was held by the district court that, by virtue of these words in the bills of lading, the carrier was *prima facie* not liable for the breakage, and that the burden was upon the libelants to show that the damage resulted from the carrier's negligence. This ruling is now assigned as error.

There is no controversy between the parties as to the effect of the stipulation limiting the liability of the carrier. It is conceded that the carrier may limit its liability by such a contract with the shipper, but that, notwithstanding such limitation of liability, the ship shall still be answerable for the negligence of its officers and employes. There is only one question, therefore, before the court, and that is, upon which party rests the burden of proof to show whether or not there was negligence? The rule seems to be well settled by the authorities that, in determining whether or not an injury to goods is of such a character as to come within an exception of liability which is provided for in the bill of lading, the burden of proof is cast upon the carrier; but that after it is once determined that the injury is of a nature, or has occurred from a cause, for which liability is excepted, it devolves upon him who claims damages to show that the loss occurred through the carrier's negligence. *The Delhi*, 4 Ben. 345, Fed. Cas. No. 3,770; *Vaughan v. 630 Casks of Sherry Wine*, 7 Ben. 507, Fed. Cas. No. 16,900; *Wolff v. The Vaderland*, 18 Fed. 733; *The New Orleans*, 26 Fed. 44; *The Timor*, 14 C. C. A. 412, 67 Fed. 356; *Clark v. Barnwell*, 12 How. 272; *Transportation Co. v. Downer*, 11 Wall. 129. In the present case no question arose concerning the nature of the damage that had been sustained. The loss was wholly

from breakage. It is so alleged in the libel. The ship was not accountable for breakage. There was nothing, therefore, for the carrier to prove in order to place the loss within the clause which accepted liability. In this respect the case differs from some of those which are cited by the appellants, such as cases where the carrier had stipulated against loss by the perils of the sea. *The Giava*, 56 Fed. 243; *The Warren Adams*, 20 C. C. A. 486, 74 Fed. 413. In such a case the duty rests upon the carrier to show that the damage resulted from the perils of the sea. In the present case the stipulation was explicit. The nature of the injury indicated for itself that it belonged within the specified exemption from liability. The burden of proof therefore rested upon the libelants to establish by the evidence that the breakage occurred through the negligence of the ship's employés. No evidence having been offered to the court to prove such negligence, we find no error in the decree dismissing the libel. The decree will be affirmed.

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#### THE PHOENICIA.

(District Court, S. D. New York. October 24, 1898.)

**CARGO DAMAGE—LEAKY PORT—CONTACT WITH STONE SLUICEWAYS AT HAVRE—MISFITTING BLIND—CONFLICTING EVIDENCE—BURDEN OF PROOF—PROPER INSPECTION NOT PROVED—UNSEAWORTHINESS.**

The new steamer *P.* on her first voyage from Hamburg to New York, when in mid-ocean on January 25th, was discovered to have a leaking port, by which cargo in compartment No. 4 was damaged. The port could not be screwed tight so as to stop the leak until the outside iron blind was removed; when that was removed the port was screwed water-tight. Upon arrival at New York the brass ring of the glass door was found to be bent inwards at the top and bottom  $\frac{1}{16}$  of an inch, on a vertical axis. The port in question was near the bridge about two feet and one-half above the water line, and 175 feet aft of the stem. A few bolts were found a little loosened about this port, and in its vicinity, and there were some scratches there; but no bolts were loosened nor was damage done for 75 feet or upwards forward of the port, nor until about abreast of the foremast where there was again some damage on the same starboard side of the ship, which arose from contact with fenders on entering Havre or departing. The expert evidence showed that violent contact with the side of the ship where the port was, might cause the glass door to be sprung, or the blind to catch, as it was found when the leak was discovered. There was no proof of such inspection at Hamburg before the ship sailed as would show the port to have been then water-tight; *held* (1) that the burden was upon the ship to prove seaworthiness at the time of sailing; (2) that in the absence of sufficient inspection of the port to show seaworthiness on sailing, the ship took the risk of her inability to prove satisfactorily that the leak was caused in fact by the contact at Havre; (3) that upon a careful consideration of all the facts and circumstances, the ship had not sustained this burden, and the probabilities were against her contention that the leak was caused by the contacts at Havre, and that the ship was therefore answerable for the loss.

Cowen, Wing, Putnam & Burlingham, for American Sugar-Refining Co.

Butler, Notman, Joline & Mynderse, for Lamb et al.

Wheeler & Cortis and Everett P. Wheeler, for claimants.