

staunch and well-manned ship, no such presumption can be invoked. And where for a considerable time she has incurred such perils, and shown herself staunch and strong, any such presumption is not only overthrown, but the fact of her previous seaworthiness is persuasively indicated."

We conclude in the present case that the vessel was seaworthy, and that the rivet was fractured and loosened by the extraordinary strain inflicted upon it by stress of weather.

We have not overlooked the contention for the appellant that the steamship should be held liable for negligence because of the omission to open the sluices during the 20 days of the storm. If this was a negligent omission, it occurred as a part of the "management of the vessel"; and the owners having exercised due diligence to make her in all respects seaworthy, and properly manned, equipped, and supplied, she is not liable for faults in her management, and the terms of the Harter act (section 3) apply. In the recent case of *The Silvia* (decided at the present term) *supra*, the supreme court defined the meaning of the words "management of said vessel," as used in the "Harter Act," as follows:

"They might not include stowage of cargo, not affecting the fitness of the ship to carry her cargo. But they do include, at the least, the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas."

The decree is affirmed, with costs.

THE FREY.

(District Court, S. D. New York. March 10, 1899.)

1. SHIPPING—DAMAGE TO CARGO—UNSEAWORTHINESS FROM IMPROPER LOADING.

The loading of drums of glycerine, which, from their shape and weight, require care in loading, in the between-decks, without filling the entire cargo space to prevent them from jumping, and when the entire loading was so light as to bring the glycerine very high above the water, where it would be subject to the greatest effect of the rolling of the vessel, and the result of which was that the drums shifted and the cargo was damaged thereby, although no extraordinary weather was encountered, constitutes such improper loading as rendered the vessel unseaworthy at time of sailing, and the damage resulting is not within exceptions in the bill of lading against "unseaworthiness" or "damage by leakage, breakage, or contact with other goods," since the bill of lading also bound the owners to the exercise of "due diligence to render the vessel seaworthy"; nor are they, for the same reason, relieved from liability by section 3 of the Harter act (2 Supp. Rev. St. p. 81), which does not cover negligence in loading, stowing or ballasting the ship.

2. SAME—HARTER ACT—EFFECT ON FOREIGN VESSELS.

Foreign vessels being entitled to the benefit of the Harter act (2 Supp. Rev. St. p. 81), they will be held subject to its limitations by courts of the United States in suits for damages to cargo arising on the high seas on voyages to this country.

This was a libel by Frederic Marx and others against the steamship *Frey* for damage to cargo.

Carter & Ledyard, for libelants,
 Convers & Kirlin, for claimant.

BROWN, District Judge. The above libel was filed to recover the damage caused to some drums of glycerine and to certain bales of rabbits' skins on board the steamship Frey, on a voyage from Dunkirk, France, to New York in January, 1898. Through excessive rolling of the ship, the drums of glycerine stowed in the 'tween-decks, forward of the forward hatch, got adrift and shifted. Some of the drums were cut and their contents spilled, which, after the ventilator had been carried away, leaked through the opening upon the rabbits' skins in the hold beneath. The defendant claims that the loss arose from the heavy weather, constituting a sea peril, and further claims exemption under the exceptions contained in the bill of lading.

The Frey is a schooner-rigged steamer of 1,948 tons net, 3,000 tons gross, 322 feet long, 41 feet beam and drawing about 23 feet. Upon this trip she was very lightly loaded, carrying only about one-sixth of her cargo capacity. Drums of glycerine constitute a somewhat difficult cargo to stow safely for heavy weather, both from their shape and their weight. The libelants gave some evidence tending to show that such drums should not be loaded in the 'tween-decks; but this evidence is, I think, fully met by the evidence for the claimant, showing that stowage in the 'tween-decks is by no means uncommon, and that it is safe and proper, if the other weights of the cargo are properly distributed, and the ship properly ballasted. The evidence for the claimant also, in my judgment, shows good ordinary stowage of the drums of glycerine in the 'tween-decks considered by itself alone and independently of its relation to the light loading of the ship, except possibly in one particular, namely, the absence of a complete filling of the cargo space up to the deck above in order to prevent the drums from jumping. In this case, as I understand the evidence, there was more or less of vacant space above the drums, which permitted them to jump. But besides this, the evidence shows two additional difficulties, viz.: (1) That the extremely light load brought the glycerine in the 'tween-decks very high above the water where the rolling was most felt; and (2) the lack of sufficient additional weights above, whether of cargo or of ballast, to prevent short and jerky rolling, and to make the vessel's motions easy. To avoid these difficulties with so light a cargo, the drums of glycerine, being from their nature somewhat difficult to stow securely, should have gone in the lower hold, and other and sufficient heavy weights stowed above to make the vessel easy.

The defendant contends that the shifting of the cargo should be attributed to sea perils. The proof leaves no doubt that this shifting was due to the excessive rolling of the ship; and the only question in this regard is, whether the excessive rolling should be ascribed to extraordinary weather, or to the improper loading and ballasting of the ship. On careful consideration of all the testimony upon this question, I do not think that the excessive rolling of the steamer can fairly be ascribed to extraordinary weather. There were one or two gales, but they were not of any unusual character; and neither arose until after the shifting of cargo began. There were heavy seas and cross seas; but the testimony does not show that it

was these seas that were extraordinary, but the behavior of the ship. The steamer shipped no sea forward, and but one or two aft, which, as the master says, were of no account; nothing on deck was carried away; there was no unusual racing of the propeller; her engines were kept in motion about as usual, and the ordinary voyage of 17 days was prolonged but a single day. On the third day after passing the Lizard, it was found that the drums of glycerine were loose, and on account of the heavy rolling of the ship it was impossible to readjust them, and the whole cargo in the 'tween-decks forward was soon in confusion. The ship had never behaved so before; but at that time there was no gale, but only a heavy rolling sea. The rolls of the ship were short and jerky; and the glycerine in the 'tween-decks, being high above the water, was more affected than it would have been in the hold. Under such conditions, it is clear that the 'tween-decks was not a proper place for drums of glycerine; or if stowed there, that they should have been more thoroughly wedged in from the top as well as the sides, and that more weights should have been stowed above.

Questions pertaining to the proper distribution of heavy and light cargo or proper ballasting and stowage in order to make the ship sufficiently easy and safe where the cargo is light, are not questions that devolve upon the shipper to determine, nor is he in any way responsible for their solution. The responsibility is upon the carrier alone; and as I cannot find in this case that there was any such extraordinary weather or seas as might not have been reasonably anticipated in crossing the Atlantic in the month of January, or any such weather as naturally to cause such a shifting and destruction of cargo in a well-loaded and well-ballasted ship, I must ascribe the primary cause of this loss to the deficiencies in the ship's condition in that regard at the time of sailing; in other words to unseaworthiness at the time of sailing as respects the needed loading and ballasting for the carriage of glycerine in the 'tween-decks as it was there stowed.

The exceptions in the bill of lading do not reach this case. Conceding, as the respondent claims, that the exceptions of "unseaworthiness," "damage by leakage, breakage or contact with other goods," throw the burden of proof in the first instance upon the libelants to prove some negligence in the ship (*The Pereire*, 8 Ben. 301, Fed. Cas. No. 10,979; *The Flintshire*, 69 Fed. 471; *The Lennox*, 90 Fed. 308), this burden is met when it is made to appear that the leakage, breakage and contact arose from shifting of the cargo, caused by the improper condition of the ship at the time she sailed (*The Thames*, 61 Fed. 1014; *Kopitoff v. Wilson*, 1 Q. B. Div. 377; *The Whitlieburn*, 89 Fed. 526). As the shipowner, moreover, is responsible for any shortcomings of his agents or subordinates in making the steamer seaworthy at the commencement of the voyage for the transportation of her particular cargo (*The Mary L. Peters*, 68 Fed. 919; *The Alvena*, 74 Fed. 252, 254, affirmed in 25 C. C. A. 261, 79 Fed. 973; *The Niagara*, 77 Fed. 334, affirmed in 28 C. C. A. 328, 84 Fed. 904, 905; *The Colima*, 82 Fed. 678), he is in this case precluded from claiming exemption for unseaworthiness by the

terms of the bill of lading, which make it a condition that the owners shall have "exercised due diligence to make the vessel seaworthy"; and for the same reason, the Harter act (2 Supp. Rev. St. p. 81) does not avail him. As was observed in the case of *The Whitleburn*, 89 Fed. 528:

"The loading, stowing and ballasting of a light cargo are all so interdependent on one another, as affecting the seaworthiness of the ship, that they all fall under the first section of the act, which expressly confirms the owner's previous responsibility; and to cases which fall under the specific provisions of the first section, the general exemptions of the third section are not applicable. *Worsted Mills v. Knott*, 76 Fed. 582, 584; *The Colima*, 82 Fed. 665."

Nothing has been cited from the law of France, from which country the vessel sailed, showing that her owners can there lawfully exempt themselves from responsibility for negligence in not making the ship seaworthy on sailing; nor do I understand that to be the French law. But even if it were, the provision in this bill of lading shows a contrary stipulation in this case; and in any event, since the passage of the Harter act, no validity could be given to such a defense in our courts for damage arising on the high seas from negligent and unseaworthy loading upon voyages to this country. As foreign vessels receive the benefits of that act, they are bound by its limitations and are subject to the declared policy of this country in that regard, as established by the federal decisions and by the positive provisions of that statute. *Worsted Mills v. Knott*, 27 C. C. A. 326, 82 Fed. 471, affirming 76 Fed. 582, and cases there cited; *The Silvia*, 15 C. C. A. 362, 68 Fed. 230, 231.

Decree for the libelants with costs.

THE GUADELOUPE.

(District Court, S. D. New York. March 13, 1899.)

1. SHIPPING—DAMAGE TO CARGO—SEAWORTHINESS.

The beams of the main hatch of a vessel had been cracked some time previous to a voyage, and on the discharge of her cargo, at the end of the voyage, were found to be in worse condition and her deck to have sunk in consequence. *Held*, that such fact, where the vessel encountered a hurricane during the voyage, which would account for her condition at its end, did not overcome the presumption of her seaworthiness when she sailed, arising from the fact that the beams had been repaired and strengthened, and that her classification had been kept up thereafter on repeated surveys, and had not expired.

2. SAME—MANAGEMENT OF SHIP—REPAIRS IN PORT OF DISTRESS.

When a ship is obliged, during a voyage, to put into a foreign port for repairs, owing to injuries received in a storm, an error of judgment of the master, as to the extent of repairs necessary, where he exercises diligence and care, and acts in good faith, pertains to the management of the ship, within section 3 of the Harter act (2 Supp. Rev. St. p. 81), and does not render the owners liable for an injury to the cargo which might have been prevented had more extensive repairs been made.

In Admiralty. Damage to cargo. Sea perils.

Cowen, Wing, Putnam & Burlingham, for libelants.

Benedict & Benedict, for claimant.

BROWN, District Judge. On the 31st day of March, 1898, the French schooner *La Guadeloupe*, being then at Santos, Brazil, was chartered to E. Johnston & Co. for the carriage of a cargo of coffee to New York. She was loaded by the charterers and left Santos on May 4, 1898. Shortly after, she met with a pampero, or hurricane, in which she lost her anchors, damaged her windlass, and was subjected to considerable strain, whereupon she returned to Santos for repairs. After an official survey there, and the making of all such repairs as were deemed necessary, she again sailed on the 31st day of May, and arrived in New York on the 13th of August. Upon discharging, considerable of the coffee was found damaged by sea water, to recover which damage the above libel was filed.

1. The libel charges unseaworthiness on sailing from Santos, and bad stowage. The evidence shows that two beams of the main hatch had been cracked at some time previous to this voyage, and that under the direction of the Bureau Veritas repairs had been made and the beams strengthened by nailing slabs or planks across the cracks in or prior to December, 1896. Her classification had been kept up on repeated surveys, and had not expired at the time this voyage was made. I am of opinion that the evidence offered is sufficient to afford presumptive evidence of seaworthiness at the time the vessel first sailed from Santos, and that the extraordinary weather she soon after experienced, together with her subsequent voyage, is sufficient to account for the widening and increase of the cracks in the beams, and for the sinking of the deck, as they were found to exist after her discharge in New York.

2. The evidence does not show any established custom requiring in the 'tween-decks of a ship like this any wooden dunnage between the matting and the ceiling. The mode of stowage used in this vessel seems upon the evidence to have been equally common, and to be regarded as good and sufficient stowage.

It was doubtless the duty of the master to use diligence in making all necessary repairs at Santos to put the ship in a seaworthy condition, and for that purpose to make such surveys as were apparently needed in order to determine what repairs were necessary. This obligation, however, was not a warranty, but a duty to use due diligence only. An official survey as I have said was made, and everything was done by the master that was recommended. But the question whether the cargo should be removed, and to what extent, for the purpose of examining the interior of the ship, thereby incurring certain considerable expense, was a question for the exercise of the master's judgment. There is nothing to indicate that he did not act fairly and in good faith; he consulted, as was proper, with the agent of the underwriters representing to a large extent the cargo interests, and they opposed any opening of the hatches, as no leak had yet been disclosed. If any error was committed in this respect, I think it was an error of judgment. It was an error, moreover, pertaining to the "management" of the ship; since the question arose after the voyage had commenced, at a port of distress, far from the home port, and away from any supervision by the owners, and was wholly subject to the master's determination.

In procuring the survey and doing the repairs, as the master acted with due and reasonable care and diligence, the case falls within the express provision of section 3 of the Harter act (2 Supp. Rev. St. p. 81). This renders it unnecessary to determine whether the injury to the deck occurred solely during the hurricane immediately before the repairs, or partly from that cause and partly from the subsequent additional strain upon the hatch beams, through the heavy weight of water taken aboard on the voyage to New York after the repairs were made.

The libel should be dismissed but without costs.

UNITED STATES v. YOUNGER.

(District Court, D. Washington, N. D. March 6, 1899.)

SEAMEN—PENALTY FOR DETAINING CLOTHING—PROCEEDING TO ENFORCE.

A criminal information will not lie for the violation of 28 Stat. 667, c. 97, which exempts the clothing of a seaman from attachment, and provides that any person who shall detain such clothing when demanded by the owner shall be liable to a penalty, as a penalty imposed by an act of congress is a debt, to be recovered by a civil action, and for which, in a state where imprisonment for debt has been abolished, imprisonment by a federal court is prohibited by Rev. St. § 990.

This is an application for a bench warrant on an information filed by the district attorney of the United States.

Wilson R. Gay, U. S. Atty.

HANFORD, District Judge. In this case the United States attorney has filed an information charging that the defendant did unlawfully detain the clothing of a seaman, contrary to the statute of the United States in such case made and provided, and has moved the court, *ore tenus*, to order a bench warrant to issue for the arrest of the defendant. The information is founded upon 28 Stat. 667, c. 97, which provides:

“That the clothing of any seaman shall be exempt from attachment, and that any person who shall detain such clothing when demanded by the owner shall be liable to a penalty of not exceeding one hundred dollars.”

And it is proposed to prosecute the case for the recovery of the penalty in the manner and by the forms of procedure appropriate in criminal cases, and the purpose of this motion for process is to subject the defendant to imprisonment, or compel her to give bail for her appearance while the case shall be pending. The statute, however, does not declare the act of the defendant to be a crime, nor authorize procedure of a criminal nature for the purpose of recovering the penalty. Blackstone, after saying, in effect, that, on the principle of an implied original contract to submit to the rules of the community whereof we are members, a forfeiture imposed by law or an amercement immediately creates a debt, in the eye of the law, and such forfeiture or amercement, if unpaid, works an injury to the party or parties intended to receive it, for which the remedy is by an action of debt, then proceeds as follows: