

NEW JERSEY

COURT OF

ERRORS AND APPEALS

IN THE LAST RESORT IN ALL CAUSES.

IN THE SUPREME COURT OF NEW JERSEY.

LUCIUS TUCKERMAN, Wm. MULLIGAN,
JOS. TUCKERMAN, AND DAVID W.
WEISS,

vs.

THE STEPHENS AND CONDIT TRANS-
PORTATION COMPANY.

} In Case.

C. PARKER and H. YOUNG,

For plaintiffs.

N. PERRY, Jr. and T. N. McCARTER,

For defendants.

NEWARK:

NEWARK DAILY JOURNAL STEAM PRINT.

1868.

New Jersey Supreme Court

ESSEX CIRCUIT

THE STATE OF NEW JERSEY, ss. I, Clerk of the Court, do hereby certify that the following is a true and correct copy of the original as the same appears on the records of the Court.

James Tuckerman, William Madison,
Joe Tuckerman and David W. Ware,

The Stephens & Condit Transportation
Company,

On the fourteenth day of January, 1887, the above case came on for trial before the Honorable David A. Hoopes, one of the Justices of the said Court, at the Court-house held at Newark, in and for the said County of Essex, upon the papers (filed in this cause) returned on a writ returnable for the trial thereof and the said plaintiff, by their counsel, having requested that the files, copies and examined as a witness in the said cause in support of the issue on their part.

Witness My Hand, who being duly sworn, testified as follows: I live in Jersey City—I am one of the directors of the said Company, and one of the parties to the said lease, and I have examined the files, copies and examined as a witness in the said cause in support of the issue on their part. I have also examined the files, copies and examined as a witness in the said cause in support of the issue on their part. I have also examined the files, copies and examined as a witness in the said cause in support of the issue on their part.

And being interrogated by the Court, they say: We are not aware of any other copies of the said lease, and we are not aware of any other copies of the said lease.

(The Court's counsel read before me the same)

ATTEST: My Hand and Seal, this 15th day of January, 1887.

CLERK

This was second trial - the first
verdict being on a mandate see

NEW JERSEY SUPREME COURT,

ESSEX CIRCUIT.

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Lucius Tuckerman, William Mulligan,
Jos. Tuckerman and David W. Weiss.

vs.

In Case.

The Stephens & Condit Transportation
Company.

On the Fourteenth day of January, 1868, the above cause came on for trial before the Honorable David A. Depue, one of the Associate Justices of the said Court, at the Circuit Court held at Newark, in and for the said County of Essex, upon the pleadings, (*pro ut* the same); whereupon a Jury was empanelled for the trial thereof, and the said plaintiffs, by their counsel, having opened their case to the Jury, called and examined as a witness in the said cause, in support of the issue on their part.

David W. Weiss, who, being duly sworn, testified as follows:— I live in Jersey City—I am one of the firm of Tuckerman, Mulligan & Co., and one of the plaintiffs in this suit. Joseph Tuckerman, Lucius Tuckerman, William Mulligan and myself, in 1865, were members of that firm—the business of that firm is, manufacturers of iron at Saugerties, New York, having an office in New York City. In November, 1865, we were the owners of pig iron, 200 tons of Glendon Foundry No. 2. When we bought it, it was lying at the dock of the Stephens & Condit Transportation Company, Newark. I engaged that Company to ship it for us to Saugerties. When we bought that iron it was the 8th of November, 1865—we wrote to Condit & Co. that we had bought it from W. S. Tisdale & Co.

And being interrogated by the Court, says:—We wrote them the letter now produced.

And being further examined, says:—The one now produced is the original letter.

(Plaintiff's counsel read letter, *pro ut* the same.)

And witness further said :—Then we did not get an answer, and we wrote this letter on the 13th.

(Plaintiffs' counsel read letter of 13th November, *pro ut* the same.)

Then we got a telegram stating that it could not be shipped at \$1, but at \$1.50. There is a copy of the telegram there—there is no date to the telegram, but we received it on the 13th of November. It said, “We cannot get iron freighted to Saugerties less than \$1.50 per ton, shall we give it?” The telegram is signed “A. Smalley, Superintendent.

And being interrogated by the Court, says :—I believe we got the telegram on the 13th of November.

And being further examined, says :—In answer to that telegram, we telegraphed, “pay \$1.50 freight to Saugerties.” The next we knew was, we received by mail without any other writing the bill of lading. That was on or about the 19th of November—18th or 19th. I do not know the day of the week on which we received it. I cannot remember the day of the week. I say 18th or 19th because the bill of lading is dated 18th or 19th and probably it came a day after. This is the bill of lading—(plaintiff read bill of lading dated 18th November, 1865, *pro ut* the same.) When we received the bill of lading we only knew that the barge was in New York, from what that paper told us. There was only that advice. Bill of lading was enclosed in an envelope. We did not know from where and when the barge was to start. We never got the iron. No part of it either. Mr. Smalley informed us that the the barge had sunk. That was, I should think, either the 22nd or 23d of November, or may be the 21st.

And being interrogated by the Court, says :—Of November.

And being further examined, says :—It was at New York where Mr. Smalley informed us. The value of the iron was, what we agreed to pay for it at Saugerties, \$56.50 per ton—\$55 for the iron and \$1.50 for frieght. On the 24th of November we paid Tisdale & Co. We paid \$11,000—at the rate of \$55 per ton. The freight we never paid at all, because we never got the iron at all.

And being cross-examined, witness says :—we have no other means of knowing when we received the bill of lading, but by its date. Mr. Smalley said the Barge had sunk. I asked him the reason. He said the barge sprung a leak, or sprung a plank and sunk. He said he was going to take up the Barge and iron if he could. I don't know that he said any more. He said he would let us know what he did, but he never

did. Well, I suppose I mentioned that we might have saved him by insuring it. I did not mean save the iron, I mean Mr. Smalley. I don't recollect anything particularly else said. Yes; he said it was a good barge. Nothing that I can remember else was said. He did not say how it came to spring a plank. He mentioned that it was a stormy night, but he did not say that was the reason—it was merely a cursory remark that it was a stormy night, or something like that. How he brought it in I cannot say. I did understand him to mean that the barge sprung a plank because of the stormy night. He did not say how the plank was sprung. He said it was a stormy night I did not take that to be the reason. I suppose he intended that as one of the reasons, that he mentioned it. He said it was a very stormy night. He said nothing about the springing of the plank. I just mentioned to Mr. Smalley that we might have insured it, and saved him because we told Mr. Smalley decidedly then that we should hold him liable for it. I did not say that we intended to have insured it but forgot it. I suppose we might have done it. I did not say we intended, because we did not intend to.

And being re-examined, witness says:—We told Smalley that we should look to him for the iron. He said that he did not know whether he would be liable or not. Something to that effect.

And being re-cross-examined, said:—The Captain of the Barge was with Smalley in New York—Mr Tuckerman was there too.

And Plaintiffs also called *Andrew A. Smalley*, who being duly sworn, says:—On the 27th of February 1865 I was Superintendent of this Company. I presume I caused the advertisement now produced to be advertised in the papers of this city. One or other of them.

And being cross-examined, witness says:

(Defendants' counsel here asked the witness "what was the business of the defendants at the time of that advertisement?" to which plaintiffs' counsel objected; and the Court over-ruled it on the ground that it was not a cross-examination. The defendants' counsel prayed exception, which was granted.)

Defendants' counsel further asked the witness "Did the Company have any regular line of boats except between Newark and New York?" This question was objected to and over-ruled for the same reason, and exception prayed and granted.)

The meaning of the last clause of the advertisement "Barges and other Vessels furnished at short notice to any point in the North or East Rivers on reasonable terms," is with reference to furnishing Barges or Vessels in the city of New York or Brooklyn in the North or East river—whenever there are convenient docks to get to.

(Plaintiffs' counsel withdrew their objections to the questions over ruled.)

And being further cross-examined, witness says:—At the time of the advertisement the business of the Company was transporting between Newark and New York. They had no regular line of boats except between Newark and New York except, that they did one summer run a boat between New York and New Brunswick.

And being interrogated by the Court, says:—I think summer of 1865 or 1866—I think 1865.

And being re-examined, says:—It stopped at Amboy.

And being further cross-examined, says:—That was the Magenta. The Company had no regular line between Newark and Saugerties in November 1865—or at any time while I was Superintendent. The Company occasionally took jobs for transportation other than on usual line as in this case. The outside business had no established rates—they were regulated by special contracts. Except between Newark and New York we had no regular rates.

And plaintiffs' counsel read the advertisement, *pro ut* the same.

And being re-examined, the witness said:—It is exactly what I meant that the latter clause of the advertisement "Barges and other vessels furnished at short notice, to any point, &c.," are points adjacent to New York. That was the only job I know of to Saugerties during the term of my superintendence—I do not now recollect of any before my superintendence, to Saugerties. The Transportation Company had three side-wheel steamboats, one propeller and two barges at that time. The side-wheel steamboat "Thomas P. Way," made a regular trip between Newark and New York—so did the Jamaica—the passenger steamboats sometimes made excursions, they took Barges along sometime. The "Mayo" is not a passenger boat. The "Magenta" and "Thomas P. Way" plied between Newark and New York. The barges did not run regular hours—they were detained in Brooklyn, North river, New York side. Both barges run regularly. This barge which ran up the river very seldom went outside.

The Plaintiffs' Counsel offered the certificate of the Incorporation of the Company in evidence, *pro ut*, the same after which they rested their case.

The Defendant's Counsel moved the Court to non-suit the plaintiffs, but the motion was refused, and exception was prayed, and his exception is hereby sealed accordingly.

DAVID A. DEPUE,

Jus. Sup. Court.

Whereupon Defendants opened their defence, and re-called and examined as a witness, *Andrew A Smalley*, who further says :—

I was Superintendent for the defendants from 1864 to 1866—two years. The Iron was consigned to us by the Glendon Iron Company of Pennsylvania, and by them sold to Tisdale & Co., New York. While in New York, by Tisdale & Co. I understand it was sold to Tuckerman, Mulligan and Co.—It was prior to November, 1865, but I cannot say whether that year or the year before it had been received at our Dock ; we held it on storage for Tisdale & Co. We were informed by Tuckerman & Company of the purchase of 200 tons of Iron from Tisdale & Co., and requesting to have it shipped to Saugerties, and mentioned that it would be taken for \$1 a ton. This is on the 8th of November. I endeavored to get vessels to take the Iron at the price. It was a very busy season, and vessels would not do it; I inquired at New York and Newark. After received a second letter from Tuckerman & Co. I sent word that it could not be done for less than \$1 1-2 a ton one captain had estimated that he would do it for \$1 1-2 per ton. Not finding one vessel that would take the whole I concluded to ship it on my own barge. We shipped it on the Barge "Mayo." We received information from Tisdale & Co. that they had sold it to Tuckerman & Co. There is dispatch here and letter too ; the dispatch is dated November 9th.

And being interrogated by the Court, says :—The dispatch dated November 9th, is a telegram by Tisdale & Co., directing us to weigh out 200 tons of Iron to Tuckerman & Co., and then writes us a letter of the 22d of November.

And being further examined says :—I tried to make arrangements to get the freight at \$1. That bill of lading was the ordinary bill of lading issued in such cases. I know of no regular carriers between Newark and Saugerties. There are none ; there were none I knew

of at the time. If I had obtained it there was no regular line to Saugerties. If I had made arrangements it must have been on special contract. We have shipped large amounts of Iron for different parties. We should have made contract of that character. It was precisely the same contract as if made for third party. I don't know of our own vessel ever taking Iron to Saugerties. We have shipped it on different vessels, but not our own. Not being able to find a vessel we substituted our own. I was the owner of the "Mayo" from 1859 to 1862.

I bought her in 1859 of Mr. Christie who represented Johnson's line of Transportation in New York. I bought her the same time that I bought the steamboat Jamaica. In 1862 I sold her to the Stephens & Condit Transportation Company. In November 1865 she had been, the year previous thoroughly overhauled and put in complete order. It was either in 1863 or 1864—I would not be positive about that. It was done by the Stephens, & Condit Transportation Company. I think Mr. Richards done the work—I think he did the whole of it. Mr. Richards is a shipbuilder in this city. I did not at the time notice the loading of this barge—I saw her after she arrived in New York. She left here on Monday morning and I saw her Monday evening. I think it was Monday the 20th of November as she was lying near the foot of Dey street, city of New York where the boats landed. I looked at her with the view of seeing the condition she was in. I noticed she was not loaded as heavy as we had loaded her—her capacity was to carry 25 to 30 tons over what she was loaded with. She was loaded with 200 tons of Pig Iron and 13 tons of salt hay, placed over her main deck. Her load was stowed. I don't know what portion in the hold and what on deck. I saw Iron on deck after she was loaded. I did not see the loading of the Iron. She was trim in the water—as nearly so as you can get a vessel of that class—as nearly so as possible. She did not seem much out of trim or I should have noticed it. She went up that night. Everything was perfectly satisfactory to me. I looked how she was loaded as was my custom. She has carried as high as 250—frequently 240 tons. I have been engaged in the transportation business between Newark and New York somewhere about 10 years; it is 9 years since I bought Johnson's line.

And interrogated by the Court, says:—I have been engaged in the transportation business about 9 years.

And being further examined, says:—I resigned business as Superintendent in February 1866, and sold out my whole interest soon after. During the time I was occupied with the transportation business between Newark and New York I became acquainted with the manner of loading iron on barges. I had the management of loading a good many thousands of tons for many years. It was invariably loaded on deck. Barges are built full; they are built of beams and timbers for that purpose—to carry on main deck. Sometimes a portion of the cargo was put in the hold but not generally on barges of that class. I have seen a great deal of Iron loaded—have shipped large amounts of Iron for these parties and other parties; shipped it as agents for the owners—as Forwarders. I gave my personal attention to this barge after it became the property of the Company. I was there almost daily during the time she was overhauled. I considered her a first-class Barge in every respect, both as to model and as to strength. We had, prior to this last overhauling she had, had the guards, extending out thus, taken out, to be more steady. All vessels are inclined to crankness built as she was. I mean by crankness, inclined to roll over. Taking off her guards had the effect of making her more steady, and stand up better. If new timbers were required they were put in. She was thoroughly overhauled to make her entirely secure—we spared neither pains nor expense in doing it. I learnt that the Iron sunk up the river. As I understood it. I saw Tuckerman & Co., after the loss. I think I heard of the loss on Tuesday night sometime; on Tuesday at any rate.

And being interrogated by the Court, says:—On Tuesday the 21st.

And being further examined, says:—Early next morning I went to New York and called on Tuckerman, Mulligan & Co., and notified them that the Barge was lost—with all on board. I think I called twice the same morning. I saw Mr. Tuckerman one time and this gentleman, Mr. Weiss one time. The captain of the vessel was with me once. Miles McKeon. I enquired whether they had insured the Iron or not. I told them I had sent the bill of lading on Saturday evening, and in time to get it insured. Mr. Weiss said they intended to get it insured but had neglected it. He asked me what was the character of the vessel and who she belonged to. He made several inquiries about her. I told him she was a first-rate vessel and that we were the owners of her. That is about the end of it. I have no recollection of anything being said about holding us responsible. I think

Mr. Tuckerman said on that day that he had been taking advice and said we were liable. I told him she had been lost in a gale, as I had heard from the captain. I have known Miles McKeon nearly the whole time I have been in business. He has been a boatman. Master of boat most of the time. I consider him one of the most competent men we had. We gave him one of our best vessels to run. That was our usual custom.

And being cross-examined by Plaintiffs' counsel, witness says:—
The Mayo was not a new vessel. I don't know her age. I have no recollection about her age—whether built in 1842. Her papers will show that; the Custom House certificate, or register will show that. I took out certificate there. I think probably I there made representations of what her age was; whatever the papers show undoubtedly was right; whatever representation the papers show was correct, so far as I had knowledge. I don't know that she was built for special purposes. She was not built for canal purposes on Raritan canal. She was built for the North river, and used in the North river. She was built at New Baltimore, up the North river. I have heard that she was sunk once before. I don't know that of my own knowledge. I think she was repaired during that year I sold her; during the season sometime; not immediately after I sold her. I think she came into the Company January or February, 1862. I mean during the navigating season, from the time of opening to closing. Previous to being repaired in 1862 she was overhauled the first year I bought her—after buying her of Mr. Johnson, in 1859. I think she was taken out on Dry dock from the time she was first repaired after sold, to the time of the accident; the ship builder can tell better about that than I can. She was busy unless undergoing repairs. She was generally busy. Her guards were taken off the season following that on which I sold her to the Stephens and Condit Transportation Company. I think we were not expecting to repair her again at the time she was taken out. It was at the close of the season, and we considered her in good order and no occasion for repairs. I have no recollection of Mr. Richards being asked how soon he could have her on the dock. We sometimes had them out on the dock as a matter of safety, without knowing that they wanted repairs. When we shipped Iron, so much as I saw, it has been generally shipped on barges. We shipped Iron to Troy and Albany. I cannot name what barges. I don't recollect sending any on this barge. I have no recollection sending any only this load. They

were loaded on deck. It depends on the structure and character of the vessel, if Iron is as secure on deck, as in the hold. I should think occasions might arise when it would be better to load her in the hold; notwithstanding; we generally load on the deck. This Barge was raised with some Iron in her. I don't know whether we should have secured more Iron if it had been loaded in the hold. We might and might not have got more. Her deck had gone; the Iron did not all go out. I suppose one reason that it is loaded on deck is, it is easier to handle. I do not think that either ourselves or anybody would load it on the deck if it was not considered safe; It is undoubtedly more convenient to handle when loaded on the deck. I cannot tell what reasons Captains have for doing it. I think it is more convenient to load on deck than in the hold; my idea is that it is ordinarily equally as safe. I may have directed Barges to be loaded differently to what this was loaded but not perhaps for the reason that it was safer. Sometimes it is required to have the load stowed away in the hold. It depends on the character of the freight; I have no recollection of giving instructions to have her loaded in the hold.

We have carried 240 tons of Sulphur upon this Barge. Sulphur is of the substance of flour. It is carried in bulk. The usual plan is the hatches are opened and it is wheeled on her, and it runs down as it might, by the hatches being open. We carried it in the hold, so far as it would run down, without brushing and shovelling away in the hold; there would be a considerable portion run down; the hatches are opened; one-quarter or one-third of the load would run into the hold. She went to some point in the East river and got it and brought it to Newark. She was loaded from a ship and it was thrown down, and the hatches were open to catch it. She was loaded in the hold when loaded with coal; about the same proportion would run in the hold as when loaded with sulphur. When we carried 240 tons, we were compelled to open the hatches when loaded with coal and sulphur. Of that 25 or 30 tons might be got into each hatch. She had not capacity to carry so much, except some of it was in the hold. She usually brought coal from New York here. It was coal of the Gas Light Company, Brooklyn, and brought here to the Gas Works. We never sent her with coal from here anywhere. I don't think we have sent her with coal up the North River anywhere. We sometimes sent our own Barges up the North River for

coal. This Barge was loaded with hay as well as iron. The hay was stowed on the top of the iron. She had a hurricane deck and the hay between decks. The hay was in bales. It was protected from the weather by canvass running all round her from upper deck down to her railing; canvass curtains. I have no recollection about directions given respecting the height of the combs round the hatches when she was repaired. I learnt she was loaded when I came from New York. I did not see the Iron upon her. I heard she was loaded. I think that was the 20th of November. The telegram was on November 13th. It said pay \$1,50 per ton freight. That was just one week from receipt of telegram to her being loaded. I could not get the vessel is the reason I did not send it. We wanted to get another vessel and did not want to send it at all in our own. We were instructed by them to take up a vessel; I think she is not narrower than other Barges, considering her length. She has 23 feet beam; not much over 100 feet in length.

And being re-examined, says:—We sent our own vessels for our own coal. The Transportation Company's own coal from the Hudson River.

And Defendants also called as a witness *Miles McKeon*, who being duly sworn, says:—I live in Newark. My business is a boatman. I have been engaged in that business about 15 years. I consider myself a river boatman. I generally exercise my business in the Passaic, Hudson and East rivers. I commanded the "Charles Mayo" in the fall of 1865. I had been master of her about 4 years previously to that—might be 5—don't remember exactly. She plied between Newark and New York generally. I superintended the loading of her before going up the river when she sank. She was in good condition at the time of loading, as to strength and soundness. Her load was 200 tons of Pig Iron and about 13 tons of salt hay—it was carried over in teirs on the deck and some in the hold. I did not weigh what was put in the hold. I should think about 20 tons was put in the hold—the rest was disposed in tiers round the deck—the hay was tiered over on the top of the Iron. I am familiar with the usual mode of loading Pig Iron on Barges of that character—it is usually done all on deck. Sometimes throw a little under the hatches into the hold. She was perfectly in trim after being loaded. John Hall weighed the Iron. Her capacity for carrying since I have been on her is 248 tons. I don't know whether or not it had 250 tons once, but not certain. I carried 248 tons from New York to Newark. Her loading

was completed with the Pig Iron on Saturday afternoon sometime. I don't remember exactly what hour. I think we were a day and a half in loading her—we commenced on Friday to load her. She had no means of propelling. I got from here to New York by steamboat—the propeller "Sanders." Captain Wm. Williams commanded that. She got to New York all safe and in good order. She stood up good, straight, all right every way. We went to the foot of Dey street, New York. I took tow from there on Monday afternoon up to Hubert street. We left there that evening in the neighborhood of 6 o'clock. We went in tow of steamboat "Herald" from Hubert street. Captain Rogers commanded the "Herald." The vessel sunk and the Iron was lost off Upper Nyack—right abreast of Upper Nyack. The only cause I ever found out, was, from springing a plank, that she sunk. I mean she sprung a plank off her bilge below the water line. That would have the effect to sink her. It would let the water in. It was a very stormy night. The storm commenced about 9 o'clock, or in that neighborhood. It was heavy wind and rain both. At or below the place where the vessel sunk the river is from 3 to 4 miles in width. It is called Tappan Bay. It was not an ordinary rain. It blowed hard; wind North-east; raining part of the time. The wind was not very steady; it sometimes blowed a great deal harder than others; still it blowed hard all night from about that time. I had two men on the Barge with me, Patrick Connor and John Darcy and Mr. Henderson and a boy. My Barge was between two canal barges in tow; astern of the steamer. The steamer run two hawser tiers—each side of the steamer. We were in the middle and fastened to two boats. The storm continued during the night. I kept a look out till along the neighborhood of 12 o'clock. I saw she was well able for the weather; without some accident unknown to me. About that time; I could not say the exact time. I turned in. It might be half-past twelve; I said twelve. I put two men on deck, and told them to keep a good look out, and if she happened to leak to inform me. So the men did. I could not say what time it was. It might be two when the men called me, and I got up immediately and came out as soon as they called me. I was not undressed; and found she was leaking very bad. I used all exertions to keep the pumps going, but found I could not save her. I did everything in my power. I undertook to ship some of the iron off, and I found she was leaking so badly I had to abandon her. I hailed the steamer. I swung a lantern and hollowed. It stormed so bad I could not perceive anybody or

whether they heard me. I received no answer at the time. I asked the Captain of the boat alongside me for permission to ship some Iron. He gave me permission and I shipped some. She was sinking so rapidly I had to cut her loose to save those other boats. Before turning in I went round her and examined her everyway. I tried if water was into her, and found she was all right. There is a guage in the boat in the cabin to tell how much water is in her; a regular guage. I could see that where I slept, in fact there was no water in then only what is ordinary. We always have from 2 to 3 inches in, or 4. A great many barges carry but one man and a boy—some of them—very few—carries but one man. I had two men and a boy. In Tappan Bay there was a heavy sea on. I should say it was in the neighborhood of three o'clock when the vessel sunk. I don't know exactly. I got nothing off except the Iron. We took off, if I remember right, 14 or 15 bars. I could not say now—somewhere in that neighborhood—pigs I mean. I afterwards saw the vessel. I was at the raising of her—when she was got out of the water I discovered on the bilge there was two planks sprung. I think one of them was near midships and the other a little further aft, if I remember right. One of them was sprung about 4 feet back—the end of it was just clear of the outside plank. The plank was 2 1-2 to 3 inches thick. I won't be certain, 3 inches I think. It was sprung up the whole thickness of the other plank. The other plank was sprung 1 1-2 to 2 feet back. I was in the hold after she was raised. The clamps where the chains cut her was broken—the upper edge. The ceiling of the barge was sound.

And being interrogated by the Court, say :—By ceiling I mean down the side—not over head.

And being further examined, says :—The clamps were cut by the chains in raising her—she was raised with two vessels. They put chains under her and screwed her up. It was a pretty difficult job to raise her. There was some unfavorable weather about that time. After I got off that vessel the captain landed me at Verplank's Point I believe I come to Nyack—next morning. I come to New York and reported to the Company. It might have been 2 or 3 days—might be next day. I think if I remember right I did go back the next day. One other vessel was sunk that night. She was a boat astern of us. I did not see her sink. I was informed and understood she sank. There was a sloop sunk and she was ashore—on the

east shore off Nyack—right opposite. I discovered that when I come back to raise the vessel! I never enquired into that whether she went ashore that night my barge sunk.

In my opinion it was on account of this sea she sprung those planks; that was what I always made up in my mind was the occasion of her sinking. I mean it was a heavy sea and heavy working of the vessel caused the springing of the plank. The North river in ordinary weather is well enough. There is a kind of open space and always a little sea on, if any wind. If that was the cause of the accident I could not do anything under present circumstances more than what I had done, the springing of the planks being under water line. Nothing could have saved it if the planks started under the water line. At the time I got up she was then about in trim. There was a pump on the vessel. It was used. The deck hands used it. I have carried coal on her. I piled all on deck as high as I could get it, and the rest in the hold. I always carried the load on deck as far as I could. There were five boats in the hawsertier; two abreast and three astern; I was in the middle; the hawser tier is what is behind. I have carried 248 tons, I think I fetched from Rondout on her. From Rondout to Newark. It was the Company's coal. They carry their own coal.

And being cross-examined, says:—The Company did not sell coal, but used it for their steamboats. It was Delaware and Lackawanna Coal. I had not room to carry all the coal on deck—I piled all I could on deck very near up to hurricane deck. About one 170 tons you could get on deck—very near 180. There would be in the neighborhood of 50 tons inside—might be 60. I don't remember the kind of weather at the time of that. It was summer time—might have been in fall. The coal was always for the Company. I did not see the iron weighed that was recovered. The iron that was saved, that I carried on another boat, I never looked after that; I suppose the captain took care of that. When I went to bed she rolled good. She rolled heavy all the night; more or less; not for that kind of storm, I could not say that she did roll unusually, in such a sea. I mean she rolled in the sea. I said she rolled heavy, but no more than another would on account of the sea. I thought her the ablest boat that was in the tow, so I made myself easy about it. The boats on the side were large Western canal boats. They had part of a load in. They might have had coal in. One of them was named the "Whitehall." I

might have said that she was loaded with coal, but would not be certain. I might say the same now. She had an upper deck. She was not loaded, she was only part loaded. I can tell by the appearance of the boat. We had about eighteen inches free-board ; might have been more. The hatches were in good order. She had three hatches and a scuttle, if I remember right. The scuttle was forward. The scuttle was secured, and it had an iron bar which went over the top and fastened with a staple lock put on to it ; there was nothing more to defend the scuttle but the bar, it was all that was necessary. There was nothing over it ; there was no hay over that scuttle. It is a small scuttle, only room for a man to get down. It is perfectly tight at the combs. The scuttle and combs are grooved into each other, the combing is fast, and the scuttle is set right on top of that. The scuttle is two or three inches high, perhaps not so much. The forward hatches were not put on, they were loaded over with pig iron. There was no tarpauling over ; none was necessary. There was none over any of the hatches, nor over this scuttle. When the vessel was taken up I don't know where the hatches were. I don't know that the hatches were found ; hatches of top deck were found. The hatches were not on when she was raised. I won't be certain whether the scuttle was on when she was raised. I don't remember about that circumstance, it might have been and might not ; the hatches were not fastened like the scuttle ; they were five or six inches high. The hatches come outside the combing. There are cross-pieces set right in the combing ; fit in ; the hatches come just flush with the combing.

If the vessel was to leak, I don't think it would start a plank as I have spoken of. We were secured between two other boats. Two were astern ; one had a line fastened to me. I understood that boat sunk. I did not see her sink. Whatever befell her happened after I saw her. I do not think I went aboard of the other boat. I think I did hear something about a woman coming aboard of the vessel frightened by my barge going down. She was cut away or broke away I could not say which. She was floating the last I saw of her. I saw her shortly before we sank. I was informed she sunk. I suppose she sunk in the morning ; it was three o'clock then ; my information respecting her, was that the steamboat took the captain from her just before she sank. I don't remember that part of it ; about what part of the day. There was no tow-line from me to the steam-

er—I was made fast to the other boats—was made fast by lines. I had them out to the other boats. She was fastened by cleets. There were fenders between us—oak fenders—fourteen or fifteen. The fenders that were between me and the other boats were of pretty large size. Some of the boats were higher than mine. As the vessel rolled the other boats pitched against us more or less—pitched against those fenders. I think our boat was a little the longest—as they were fastened, I could not say which bow was foremost—I could not say any of them were. We get as near abreast as we can. The plank had sprung off a distance of four feet. The plank was ten, fifteen, or twenty-five feet long—I could not tell. It is likely to be twenty-five, more or less. If I remember right it was the forward part of the plank that had sprung. I might be mistaken but don't think I am—I mean that part of the plank which was nearest the bow of the vessel. I think that was so with both of them but would not be certain. The planks that sprung were both on one side. They were six or seven feet down the side from the edge of the vessel. When we started from Newark I don't recollect whether it rained or not—it blowed a little. The wind was in the neighborhood of the North-east. I don't remember, I think it did not rain—I would not be certain. We got to New York in the neighborhood of twelve o'clock. I don't remember who towed us to Hubert street—it was one of ————— propellers. I did not see much difference in the weather then, from when we left Newark. I could see a good deal of difference in the weather when we left Hubert street. I could not say about when, I did not take notice of it. It began to blow heavier about nine o'clock—in that neighborhood—somewhere about nine. I took notice that the wind was North-east. We were heading in that direction. Some part of time North-east. We did not keep any course. A flood-tide makes more sea than any wind you can get. We had flood-tide most of the way. We had flood-tide up to about three or four o'clock. Suppose there was a North-east wind, and flood-tide high, and a flood-tide and westerly wind, I should say the North-easterly wind would produce most rolling. I don't think I did say before, that she rolled more if she comes broadside to the sea. If she is running right ahead of the sea she would not roll so much. If the vessel was in the trough of the sea she would roll more—I suppose she was going in as good a direction as she could, except to run before the wind. I could not say

the width of the Bay and Sound, I never measured it. New York bay might be five miles wide. We might go nine miles distance in the bay which is five miles wide. I would not say. Tappan bay was in the neighborhood of three or four miles wide. Just as you look at it. I could not say, it might be somewhere in that neighborhood, three or four miles, or five or six miles.

The gauge was in my cabin. I don't know that I told you about that before—It was about midships in the cabin, five or six feet from where I was sleeping—it might be ten feet. That gauge would tell us how much she gained in water. I looked at it after I got up, there was then somewhere in the neighborhood of a foot of water—I did not measure it, I am only guessing at it. I am sure I looked. One foot of water alarmed me. I don't know how long it was from that time to her going down. During that time I was working the pumps. I did several things. I helped to ship the iron, one thing. I think it was a little more than ten minutes—it might have been fifteen or twenty minutes before I helped ship the iron. Before that I examined the boat. I kept the pumps going. We had two pumps. a pump aft. It was a pump you could use anywhere—a portable pump. One pump was a regular fixture—that was aft. We had none forward. I was not at the pumps before I went to bed. We did not have any occasion for them.

The cross-examination of the witness was here suspended, to enable the plaintiffs to call *William Whitehead*, who being duly sworn, says :—

I reside in Newark. I keep a record of the weather. On reference to my record, I find on the 20th of November, 1865, it was cloudy all day—with brisk wind—a brisk breeze blowing, it continued cloudy till 8 p. m., when it commenced raining—rained all night, and all the 21st, until the evening of the 21st. During the night of the 20th and 21st, before the morning of the 21st, the wind rose, and blew very fresh the whole of that day, commencing the night of the 20th or 21st. My observations are made according to a scale established by the Smithsonian Institution the different states of the wind from a light wind up to a violent hurricane, being marked from 1 up to ten—light wind is marked 1—pleasant 2—brisk 3—hard wind 4—very fresh 5. Very fresh is the next step to a gale. My observations were made in this city. The direction of the wind was North-east. I have merely the recollection

that the tides were very high here during that storm. I made a general remark. I have no recollection about the Hudson. The remark I made in my general summary was "tides very high." I am in the habit of going to New York.

And being cross-examined, says :—The scale is, 1 light wind ; 2, pleasant ; 3, about equal to brisk ; 4, hard ; 5, strong wind I believe ; 6, gale ; 7 and 8 are degrees of violence of gale. I forgot how they are on scale.—9 hurricane ; 10, violent hurricane, and then very violent hurricane. I take my observations in the evening and morning. On the evening of the 20th, I took my observations about 11 o'clock, before retiring—that records North-east wind. I marked it brisk equal to 3 on the scale. I made that more at night as having been the rate of the wind on the morning and afternoon of that day. It indicated the state of the wind at the time when I made the observation.

And being interrogated by the Court, says :—That is at 11 o'clock it was brisk.

And being further cross-examined, says :—The next morning's observations, I presume, was between seven or eight o'clock. I then marked it 5, fresh. If I mistake not, I first recorded it as 4, and then marked it up to 5—that is my recollection of it—5 was recorded. The wind was still North-east. I don't know how much rain had fallen up to that time—the observations being apart. I have no personal knowledge of the state of wind during the night. I have no indication of that storm increasing during the day. My impression is the storm increased all day up to the evening. My record is 5, as being the record of the general force of the wind during the day. The only reference I have referring to the storm, I have here, and I believe I have the exact language—[Witness read from a paper.] Rain commenced falling on the evening of the 20th, and continued with little intermission, &c. &c.

The summary I referred to is made up at the end of the month—that is a record of the whole month. I cannot tell to what portion of this time referred to it belonged. North-east storms invariably commence southward and travel North-east.

And being re-examined, says :—I gave some record of the tide. I mean I could not tell about the storm. The high tides were in consequence of the storm. About two inches and 1-5th of rain fell during the storm—it is rather more than the ordinary quantity.

The cross-examination of *Miles McKeon*, was here resumed, and witness says :—

The gauge stood about midships. At the time I tried the gauge the boat might have had some little list on her to the right—the starboard side. The last time I tried the gauge I suppose she had some list. The last time I tried it was before I abandoned her—it might be some ten, fifteen or twenty minutes, I could not say exactly. The time I spoke of before was the first time I tried it—I think it was. She listed to the starboard when she got water in. The plank was sprung on the port side. Where the chain broke her in raising her, the upper deck was carried away, and one or two planks on the starboard side. There were more off on the larboard side. I don't think I was up an hour before she sank. I think I was up one-half an hour, more or less. I think I took my watch out. I think it was a about three o'clock when she sunk. I did not say I looked at my watch before she sunk. I don't remember that I said I got up about two o'clock. I might have said I was up about an hour. I might have said in the neighborhood of two. I don't remember how long I got up before the vessel sunk. I was up one-half an hour, more or less, before she sunk. I think immediately after she sunk I looked at my watch—very soon after. When I turned in I left up Patrick Connors and John Darcy—they were what we call deck hands. I went to bed somewhere in the neighborhood of twelve o'clock. I left some directions—I told them to keep a good look out in case of any accident should happen. I believe I told them to take care of the pumps. I told them to watch her so that if she should happen to spring a leak or anything to call me I told them certainly. I told them to keep a look out, and keep trying the pumps, and if anything happened to call me. I think that is about all I told them. Shortly after, I went to bed. During the evening I was reading a book—part of the evening. I was in the pilot house.—Mr. Anderson was with me—it was pretty comfortable there. As far as I know. It was not very rough in the pilot house. It was very favorable in there—not very rough. Mr. Anderson was there. I think he stood in the wheel house looking out part of the time. He might have had hold of the wheel. There was no occasion for steering. He might have steered a little for his own amusement—I don't remember that. The boy, I suppose, was in the cabin during the evening.—I did not keep exact account of that. I do not know what time he went to bed—he was in bed when I went there. The

very first thing I did when I got up I think I come out and looked at the vessel. I don't know whether I tried the water or not—I am not certain. If not then, I did very shortly after I come out—with in a few minutes. I gave some instructions about keeping the pumps going. I did not put on the other pumps to work. She had got to sinking so rapidly it was no use. We did not try to get the other pump to work. As soon as I seen the pump would take no effect—the water might have been raising two or three inches a second, or five, and I seen the pump was no use to her. I tried to get some cargo off, but she was sinking so rapidly I had to abandon her. Next thing after getting the pump to work was getting cargo off. I put that on the Whitehall. The hands on the Whitehall did not help me—they gave me permission. They were in bed. I called for what assistance I could from the steamboat and could not see that I could get any assistance from the other boats. Some of them in the boats were not in a very good condition when we started from New York. I had to lash the boats myself. I believe they were in liquor. I did not call on them to help me at all. I think I gave them the alarm I told them to get out. I don't know whether they heard me. I did not know but what they were going to sink. I don't know that one of them signalled the steamboat. They did not offer to help, and I did not say I was getting along well enough. They did not help me to carry the iron on the Whitehall. I put no hay overboard—I could not get it overboard without rolling it over the other boats. We were lashed close to them. There was not time to roll it off. I took the quickest way to lighten her. Took the heaviest first. The pilot house was clean over and would prevent us. We could not roll it over the forepart. I don't suppose that the wind made it easier. Carrying the iron off was to make it lighter.

I think that all who was helping me was one of these men—my man. 120 pounds perhaps these pigs weighed. I don't remember how many, whether it was 14 or 15, we took off—somewheres about that. I took it off the side she listed on. I found the leaking was so rapid there was not time for anything. I did not try to find the leak. It was not safe to go down below. I knew she must have sprung some fo her planks. I should have got below through the scuttle, and passed in through the hold of the vessel all the way through to the leak. There was no other way to get to the leak without slipping her hatches—these hatches were all covered with iron or hay. There was no way through the cabin to the leak. If I had

been up and had put my ear down and listened, if I had happened on the right place, I suppose I might have heard it coming in certainly. It came in so rapid. Sometimes we find it out that way. Sometimes you can stop a small leak, I suppose, if you have time enough. I did say so, that I did not try to get more pumps. I think I gave the reason why I did not—because it was coming in too fast. I don't know that she made more water than is usually made by other vessels. It is usual for vessels to have a little water in and to make a little. She might have made a little—very little—as to whether she made more sometimes than at others, it might be so in a storm more than in a calm. I never found she made more when heavily than when lightly loaded—not without some accident. I think she drew water about 6 feet 5 inches then. Her draught 3 feet stern and 2 feet forward when light—somewhere in that neighborhood. I think it is as safe on the barge loaded as unloaded. To load her with hay on the top of iron, is not as safe in windy weather. I don't remember what remarks I made on her on the last trial. I don't think I said that a vessel sailing with all her sails spread is simply as safe as without sails on. The hay loaded on the top of the iron with canvass round it would not be as high as a sail. I don't think the hay had anything to do with the storm. It depends altogether on the vessel. When we went up the North river we expected rough weather more or less—we could not say about that. When we started I don't remember whether it rained or not—it might have done so. I thought she was well able for the storm. I thought she was the ablest vessel in tow and I put two good men to keep look out if anything happened. The vessels alongside me was not like ours. They had one deck on—no upper deck. The vessel that sunk behind us was an open boat. I did not take particular notice of the whole tow—there were some light barges—canal boats and different classes in them if I remember right. I don't think any of them were canal boats of two parts. I think there might have been some open boats I was astern. There were three of us lashed together. Two boats were lashed astern of me. I was in the middle of the hawser tier. There were some ahead of us. I don't know whether there were 25. She always has stanchions. I mean they are there all the while without taking them out for some purpose or another—none were taken out. They are put in by driving them up taught under the deck—with a hammer or sledge. When we loaded her she was trimmed on deck. The iron I put down under the hatches was first

put down easy—after we got some in there, the rest was thrown down so as to strike the iron. There was no trimming specially done in the hold.

And being re-examined, says :—The canals boats were not loaded, that is the reason I say they were light boats. I went with Mr. Smalley to Mr. Tuckerman's office in New York. I had conversation with some of the plaintiffs. I don't know his name. I think that (Mr. Wiess) is the gentlemen. He said he intended to insure that iron and he neglected it. I told him about the loss of the vessel. I would not be certain whether I described the occurrence of it. I think I said something about it. I think Mr. Smalley said something towards it.

And Defendants also called *Thomas E. Richards*, who being duly sworn, says :—

My business is a shipright. I have worked at it, carrying on business about fifteen years, at Newark. I know the barge "Mayo." I have overhauled her—before November, 1865. I really cannot tell exactly whether I overhauled her that summer or not—but we overhauled her every season. We hauled her out on the railway and gave her a general overhauling—examined her and caulked her. We took off her guards. I really cannot say when. I think I did it for Mr. Smalley. I think it was before she was bought for the Stephens & Condit Transportation Company. When I last overhauled her, prior to November, 1865, she was left in good order—so every time. Her condition as to soundness and seaworthiness, in November, 1865, was good. I superintended the raising of her after she was lost. I found her off Upper Nyack—Tappan sea. I suppose it was in the centre of the sea—about two and a half miles from either shore. It was but a few days after the loss of here. Sveral days. We got her up by getting chains under her and screwed her up. We used two vessels—had logs across the two vessels, and got chains under the barge. We found her in about thirty feet of water, lying on her beam ends, buried in the mud. After we got her up I found one side of her had been carried away by the iron which had slipped off the deck. Her hatches were gone, with the exception of her fore scuttle. That was on and barred. Her upper deck, was all entirely gone. Her anchor was on her bow lashed fast. The main deck was loose. It started up from the clamps—deck frame altogether, so that the action of the water moved it. That was midships. It was fast fore-

wards and aft. I did not notice the condition of her butts until I hauled her on the railway. We then found two butts started on the port side, aft. The butt is the end of the plank. Two planks started. They were below the water line on the turn of the bilge. One plank would admit one-half an inch of water the whole length of the plank.

And being interrogated by a juror, says :—Water would run in from a stream of one-half an inch to nothing.

And being further examined, says :—The plank was 7 inches wide. The other plank that had started was a little more forward. The ceiling was good except the upper clamps streak on the starboard side which had broken some when the side was carried off by the iron, and we sawed it badly by the chains in raising her. The ceiling was perfectly sound. The deck was loosened. The cause was, the iron struck her. She heaved so much. I knew that by the marks of the iron on the deck. After we raised her all the iron was in the bilge. When there was a foot of water in her, it would cause her to roll. The leak would be sufficient to sink her. The pumps would not have saved her. I found some iron in her after she was raised, and considerable mud. The raising was a work of difficulty. It is a hard matter to raise a vessel, you are apt to break the chains the sea runs so high—we were broken adrift once. If she had had 200 tons of pig iron in her hold, I think she would have gone down sooner. We could not have not got her up except by fishing the iron out of her. I have been down on the coast two or three times. I have been owner of a vessel and went down with her. I have been up and down the North river several times. I have been a captain once. If she had had 200 tons of iron in her hold she would have gone down fair and square and not listed at all. Two hundred tons of iron would not have filled her hold. It would have to be a suppositious case for she could not list over with 200 tons of iron in her hold. With 200 tons in her hold she would go down deeper. She is calculated to carry on deck the principal part of her cargo. Her condition after she was raised as to general soundness, except as described, was good. She was a very good barge for her age—uncommon good. She was 12 or 14 years of age I should believe. It is not a very venerable age for one as well preserved as she had been. She had been salted when built and that preserved her timber. She was eight or ten feet in mud when I raised her. She might have settled ten or

twelve feet. I don't how deep the mud was there. All the poles we had would not reach the bottom of the mud.

And being cross examined, says:—I really cannot be definite as to the time when I put the barge in order—I have a book that will tell me when I did it, and what I did. You did ask me for that book on the last trial—I have not thought of it since. I cannot tell whether I took off her guards and gave her a thorough overhauling in the fall of 1862. I cannot recollect whether I told you so the last trial. I do not remember being spoken to just before she was sunk to put her on the ways again. Word was sent to me by Smalley to come and raise the barge. They had gone first and found the barge. They had a bouy. It was eight feet high from the bottom to the top of guard. We should have got the cargo out if she had gone down plumb. It is a fact that many cargoes are saved just that way—fishing it out. My idea is that she listed over. She got some water in her hold—and that twisting about and turning about—and she being loaded on the deck, she turned over. No sir; loading her on deck did not add to the rolling—after the water got in her she would roll more, because loaded on deck. If the water had not got in she would not have rolled. It is possible the butts that had started might have had nothing to do with the original leak. They might have started in raising here—it is possible they might. She never was cast ashore—we towed her ashore. I think the only time they could have started was when jumping in heavy sea, or with the chains when raising her. I do not think it possible for the butts to start after we got her here. They might have started when we got her slung in the chains. It was the aft end of the plank that started—the same end of both planks. They were both on one side and that on the port or left side. As she passed through the water—towed through the water up the river, on the hypothesis they started then, it would not make much difference between the forward or aft end of the plank that had sprung, with respect to the water pressing against the planks and pressing them inwards.. The other plank that had sprung was some eight or ten feet from the first one—a little forward. That was not started so much as the other one. The main deck was sprung off amidships. It is about forty or fifty feet from the aft hatch to forward hatch. The plank was sprung about aft the after hatch. If the vessel had listed over and struck the other vessel alongside her it would have been impossible for her to have hurt that side. The

breaking up was by the iron falling. She would have been a rousing barge if she was as good as she was then, and twenty-two years old—no matter if forty years old. She was very good for her years. When I had raised her I repaired her. I found some of the bolts and screws that fastened the clamps and the wales or shear streak together that leaked a little—nothing to amount to anything. The wales on the outside top streak. The shear streak is the top streak of all. There are two or three streaks called wales. That deck frame was fastened to clamp streak. These bolts went through and through the clamps that fastened the inside streak and outside streak—clamp streak and shear streak together, and I found a few that dribbled water through them.

And being interrogated by the Court, says:—The width of shear streak is fourteen inches.

And being further cross-examined, says:—I think there are somewhere about forty of these bolts on the side—they are usually driven in tight. They ought not to leak. They are three-quarters of an inch in diameter. I don't know whether the planks were both bolted—I don't hardly think they were, but I am not certain. It is not common to butt bolt butts of that kind. Schooners, ships and outside vessels, they are all butt bolted. The best way of butt bolting, is, to put first rate copper bolts in the bottom, but it is not what is commonly done. They bolt the frame next to the butt. This vessel was not bolted with copper bolts about one foot from the butt. There is not one comes into Jersey this year that is butt bolted that way. I can tell that by the build and the owners—it is according to how deep their pockets is whether they put copper in. There is another way of fastening butts called treenailing—by locust pins. Treenails were driven through the plank, through inside the ceiling and wedged both sides—that is a very secure way. I think this vessel was not done that way. My opinion is this was a good vessel for a barge. The planks that sprung were four feet apart. I am quite certain there was three spikes at the butt—there ought to be about six spikes in the length of the whole plank. I really don't know how many there were there. The spikes were about six inches long and about three and three eighths and one sixteenth square iron. I don't remember seeing these at all. The only way of seeing the spikes is from the outside—we did not take the plank off.

And being interrogated by the Court, says:—We took plank off

on the other side—the starboard side. It was full of mud between her timbers. Where the plank had started was just on the turn of the bilge—it is about six feet from the edge of the vessel, not close to the keel but close to the bottom.

And being re-examined, says :—If the iron had been loaded in the bottom she would have sunk sooner—it would have made her leak worse. I knew of nothing wanting in her or I would have repaired it. She was calculated to go up the Hudson river, East river, and for inland navigation—she was well calculated for that. She was a first-rate barge, and I would certainly have trusted a cargo on her. I did not know particularly at that time any of the boats of the Stephens & Condit Transportation Company. I was always told to put them in thorough order—I always put them in thorough order.

And being interrogated by the Court, says :—I took off six inch spikes made of square iron.

And being interrogated by a juror, says :—There was no evidence that the loose iron in the hold had broke the ceiling in its fall, because it was on the opposite side of the vessel. The starboard side took the pressure of the chain, and the butts started off on the port side.

And being interrogated by the court, says :—A rope is fastened to the fenders, and they hang loose. I know of construction of barges on the North-river. I have overhauled many. I know considerable about them.

And being further examined, says :—The ceiling was sound everywhere but where the iron had struck it in going down.

And the defendants also called *Captain Elvin Rogers*, who being duly sworn, says :—

I reside at Newburg, New York. My occupation is a boatman. In the Fall of 1865, I was boating the steamboat *Herald*. It was employed in towing between New York and Rondout. I took the *Mayo* in tow in November, 1865, on the occasion on which she was lost. She was made up in a hawser tier—was made fast at the foot of Hubert street. A hawser tier is made up of a certain number of boats made fast together, &c. This hawser tier had other boats. We had some twenty-five boats all told. Five loaded ones. The balance light. The five loaded boats were in the hawser tier, and the others were what we call tailed on by ropes strung out. It was the only secure place we could put them. The reason we put the loaded

boats in the hawser tier is they were more shielded there than any other place. I noticed the boat before she was put in the tier. It struck me that she was one of the best barges that we had to put in head tier. We left New York somewhere in the neighborhood of seven o'clock.

After getting the tow ready we started on up the river, and with wind North-east, light. When about twelve or fifteen miles up the river the wind began to brace up fresh, and continued to increase up to two o'clock. About that time the tide slacked, and at about half past two I supposed the danger was all over, and then we turned in. About three o'clock I was called out by a man on the tow saying that there was a barge on the tow in a sinking condition.

And being interrogated by the Court, says:—The man who came up and called me was in the hawser tier—tail end.

And being further examined says:—I immeniately went out to tail end of the tow to ascertain what it was. After I got there I found the barge had sunk. The balance of the hawser tier were in a very bad condition, and in danger of being sunk—all of them. I mean the danger of losing any of our tow, as the flood tide was about over. That is, if we could steer the steamboat. I mean it was a very bad night—as seamen use the term bad night for a dark, stormy, blowy night. It was in the upper part of what is known as the Tappan Sea, near Upper Nyack, as near as we could make out by our landmarks.

And being interrogated by the Court, says:—It is two miles from Upper Nyack.

And being further examined says:—It was an extraordinary storm—not an ordinary storm. Had some apprehensions at nine o'clock, and yet I did not suppose it would increase with so much violence at that time. I did consider the danger serious. I was between Spuyten Duyvil and Yonkers, when I considered it so. I had no port to make. I have been some twelve or fifteen years engaged in river navigation. I have but very little acquaintance with the loading of barges. When I began to apprehend serious dangers, there was nothing I could do but to keep head to it. One boat went adrift at the time the barge went down.

And being cross-examined, says:—We were about twenty-five miles up the river when she sunk—twenty-five to twenty-seven miles. We started about seven o'clock, somewhere in that neighborhood

Some part of the time we went from the place of starting to where she sunk, along at the rate of three or four miles an hour. That was the forepart of the night, up to about ten o'clock. After that it would be very difficult for me to tell you how fast we went—it might take us three or four hours to go a mile. I did not keep a log all the time, and could not tell how fast we went. From two o'clock till the time the barge went down, we did not make over two and a half or three miles. I could not tell what rate we made between seven and twelve. When the wind lulled we would make land. It did lull a little by spells. It lulled between the place where the barge went down and Spuyten Duyvil. It blew very heavy sometimes, and then it would lull ten or fifteen minutes, and then it would come a bleak squall. You could see it coming while that was blowing at us. We did not go any. I supposed I did describe the blowing on the last trial. I suppose I said that the wind was very heavy—a stormy night—a bad night—a severe North-east storm. I suppose that was my evidence before. I don't remember that I did tell you of its being an extraordinary storm. When we started from New York I cannot say that I expected foul weather—we apprehended a blow as we frequently do. The wind that day had been blowing lightly from the North-east—I think it had been raining, not heavy, however. When we started the wind was blowing North-east, and I think raining a little, but I am not positive. The wind was not increasing then—when we started. When the foul weather was on, and the wind North-east, we apprehended danger. If it was flood-tide, and a North-east wind blowing, with rain, at sundown, I should expect the wind would decrease. It was past flood-tide after nine o'clock. From Spuyten Duyvil to Yonkers, I suppose is some seven or eight miles, though I don't recollect. We could not make a harbor from Spuyten Duyvil to Yonkers. Vessels do go into Yonkers but they are exposed. There are docks there—it is a regular landing place. I mean to say there is no place to harbor a tow. They can be made fast to the docks. If vessels had been made fast to any dock from Spuyten Duyvil to Verplanck's Point, they would have been in greater danger than in our tow—I should so consider. The docks at Yonkers come out just to the edge of the channel. There was not water enough in the docks to get the steamer in. I told you I laid down about half-past two. After I had been called I got out to the tail of the tow, to see what condition they were in. The only thing

I could then do was to drive ahead. After the wind got up I was obliged to go ahead. I was brought up on the water—in Long Island Sound—on a sailing vessel. We might possibly have got in there. Piermont Landing, but we were safer than if there. There was more sea there. Along about Yonkers was the heaviest sea.

And being interrogated by the court, says :—From Yonkers to Tarrytown Point was where the heaviest sea was.

And being further cross-examined, says :—I considered the danger over when I turned in because ebb tide was over, and the sea was running down. It was slack tide about two o'clock. We find the heaviest roll generally after the tide slacks. After the tide has run ebb for sometime, when the wind is North-east, it will run the sea down. There were four boats loaded with coal in my tow. I am not positive about it. They composed the hawser tier. There was nothing else in the hawser tier. Barges and boats composed the tow. Canal boats principally. Delaware and Hudson canal boats. Light boats. The light boats had no upper decks. Some are box made and some boat made. I mean to say that some that I call light boats had nothing on board. I could travel over the tow attached to the steamboat. We had some twenty there. I suppose we had out that night some seventy-five or eighty fathoms—in that neighborhood. That was the length of the two hawser tier. They had two astern with their own line. I could go from the steamboat to the whole line. I considered the barge in as safe a place as we had to put her. I put her there (in the middle) simply because I wished to make my tow good. I did not do so with reference to her safety. I considered it equally as safe to put her where I did. I don't know that I would consider it any safer. It is a fact that I put her in as safe a place as I could find. It had the appearance of a storm when I started from New York, because it was storming. I did say, on last trial that when we were ten or twelve miles from New York, somewhere in the neighborhood of Fort Washington Point, we were making about four miles an hour. I have nothing but my memory to guide me.

And being re-examined, says :—It was what we term a very heavy sea. Tappan Bay there, is somewhere between four or five miles inside.

And being cross-examined, says :—The vessel cast adrift was the "Arrow," it strikes me. She was an open boat. I don't know

when she sank. I know she sank, by being told so by the captain. I don't remember he told me at the time how she was sunk because I did not see him until some time after. When the Mayo went out of the middle it left the others astern all adrift. I suppose it took me half an hour to get them straight again. I got all the help I could from the other boats. I stopped and hauled in both hawser tiers, and tied them together, and made them fast, and went on. If she had not sunk so quickly we could have hauled in the slack.

And being further re-examined, says :—We had to go on because the wind would cause the steamer to drift. As soon as we stopped her she drifted and thus we might have lost the whole tow.

And being interrogated by the court, says :—We had four deck hands, only two were up when I went to bed. The men and pilot were in the pilot house.

And being further cross-examined, says :—The crew of barges are generally composed of captain, man and boy. Canal boats generally have man and boy—sometimes man alone.

And defendants also called *Captain Silas Betts*, who being duly sworn, says :—

I live in West Troy. I have been engaged in the freighting and towing business in New York. I have been in the freighting business twenty years. Have been doing business eight or ten years. I am accustomed to the management of river barges. Our principal freight is lumber down, and iron and coal up. The barges are towed. I own barges—myself and partner. Pig iron is generally transported by barges. It is the ordinary way to put it on deck. The load is generally stowed on deck. They generally put the whole on deck—sometimes a little in the hold. As a general thing it is all on deck. When they put any in the hold they drop it down the hatchway. We never trim iron in the hold. The trimming is done on deck. I am acquainted with the towing business for West Troy and New York about six years. I heard the recent testimony of Captain Rogers. The Mayo was in a safe place in the tow—as safe as any in the tow. I am acquainted with the place where the loss occurred. Compared with other parts of the river, it is a very rough place, when the wind blows hard. I should think there is no harbor that could be made there with a North-east wind—with a tow.

And being cross-examined, says ;—There are no places along the shore between New York or Spuyten Duyvil and Yonkers to have

harboréd the barge and save her deck load, that I am aware of, if drawing much water. I don't know that I said so before. I think that this vessel could not have been anchored—that is my opinion now. Very little pig iron is carried up on sloops compared with what there used to be. I am in business now.

And defendants also called Captain *William H. Wilson*, who being duly sworn, says:—I reside in Greenwich, Connecticut. I am a boatman on the Hudson river. I have been twenty-five years so engaged—part of the time towing and part of the time on barges. I carried lumber down, and iron up the river. We always load our barges on deck principally. We load about fifteen or eighteen tons out of one hundred in the hold—that is our practice—all others as far as I have seen do that way. It is thrust right down the hatches. It is not trimmed down there. I have been on the Hudson river twenty-five years. I know Tappan bay—when the wind blows it is a pretty rough place. It is much wider, and that is the reason it is rougher than other places. I have heard Captain Rogers describe his voyage the night the barge sunk. As far as I know he could not have made any harbor. We never throw anything over the hatches unless there is something in the hold we want to keep dry. My barges have no upper deck—not the whole length—only a quarter of the way.

And being cross-examined, says:—Our barges are flat on the bottom—not what we call sharp vessels at all—they are built for carrying. Some draw more water—some less, according to the width of the hold—usually seven and a half feet. I mean that the tow could not make harbor.

And defendants also called *Charles Scott*, who being duly sworn, says:—I reside in the city of New York. My business is boating between Troy and New York. I have been about fifteen years engaged in that business. I do barging, steamboating and boating. I carry different things, grain, flour, iron, lumber. I am acquainted with the mode of loading pig iron on barges. I load it on deck always. I have put some in the hold. If I was loading about two hundred tons I would put about twenty-five tons in the hold. Sometimes we have a little board and slide it down and then make a kind of a bed, and then throw it down. I have helped to get iron on myself. I am acquainted with the locality where the vessel was lost. I heard Captain Roger's evidence. I should not know of any place where he could have made a harbor for his tow, with a North-east wind.

It is generally accounted the roughest place between Albany and New York—between Troy and New York. When we get through there we generally think we are all right in a blow. I should say the vessel was in her proper place in the tow. In covering hatches, the practice is, a common board hatch is put on. When we have got to carry grain, we have got to have canvass over to prevent any leaking—that is where there is no upper deck. Where there is an upper deck we do not do it.

And being cross-examined, says :—All barges are not made to carry everything on deck. We put a little in the hold to ease the deck. Some barges are made to carry everything on deck—made flat, low, middle stauncheons. The convenience of handling is some part of reason for carrying iron on deck—another thing is we are not afraid of damaging the iron. I have never carried hay to my recollection. The barge might have let out herself, and gone into harbor herself, but there is no place for the steamer with the tow.

And defendents also called *Captain Wilsey*, who being duly sworn says :—I live in Newark. My business is boating—coasting. I have been so employed about thirty years. During that time I have exercised the calling and been able to see some coasting around the New Jersey coast, Albany, and the east coast as far as Boston. I have been familiar with the mode of transporting pig iron on barges. I have towed barges. Pig iron is usually loaded on deck. Sometimes I have seen a little put below. When it is put down there, it is thrown down in the hatches. I never saw any trimmed, nor never had any trimmed in the hold. I have heard a description of how the “Mayo” was loaded. I think if I kept that barge I should have put that proportion in that hold, or should have put a little in the hold. I think a vessel loaded with iron on deck is safer than when loaded in the hold. I mean barge when I say vessel. Probably four or five hundred tons of pig iron I have towed. I think I towed the barge “Nichols” from Elizabethport with five hundred tons. My impression is it was all on deck—I wont say all. We generally put the hatches on. I don’t know that I ever saw a barge with the hatches covered up, except loaded with grain. We then put a piece of canvass over. I do not think they do that when they have upper deck. I am acquainted some little with the towing business. I heard Captain Rogers’ evidence. I think the course he took was the safest way of doing it in my judgement. I know the “Mayo”—I have known her

probably some twelve years. Prior to the loss of her I do not know what condition she was in as to soundness and good order. I never examined her. Mr. Smalley spoke to me one day, and said he had some iron to go to Saugerties. I said one hundred tons. He said he had two hundred tons to take, at one dollar per ton. I said I would take one hundred tons at one dollar and fifty cents. That was before the "Mayo" went.

And being cross-examined, says:—I own a schooner. I think a vessel as safe loaded on deck. It does not strain a vessel so much. Some vessels are just as safe if loaded on the top as at the bottom. Where vessels partake of the sharp build, they would not carry their load on deck—they would roll over with it. In proportion as she differed from being a square or flat bottomed vessel, would be the risk of her rolling over. Supposing that hay ten feet high, loaded on the top of the iron on deck, with canvass around it, it would make little difference in its liability to roll over. I knew the "Mayo" was sunk about eight or ten years ago. She careened over at the Gas Company's wharves. I have known her some twelve years—since she belonged to Newark.

And being re-examined, says:—At the time the "Mayo" sank, some years ago, she was lying at the Gas Company's wharf, with guards two feet wide, her guards caught on the dock when the tide came up, and when the tide went down she rolled over and sank. I do not think the hay on the deck would affect her at all. The wind would catch her right in front and would not careen the vessel at all. As far as the safety of the vessel goes, I would not mind putting sail in front as this was. I think it was Captain Daniel Van Buskirk who commanded her when she careened at the wharf.

And defendants also called *David F. Brown*, who being duly sworn, says:—

I live in Newark, my business is a shipright. I have worked at it twelve years with Thomas E. Williams and others. I know the barge Mayo. I worked on her when her guards were taken off. She had a thorough overhauling at that time. She was put in good condition. I overhauled her afterwards. I examined her—that was before she was sunk. I left her on those occasions in good condition. I cannot tell exactly when she was last done. Her condition in November, 1865, was very good, so far as I know. I saw her frequently, prior to her loss, almost daily. I saw her after she was raised. I worked at her afterwards and repaired her. Her general

condition, independent of the injury she then received, was very good. Her timber was sound, with the exception of what was broken in sinking. Previous to her sinking we were always instructed to put her in good order, and we always did so.

And being cross-examined, says :—It was before November, 1865, I think in the summer before she sunk. The year previous to sinking I saw her. I think she was on the ways then—I cannot say exactly. We have books that would show. The books would show the materials used and what was done to her. The books show whether she was on the ways or not. Not to my knowledge was she expected to be repaired again.

And defendants also called *Patrick Conner*, who being duly sworn, says :—

I live in East Newark. I was on the *Mayo* when she sank. At the present time I am working for the New Jersey Railroad. I am freightman. When I was on the *Mayo*, my business then was boating. I am boating off and on for fifteen years as deck hand—sometimes piloting. I went with the *Mayo* at the time she sunk from New York and from Newark. I had been probably a month or two on her—probably more. In and about twelve o'clock I came on watch that night. I was in bed before that. John Darcy was on watch with me. The condition of the boat when I went on watch was, I thought she looked as usual, all right. I believe the captain gave us some instruction about pumping her out at the time, and to keep a good look out between that and morning. The first thing we did after getting up was pumping the barge out. We then went up into the pilot house. There we stayed about an hour and a half, near and about that time, then went down and examined the pump again, and found her leaking a little more than usual. John Darcy started the pumps. I took a lamp and went around her. I could not see anything about her. I guess I went twice around her. I then went to call the captain when I found her leaking. I did not discover anything to account for it. I went forward. I saw a little spray there on the deck. Not much water. That's all. It was nothing to excite alarm, or account for the leaking. Next thing we worked was to get the steamboat. We kept the pump going. We could not make them hear. It was a very stormy night. We did not get help from the steamboat. The captain got permission from

the captain of the other boat, to put part of the iron on his boat. As I was in the act of passing iron to the captain we had to leave her—she was sinking. No one assisted me and the captain in carrying off the iron. No one offered to assist, that I know of, from the adjoining boats. The hatches were on. I helped to put them on. The hatches were pretty tight. Pig iron was over the hatches—hay was over the iron.

And being cross-examined, says :—I was a boatman employed as deck hand before this. I am not a sailor. I was employed as deck hand out of Newark by Stephens & Condit's Company and Thomas V. Johnson. We found water in her as soon as captain turned in—five or six inches. It did not take us more than one half an hour, if that, to pump it out. I don't know but what we did pump before night. I don't know but we did. Both I and Darcy pumped the water out after getting up. We were both at the pump—both took spells. I don't know who pumped last. We then went to the pilot house. We sat down. We did nothing to keep her steerage way. Whether we sat there for one and a half hours I could not say. We kept looking out to see if anything were to happen. We could go round, in one and a half hours or a little less than that, or over that, we went round. I say it was in that time because it seemed that to me. Both Darcy and I went down together. John Darcy took the pump—I took a lamp around. There was a little more water in her than there was before. There was six or seven inches. I left Darcy at the pump. I went outside on the barges that were on each side. I was there looking to see if anything was the matter with the vessel. I did not go in the hold. I went round twice. I was pretty slow in going round, not very slow neither. I examined her carefully. I don't know how long it took me to examine her. It might have been ten minutes. I cannot say what time. I believe I did say on the last trial. I judge I called the captain in about half an hour after I discovered that there was more water than there ought to be. I have no doubt I did. I helped to put the hatches on. I was around at the time she was loaded.

The loading was a contract job, and I could not say who did it. There were several men loading her. They generally hire who they please on contract jobs. At the present time I cannot tell who was there. I cannot say which of our men was in the contract.

And being interrogated by the Court, says :—When we pumped her out first time, we were not engaged more than one-half an hour.

And being re-examined, says :—We had no difficulty to get the water down the first time. When we tried afterwards, the water increased in spite of us.

And being interrogated by a juror, says :—The means we had of finding out that she was leaking more, was, we had a guage in the cabin. I went to the cabin to look. I was not on deck all the time.

And being further re-examined, says :—I discovered the pump did not reduce the water, and then I went round with the lamp.

And being re-examined, says :—Before I went around I discovered the pump did not decrease the water. I looked at the guage before trying the pump—when going from the pilot house. There was then six or seven inches probably of water in it, the gauge told us. That pump was aft. I do not think that the vessel had listed a little then. I think she was trim at that time.

And being interrogated by the Court, says :—I judge there was nine inches of water in when I called the captain.

And defendants also called *John Darcy*, who being duly sworn, says :—I live in Newark. I was on the “Mayo” the night she was lost—I was deck-hand on her—I had been four or five months employed on her. I had been deck-hand before on another boat. I had been in the business four or five years, between here and New York. I came on watch the night the “Mayo” was lost, at twelve o'clock, to the best of my opinion, with Patrick Conners. We first pumped her out—then went up in the pilot house. The captain said we was to keep a sharp look out if any of the lines would part, or anything around her. That is all the instructions he gave. Yes ; he told us to look after the pumps, and try her once in a while. Me and Peter Conner pumped her out. We took about one-half an hour to do it, to the best of my opinion. The pump pumped her out—pumped her clean. Then we went up and sat in the pilot house sometime about one and a half hours. I could not say longer or less. About one and a half hours, I suppose. We had no clock or watch either. I merely give the best of my opinion. We went down after and tried the pump. We found a little water in, and I went to work to put the water out. I pumped out and she kept gaining on me. Patrick Conners went all around her. He came back and said

he did not see anything the matter with her, and that she was gaining in her leaking all the time. I continued pumping. Patrick, I expect then called the captain. The captain then got up. I could hear the captain hollowing, and Patrick Connors—could hear both of them halloo. Not yet came any answer. After a while she listed over. I could not tell what the captain and Patrick Connors was doing. I suppose taking iron off. Finally she listed over. I stayed at the pump while she listed over on starboard side, and then I got over on the other canal boat. I stayed as long as I could on her to be safe.

And being cross-examined, says.—I am at laboring work now. I was brought up to laboring work and boating once in a while. I am not a sailor—a river boatman. When we left the pilot house we went straight to the gauge and looked at it. Well, I suppose, there was then about five or six inches of water in it. To the best of my opinion it was pretty near half an hour after that, that the Captain got up.

And being re-examined, says:—When Connors had gone round the boat. I don't know but it might be ten minutes or quarter of an hour I heard him call the captain. I don't know whether he got up. I know there was no assistance from the other boat.

And being re-cross-examined, says:—I went to the pumps right away from the gauge and Patrick Connors went round. We found right away after his going round the boat that the water had gained.

And defendants also called Captain *Richard W. Kelsey*, who being duly sworn, says:—I reside in Albany—my business is steam-boating. I have been so engaged twelve or fourteen years. I was in barges about twelve or fourteen years. On the 20th of November 1865 I was bound from New York to Albany. I was on board the propeller "Wm. C. Redfield." I left New York, Broad street at five o'clock in the afternoon. I had no tow. There was nothing peculiar about the night—it was hazy. Between eight and nine o'clock it struck down upon the river pretty heavy upon us—the wind did. That was up the river about twenty-five miles. It commenced by raining and blowing in squalls. It continued on till we got to the Highlands and increased till it got to be a perfect gale.—The Highlands with reference to Tappan bay is above. It was between eleven and one o'clock when I was there. The sea rough—the river was—it was flood tide—it was pretty rough. The wind was

about North-east, and it blew right down the river. A barge going head to sea is apt to start a plank sooner than going any other way—by bending—going up and down is apt to start a plank on the side. If a vessel is lying in the trough of the sea there is not as much strain as if under headway. I was barging several years before steamboating. I carried down the river flour and grain—up, merchandise of all kinds. I have carried pig iron on barges—it was put on deck. I carried railroad iron—more railroad iron than pig iron.

And being cross-examined, says:—We do not feel the North-east wind so much in the Highlands—we felt it most at Poughkeepsie.—Poughkeepsie is about eighty miles up—we were up there about one o'clock. I should think we were going about ten or eleven miles an hour. I had partly loaded propeller. I think about two hundred tons on that night. I generally carry from two hundred and fifty to three hundred tons in that line. The action of the waves upon barges has a tendency to bend them in the middle. I staunched on my deck. I should judge it has not a tendency to strain the sides by staunching. We take care not to load them too heavily in the middle.

And defendants also called Captain *Robert Burnett*, who being duly sworn, says:—I reside in New York city. I am a boatman—on propeller now—on the Hudson river. I had a propeller on the night of the twentieth of November, 1865. I was master of it—it was the "H. P. Carrington." I am master of it. I went up from New York to Grassy Point. It is about one mile off Stoney Point—at the head of the bay—Haverstraw bay—that is above Tappan bay. I left New York from 4 to 6 o'clock. I had two boats—one loaded and one partially loaded.

And being interrogated by the court, says:—I had two boats in tow.

And being further examined, says:—The loaded boat was going to Manhattanville, and the partly loaded one to Riverdale. Riverdale is one and a quarter miles above Spuyten Duyvil, and about nine miles from New York. I got tows there and I went on to Grassy Point. I got there between ten and eleven o'clock. It was not midnight. I went there to bring a loaded brick barge down—a Western canal barge, loaded with brick. I did not come down that night. I expected to have done so. The barge could not get out to the channel. They said the wind blew too strong. It was a very bad night—blowing very heavy.

Examination resumed, Thursday, a. m. 16th.—That was my intention when I started to come down again that night when I got to Grassy Point. When I got there I did not expect to come down again that night. The sea was too bad to bring the tow down. I did not look for the boat at all when I got up, because I could not bring it until ebb tide. I could have brought it on the ebb. I turned my boat's head to the sea, and lay there all night. In the morning I did not get the tow. The weather was just as bad in the morning.

And being interrogated by the court, says :—I did not get it because they would not come out of the creek.

And being further examined, says :—It was blowing a heavy gale the latter part of the night. The sea broke up on the steamboat dock at Grassy point—on the upper side of it. When the flood died that was. I did not run regularly there, but in passing there I never saw it before break over the dock. It rained that night. We had rain falls all night. I came on without the barge in the morning on flood tide. I got from there about eight o'clock, I suppose, or nine o'clock—as soon as I ascertained they would not come out. The sea was very heavy on the flood. I brought a light boat from Sing Sing. I mean an empty boat. We had to put extra lines on her to keep her along side. We usually tow them with their own lines, but I had to furnish them with one or two—I am not sure. That was on account of the sea way. By sea way I mean height of the seas. I have used barges. The only one I ever had I used to carry flaging stone on, and one load of iron she carried from Princeton. I was not on board that. I was when she carried flaging. I have not seen iron carried. I know she carried it on deck. She had a hold but we never used it—except to carry coal. Whether carrying stone or iron we never put any in the hold at all. The usual way of carrying pig iron is to put all on deck, particularly if the deck frame is sufficient to hold it.

And being cross-examined, says :—I should have brought the boat down from Grassy Point if the tide had been on the ebb, because the ebb tide cuts the sea down. The ebb tide flows out. The flood tide flows in. If it is ebb tide a South wind makes a heavy sea, and if flood tide a North wind. A cross wind makes the heavy sea. In going down the wind was in our favor. If wind and tide had been in our favor in the morning, then I would have taken the barge down. I should have to take her alongside—not tow her, and not by haw ser

They could not steer her—we should go too fast. I expected to take her alongside. If there had been two of them I could have taken them. If I had had two, I should have towed hawser fashion. If there had been three or four boats I would have taken them alongside, if no more. I should not have gone out that morning with such a heavy tow hawser fashion, with the full swing of that wind. Grassy Point is above Nyack. It was ebb tide the latter part of the night, and the wind rose in the morning. I went to her about one o'clock. I thought it did lull a little when I went to bed.

We were not travelling then—we were tied to the dock. By the latter part of the night I mean after I went to bed. I thought the wind moderated a little after I went to bed. After I went to bed I don't know what the wind was, but I could feel the boat jump. The blow continued up the river. I went next night about two or after dark. It was not blowing then. The dock at Grassy Point was about the usual height of docks on the North River—four and a half feet above high water mark, I should judge. It might be a foot or two less—might be more—perhaps not above three feet on extraordinary tides. The usual high water mark is four feet or four and a half feet. My vessel by the old measurement was eighty-four tons. It was just a tow boat. Nine miles an hour is her usual rate of speed. The barges that I said carried all on deck were right flat boats. I went on that one. I owned that one. We carried flaging stones from New Brunswick to Philadelphia. She carried all on deck. We put nothing in the hold at all. She had six feet hold.

And being re-examined, says :—That barge I speak of had a screw bottom—stayed down. There are only a few of them made so. Only four or five on the North River.

And defendants also called *Captain George A. Gage*, who being duly sworn, says :—I reside at Kingston, New York. My business is a boatman. That has been my business for about thirty years. I was engaged in that business in the month of November, 1865. I remember that I was on the river on the night of the twentieth of November, 1865. I had a tow. The propelling power was a side wheel steamboat. I was master of her. My journey was, bound from Roundout to New York. I think I had sixteen to eighteen boats and barges together in my tow. They were loaded. Loaded with coal. I left Roundout about four o'clock in the afternoon of the twentieth. I did not get to New York until the morning of the twenty-second. The reason I was so long, was in consequence of the storm. It was blowing heavy, and raining. I made harbor at Verplanck's Point. Verplanck's Point is the terminus of Haverstraw Bay.

And being interrogated by the Court, says :—It is above Nyack.

And being further examined, says :—I made harbor there in consequence of the storm. I could not have got further with safety. I reached there about five o'clock in the morning of the twenty-first—that is Verplanck's Point. It had been a very rough, stormy night. It was not an ordinary storm. It was an extraordinary storm. A great deal heavier than we usually have there. I think I left there at night, or neighborhood of four or five o'clock in the afternoon of the twenty-first—it might be a little later. I was in the Court here when Captain Rogers gave his evidence. I heard his testimony. From my experience there was no harbor Captain Rogers could have made the way the wind was.

And being cross-examined, says :—There was no harbor for a vessel drawing water over six feet. No; not at high tide. I don't think of any place they could get in with safety for a single vessel drawing more than six feet of water. There are docks there at Piermont for five feet four and a half inches draught vessel. I have stayed there. I did not happen to be there in a storm like this. The tide only rises four feet three and a half inches. Not within twenty miles from New York I don't know it rises from five to six feet. When I started the weather was stormy. At five or six thick and misty—not much wind. The wind was from the North-east. I expected a storm. It looked stormy. We would go five or five and a half miles on ebb tide. We meet the flood about ten o'clock, below Newburgh. The weather had then become much heavier—blowing heavier—behind us. We were going down before it—with fair wind. I did not turn in. It is something I never do, with a tow like that, and in bad weather—not at nights. One watch turned in. One watch is one engineer, and quarter deck hands. When we came to anchor it was blowing harder. About nine and ten o'clock it blew heavily with us. From that until one o'clock it blew heavily. I could not tell whether the wind lulled any. I was in the Highlands where the wind is very unsteady. It was first part of ebb tide when we came to anchor or the best part of it. After we started we carried ebb tide until about nine o'clock. The tides are every six hours. At three o'clock in the morning it was high tide. I don't carry tide with it as I do against it. I only carry five hours with it. I count slack water in. If it is high water at nine o'clock we expect it next day to be high water at ten o'clock. I count from the ten to the time it slacks and there is one hour difference as the tide slacks. It was high water again with us about four o'clock in the morning. I came to anchor between five and six in the morning—we had both kinds of tides. My tow was

partly canal boats and partly barges—they were all flat boats. I had no sectional boats with us. They were all canal boats built for river service. They were loaded with coal—fully loaded. I had no tow on hawser. I had then all with me. It is not customary to tow with hawser a small tow. I call sixteen to eighteen a small tow. Twenty and above a large tow.

And being re-examined, says :—The wind was heavy in the Highlands. We never expected any trouble with the tow in the Highlands. If we reach the Highlands we are safe to go through with wind anyway. In the bay we cannot go through with a tow with wind blowing heavy either South-ward or North-east. The barges I had were built for canal and river service. We have a double crew on steamboat, where running night and day. Four men take half night and half day—then we have two to call for the next—we stand six hours. We divide them into fours—part takes one time and part the other.

And being interrogated by the Court, says :—We change watch at twelve o'clock at night.

And being re-cross-examined, says :—With any ordinary weather we can go through the bay. A south wind would blow nearly up the river and when north-east would blow nearly down the river. If going either up or down the bay, and the wind was either in the South or North-east, we could not go.

And being further re-examined, says :—In saying with any ordinary weather we can go through the bay, I mean an ordinary blow, such as we are subject to meet. If we happend to be in the bay and caught, we would have to go on as we could.

And being interrogated by the Court, says :—I think one tow passed us at Rondout, at Newburgh bay.

And the further re-examination continued, says :—The tow just referred to was chiefly vessels—sloops—they were towed by hawsers. I do not recollect what time I passed them. It was a full tow I think. It was between twelve and one o'clock. We don't go much with flood tide. We never anchored with any tow. We could anchor. If we had anchored, it would blow all the boats together—it would not be so if going ahead. It is not customary to carry two anchors. Coasters do carry two anchors, but not to anchor at both ends.

And Defendants also called *Captain James E. Heaton*, who being duly sworn, says:—

My occupation at present is Agent of the Whitehall Transportation Company. I live at Rondout. I was on the river on the night of the 20th of November, 1865, between Rondout and New York, on the steamer *Thomas Cornell*. She was a passenger and freight boat, running regularly from Rondout to New York. I left Rondout at 6 o'clock in the evening. Her usual practice was to make landings all along the shore. My experience of that night was, we had a very heavy night. We came from Rondout, landing at Poughkeepsie, thence to Newburgh. We landed between the places at Marlborough and Milton. We got to Newburgh and the pilot thought it was best to come to and not go on. The weather was so dark and stormy and we did not dare to go on. They could have gone through, perhaps, but we had passengers to wait for and freight to land. The wind was blowing heavy from the Northeast, and raining. Our difficulty about landing was the wind. She was a heavy steamer, and could not come to to the wind. It is very few times that we do not go through. It is not often she comes to except in a very severe storm. She usually makes her stops if the wind does blow. Along in the morning, after it was got light, we left Newburgh. On the next day it was a very heavy sea—during the day. I think we did not make our stops the next day, but went right through to New York. I think we made one stop, but would not be positive. One I know we did not make. We did not make the usual landings. The character of the storm on the night of the 21st was, the wind was blowing very heavy to an extreme blow—what we call a heavy storm. It was a storm we do not often see. I was away out of town and did not notice how the tides were. I remarked that it was very high water during that storm.

And being cross-examined, says:—

A northeast wind always raises the tides in the North river, because it blows the water in from the Ocean. We were to have

made landings at Cornwall and West Point. Cornwall is below Newburgh, on the west side of the river. We had no more callings to make. We did not land on the east side of the river. If we had landed, we should have had the full swing of the wind to the shore. It was a steamer. I do not recollect how much water she draws. She had double deck, with state rooms. It was nearly 9, or somewhere about, when we made Newburgh. Next morning when we started it was blowing. The storm increased that day—blowing heavy. The darkness had a deal to do with our not landing, and with the reason we did not go on. The darkness does not prevent them landing—not in good weather. We landed at Marlborough and Milton between 8 and 9 o'clock. Those places are between Poughkeepsie and Newburgh, on the west shore. The river is very wide at Newburgh.

And being re-examined, says:—I “turned in” at Newburgh. I stopped there all night. I was out during the night, and it was blowing very heavy.

And Defendants also called *William Hopkins*, who being duly sworn, says:—

My business is a boatman. I exercise that calling on the North river. I was in that business in November, 1865. I am living at present in Jersey City. I was on the river on the day of the 21st of November. On the night of the 20th I was lying in Rondout Creek, on the propeller “George W. Pratt.” I was master of her. I was out around in the morning, and did not go down the river until after dinner time. I went down after dinner until I met one of our tows—either the “Herald” or “Marshall.” I was in the employ of the line that owned the Herald and Marshall. It is the Cornell line. I was sent down till I met either one of the tows and to assist them up to Rondout. I was sent in consequence of the storm—afraid the boats would be behind time. I went down as far as Low Point—that is about three or four miles above Newport, and there I found the “Marshall” lying to the dock. She had part of tow with her, and the rest was anchored all along Newburgh bay.

She had canal boats, barges and vessels. She had canal boats and barges with her. I do not exactly know the number of the tow. I should think she had between twenty and twenty-five, all told. I rounded to alongside the Marshall and told them I had been sent to assist them. The Captain said the best assistance I could give them would be to tie up alongside and wait till the storm abated, and help to gather the tow together for him then. I tied up between five and six o'clock in the evening I arrived there. I got in behind a big barge to get out of the way of the heavy sea. About 1 o'clock we commenced getting the tow together. He came across the river. We made the tow up again, and I got alongside of him and helped him up to Rondout. My recollection of the night of the 20th is of its being a very severe night. The next day, the 21st, was a very bad day indeed. It was a little more than an ordinary storm—it was an extraordinary storm, I think. Jacob Dubois was the Captain of the Marshall.

And Defendants also called *Captain William Whitfield*, who being duly sworn, says:—

I was on the North river on the night of the 20th November, 1865—on the "Cement Rock." I am Captain of her. She plies between Newark and Rondout. She belonged to the Newark Lime and Cement Company. She was a propeller. We had cement with us and a schooner in tow. The schooner had stone on. We left Rondout between four and five o'clock in the afternoon. It was a very stormy night and blowed. We did not get the tow home. We got it down in the kills—that is right off Staten Island. We got there between five and six o'clock of the morning of the 21st.

And being interrogated by the Court says:—That is, we got there with my tow.

And being further examined, says:—The reason we did not bring them home was, because it blowed so heavy we could not. I think it kept on blowing on the 21st until sometime in the after-

noon. We had the wind behind us. We went with the wind—a fair wind it was. When we got to Newark Bay the wind was ahead.

And being interrogated by the Court, says:—I don't mean by that that the wind was ahead in the kills.

And being further examined, says:—Thomas Petit was the Pilot on the "Cement Rock."

And being cross-examined, says:—We were traveling all night, steadily. We towed alongside—not hawserway. We left Rondout between four and five o'clock. We met all sorts of tides coming down. The blow increased about ten o'clock in the night, I should think. It commenced blowing about ten o'clock, I think, harder. I don't know that it blowed harder the next day than it did that night. When I got down to the kills I anchored the schooner which we had in tow. I do not know what horse power the tug was. We had not enough power to tow the schooner against that head wind, the reason we anchored her. She was a schooner 120 tons burthen, carrying about 120 tons. She had stone aboard. We had head wind all the way up to Newark. I came up. I suppose we came up about seven miles an hour; our general runs about eight or nine. I could not say how the tide was when coming up at that time.

And being re-examined, says:—We did not have head-wind when we got to Point No-point. We had fair wind.

And being re-cross-examined, says:—We had head-wind to Point No-point, then a little fair, then head-wind again to our dock.

And being further re-examined, says:—We had not power to tow because of its blowing so heavy. In ordinary weather we would not have had difficulty. One schooner was not a heavy tow for the propeller, without it blowed heavy.

And Defendants also called *Captain Thomas Pettit*, who being duly sworn, says:—

My business is a boatman, at present between Newark and New York. In November, 1865, I was on the North river, on the propeller Cement Rock, as pilot. I remember coming down the river on the night of the 20th November, 1865. I had a schooner in tow bound to Newark. I did not get her up. I left her down in the Kills. I did so because it was blowing so heavy. I could not get her up. I did not think we could. It was a very bad, stormy night. It was more than an ordinary storm, I thought. When I came on watch, it was blowing then pretty heavy. It was then about 12 o'clock, and puffing and very squally like, by spells. Would lull and then come on harder again. The sea was not so bad the first part of my watch, because we were up in the Highlands. When we got in the bays, the sea was pretty bad there, although it had got ebb tide then. Captain Griffin was with me in the pilot house. He was Captain of the schooner I had in tow.

And being cross-examined, says:—I came on watch in the neighborhood of 12 o'clock. We had three deck hands on board, and the Captain, engineer and me. I cannot tell whether the deck hands were up that night. I rather think some of them were, the night being so bad. I am boatman on the Charles Mayo now, in the employ of the Stephens and Condit Transportation Co. I went on her in neighborhood of a year ago. I was here on the last trial. I was not sworn. I was subpoenaed by the Defendants.

And being re-examined, says:—The Mayo is laying in the docks now. She has been in use last season. In constant use.

And Defendants also called *James Anderson*, who being duly sworn, says:—

I live at No. 13 Union street, Newark. I was on the barge Mayo in November, 1865. I was merely going in charge of some baled hay we had for the Newark City Ice Company. I started with her from Newark. We went very well from here to New York. We had no difficulty whatever. I went with her from New York up the river. About 12 or 1 o'clock, we turned in.

The Captain laid down, and some time after, one of the men came and said that the vessel was making water—leaking. The Captain got up, and the Captain came some time after, and told me to get up—that she was in danger of sinking, and I got up. They were at the pump, and she was in danger of sinking. That is all I know about it. They cut her loose and got on the other boat. They cut her loose with an axe. They could not untie the ropes. The Captain was on the opposite side at that time on the other boat. I should call it a pretty stormy night; about the worst ever I see. I am not a boatman, but frequently up and down the river. I am in the employ of the Newark City Ice Company. They get ice about three miles above Rondout. My business calls me up and down the river where they get ice. The Company have barges running all the time between Rondout and Newark, where they get ice. I did not make any effort with the Captain to get from off the barge. The Captain told me to go on the other side, and I was going for that purpose.

And being cross-examined says:—In the fore part of the evening, I was up in the pilot-house, standing at the wheel. The Captain was up there reading the paper or a book. I was just keeping her steady after the steamboat—steering her. I left with the Captain, and went to bed. I don't know how long I was asleep. I don't know what time it was when he called me. I don't know how long it was from the time when I got up, to the time of the vessel going down. It was not long. I should not think it was more than three-quarters of an hour; it might be longer or shorter. The Captain was up some time before I got up.

And Defendants also called *Captain William H. Williams*, who being duly sworn, says:—

I am a boatman. I was a boatman in November, 1865. I commanded a propeller. She plied between Newark and New York. I towed the Mayo down to New York the day before she was lost. I cannot tell the day of the month or the day. I towed her on the voyage on which she was lost. She was alongside part of the

way, and part of the way astern. I had no difficulty with her in getting along. I left Newark between 3 and 4 o'clock. As to being trim for towing, I do not know but she was the same as all other barges. I could not see she was any way out of trim. We must have got to New York about 1 o'clock, I should judge. About that time. I left her at Hubert street.

And being cross-examined, says:—She was loaded pretty deep. I did not think anything of her being loaded too deep, because I did not know anything of the quality of the barge. Some load decks even with the water, almost. I had known the Mayo a good many years. I knew she had sunk before, in Tappan Bay; I know that of my own knowledge. I seen her there, that is the reason I know of my own knowledge. I saw her while laying there. I passed her there several times before she was got up. It is a good while ago. She was then, I think, loaded with iron. She then, I think, belonged up the river somewhere; I could not tell you where. After I had towed the Mayo up to New York, I came back again. I think that night I got here; I could not tell you, I do not remember; if I had a small tow it would be early, and if a big tow, late. I think I brought a tow; we seldom come without one. I think we went to New York next day with a tow. We have it more rough in Tappan Bay than New York Bay, because Tappan Bay is biggest—not so wide, but the largest.

And being re-examined, says:—When I saw the Mayo sunk in Tappan Bay, I was in a sloop. I don't know who then owned her; she was owned up the river. I saw her name, "Charles Mayo." She was fixed after she came here; her guards were cut off. I suppose that would make her stand up better. She had a short mast with derrick on before she was altered. She did not have it when she went with this iron; she was loaded with iron, I think railroad iron. I don't know how she came to sink. I don't know she capsized, only I see her there. I don't know anything of the circumstances of her sinking. The weather on the day after I towed the Mayo down, was pretty storming. Down at Newark the

tide was pretty high—we always have high tides on such blows; severe gales on the North River produce high tides here. I don't remember house in East Newark being surrounded by water. It was pretty high upon the tops of the docks in some places here.

And Defendants also called *John Hall*, who being duly sworn, says:—

My business is weigh-master for the Stephens and Condit Transportation Company. I have had full charge for about 19 years. I superintended the weighing of the iron on the barge *Mayo*. I weighed that which was saved out of her—it was placed right alongside of the principal office, Centre street.

And being interrogated by the Court, says:—I mean the Defendant's docks.

And being further examined, says:—It was sometime in April, 1867, I weighed the Iron that was saved; it weighed 11 tons, 17 cwt., and 18 lbs.—2,240 lbs. to the ton.

And being interrogated by the Court, says:—I mean 11 tons, 17 cwt. 0 qrs., 18 lbs.

And being interrogated by a juror, says:—It was weighed in April, 1867.

And being further examined, says:—I mean 1,700 gross—the original weight was gross. I have been familiar with loading iron on barges. Albany barges always take it on deck. I do not remember seeing any put in the hold on barges. I mean barges that run on the North river, by Albany barges.

And being cross-examined, says:— We have got two new barges, not what they call barges. Albany barges are some flat, and some appear to me to be sharp-bottomed. The *Mayo* was loaded with some iron in her hold. We have to have two scales; we had when we weighed the iron upon that day. They were close by. A man was attending to one and I to the other; I was watching

both scales. The iron was carried right off the scales on the the barge. I was not busy all the time. She was loaded 17th and 18th November, 1865—she was loading all the time. There was no particular account kept of where it went. I could not say who was there loading, there are so many gangs of men there kept to work. I could not bear in mind who was there. I am not a sailor. I never remarked any difference between the Mayo and Albany barges.

And Defendants also called *Thomas W. Dawson*, who being duly sworn, says:—

I am a Director of the Defendants—The Stephens and Condit Transportation Company. I know the iron testified to by John Hall, saved from the Mayo. I have seen it: It was brought from the Zinc dock when she was raised. The iron was taken out of her and placed on the dock and afterwards brought to Newark and weighed.

And Defendants rested their defence.

Thereupon the Plaintiffs, by their counsel, called *Julius Van Wagenen*, who being duly sworn, says:—

I am in the Collector's office. I have with me here the affidavit and enrollment on application of the owners, relating to the Charles Mayo. She was last enrolled by the name of The Stephens and Condit Transportation Company. It is the affidavit of Mr. Whittingham—he was Secretary—and it is the necessary enrollment on that affidavit, dated 7th July, 1865.

Plaintiff's Counsel read same.

And being interrogated by the Court, witness says:—The Mayo was built in 1842.

Plaintiff's Counsel also read affidavit of Mr. Smalley, 19th February, 1859.

And being further examined, says:—“Changed to the new admeasurement,” is the change by statute.

And being cross-examined, says :—The tonnage is ascertained by admeasurement. It does not indicate the load the boat carries. There is no particular rule of measurement. The only load a boat will carry is 90 per cent. more than the new admeasurement. If registered at 100, it would carry 190. The difference of the tonnage is the different scale of admeasurement, as changed by Act of Congress ; it is not difference of size or capacity.

And being re-examined, says :—The tonnage depends somewhat on the shape of the vessel ; it depends upon the width of the vessel ; a flat vessel, with great breadth of beam will carry more. That is all I know about it. No matter what shape of the vessel, we can calculate 90 per cent. over her measurement. We learn that by general observation. I do not pretend to be an expert.

And being re-cross-examined, says :—The tonnage has reference to what we can put inside her. It has no reference to strength of timbers, or what we can get on deck.

And plaintiffs also called *Captain David Cox*, who being duly sworn, says :—

I live in Jersey City. My profession has always been following water. At present I do not follow the water, but have propellers. I quitted the actual following of the water fifteen years ago, may be a little over. I have been on the water some since, but not on regular business. My first employment was from Belleville to New York. I was employed by the Stephens and Condit Transportation Company for some years, when they first started steam. I really cannot say how long I was with them, I think some fourteen years. I was towing up the river here part of the time, until they got a steamboat in. We had first sailing vessels, then steamboats. I knew the *Charles Mayo*. Her style of build at each end is quite sharp bottomed, quite flat, and I think she has got straight sides, I rather think, but I never measured the vessel. I was never interested in her. I think she is a little longer than she should be for the width of her. Supposing she was loaded

with pig iron, going to Saugerties and likely to lay ashore, I should load her with 70 to 75 tons below. That I should consider the safest, according to my judgment. Supposing she were loaded with 213 tons, of which 200 were pig iron, and from 11 to 15 tons only in her hold, I should not consider that a safe way to load her, myself, at least, I should not load her that way if I had control of her at the time. Supposing that the load in the hold was greater than before named, and went up to 20 or 25 tons in the hold, it would be coming nearer to my opinion, but I should not load her so. I don't know how much she was rebuilt, or whether she was rebuilt, or what extra repairs were put on her, but I should think 213 tons a pretty hard load to put on her. It depends on her build what she ought to bear, with a tonnage of 120, according to her last measurement. Her build is different from some others; some others would carry 20 to 30 or 50 tons more. It has always been a difficult matter, and with the new measurement it is a little more so. I would rather carry the carpenter's measurement, that is 157. I think that vessel, according to her build, should carry 200 or 215 tons, if perfectly sound. I think it was not a prudent way to load her with hay in bales on the top of the iron, on deck. A vessel going that voyage will have pretty rough weather. In going to Saugerties are apt to get ashore, not often, but do do it, and I should prepare my cargo accordingly. If a vessel has so much on deck, she is apt to sheer a little, but when she has got a vessel at the side of her it would not matter so much. If the disaster happened by springing of butt, I think that loading her in this way would have little tendency to produce it. I should mention that the practice of barges is, that they carry everything on deck. Every man has a different way—different notions. It is put on deck for convenience sake and to save labor. In breasting a sea and a wind, going up the North River, it depends altogether where vessels are weakest how they become leaky and where they make water. I should judge the Mayo made water above her guards, on account of her going from here to New York without making any. If she had a barge on each side of her

going up the North River, where there is a little sea, it makes quite a jar, and she might have had a little sea there, which she did not have going to New York; the jarring might have started oakum from the seams and then started a plank. With such a cargo as she had on board, it would not take long to get water enough in her so that they could do nothing with her. Good seamanship required the looking out to the pumps all the while, I should think; when I was captain I did very often. That is required according to the severity of the weather and the weight of the load. Supposing she had made water in some such way as I have spoken of, and it had gained on her, I think it would not have had a tendency itself to start these planks. If she was making water through the seams, she might have made enough without starting the seams. If she rolled, having water in her, or struck against anything, especially, it would have a tendency to start the planks. Such a vessel generally has two pumps—that sized barge sometimes only one; when they carry grain they have two—sometimes one aft; they almost always have fixed pumps. Barges do not often carry more than one anchor, sometimes they do carry two. The barges I had carried one, and it was thought sufficient.

And being cross-examined, says:—I was formerly with The Stephens & Condit Transportation Company—not with the present corporation. We used sailing vessels when I first went,—small ones. I really cannot tell how many years it was before they got steam. The J. C. Heartt was first. I am under the impression that they did own barge steamers. I could not say they did before I left. I never commanded a barge. I really cannot tell whether I went up and down with the barge steamers or not. I would not like to say I ever made a journey with a barge. If the vessel was going to Saugerties and likely to lay ashore, I would lay 70 to 75 tons of her cargo below; that would be in reference to her going aground, because I think it would help her a little. It would be apt to squeeze her a little to pieces, if she was an old one, and all

loaded on deck. That was the principal reason I gave for putting 75 tons below. As a general rule I would prefer doing it, if I had to load her. There would be so much more load taken from the deck. If she was able to hold it up it would not make any difference, except she got ashore. If there was a heavy sea, I should prefer, if I had the loading of her, to load her below. That would make this difference, I don't think the vessel would strain so bad. It strains a vessel because the weight is all on deck, and our barges have always been very much strained, except especially built to have all on deck. I don't know whether the Mayo was designed to have her load carried on deck. A heavy sea strains a vessel; I have seen it lift the guards up—it strains if there is a heavy load in. A heavy sea will wear out the best barge if she is kept long enough in it. The tendency of that straining and laboring is to spring her planks, not so much as her bilge. We do not get so much pressure on the side of the vessel as on the bottom. I consider a vessel would give way on the side before the bottom. I have known them to hold the planks while the spikes have all rotted away. I think jarring against the boats alongside her would have a tendency to spring a plank. I should not think it would start a plank as soon below as at the point of contact above. I don't know how the vessel is stanchioned. If she is well stanchioned she would be better able to carry her load on deck. My reason for thinking she may have made water over her guards is, her going to New York towed astern and had no water. If I had seen the vessel afterwards, when raised, and she had nothing amiss with her, only the springing of the planks, I should think she had sunk because they had started away. They might have started by striking the bottom. I don't know whether she has guards or not. I have not seen her guards. I know the ship carpenter, Mr. Richards. It would depend altogether how much had been done to her, when she was overhauled, (eighteen months or less before she sank,) how her age would affect her. He might think he had done all that was necessary to put her in complete order, but I should think she would require rebuilding—by

rebuilding, I mean taking them down to the bilge. Her fastenings might have given away; her timbers rotting makes old age. I say if she was so old, her age would make against her—that is all I mean to say. I think she ought to carry 215 tons. According to the old tonnage she ought to carry 210, 215 or 220 tons; that would not be overloading. If she had eighteen inches freeboard, I should not consider her too deeply loaded. I have noticed the loading of pig iron. It is loaded principally by putting it on deck. We have a great deal of iron loaded at Jersey City—I see it most every day.

And being re-examined, says:—This way of loading on deck began about the time I quitted the Transportation line from here to New York, fourteen or fifteen years ago, when freights became so low. It depends on the build of the vessel, what proportion of the load should go under deck. It also depends how far it is going, and where it has to go. As a general thing, you must put two-thirds of the load on a sailing vessel under deck. It depends altogether about the build of a vessel how soon she would require rebuilding. I cannot come at that at all. I have a vessel, built twenty-three years ago, which does not need to be rebuilt at all, and another wanted rebuilding in twelve years. Some rot in six or seven years; it depends what timber is put in the vessel. I have had stanchions go halfway through the beam by straining. Such pressure tends to create more straining. Supposing the leak to spring from the plank off bilge, tarpauling might have been put around her, if time was allowed, and she was not too deeply loaded. It takes some time to get it around—it might then have saved her. A vessel loaded as this was, would roll easier and quicker than one loaded in the hold.

And being re-cross-examined, says:—If the planks sprung six feet under the water, we could not have time after we found it out to get tarpauling around, and would not know anything about it if not found out, and could not, of course, get tarpauling around.

And Plaintiffs also called *Captain Williams*, who being duly sworn, says:—

I saw the vessel when loaded with the iron. I cannot tell how deep she sat in the water. I should think she was pretty near “decks to”—decks into the water. I could not say, however, whether they were or not.

And being interrogated by the Court, says:—If “decks to” she would have no free board.

And Plaintiffs also called *Captain Francis King*, who being duly sworn, says:—

I live in Newark. My occupation is a boatman, for sixteen years past. I am master of a schooner. I know the *Mayo*. I have known her, I guess, ever since she came to Newark. Her style of build is sharp. The safest way of loading her with 200 tons of pig iron, I should think, would be to put 75 to 80 tons in the hold, in order to make her stand up. I have heard of the way the *Mayo* was loaded. I should think on her meeting a blow it would have a tendency to careen her over, the vessel being narrower. Supposing that the planks on the butts sprung in the way described here, I don't know whether her loading could have anything to do with it, except she got in the sea-way and worked her plank loose—I mean by working up and down in the sea—it might have effect to start those planks. I don't know but that if she had leaked from some other cause, and not been noticed, and it had gained, and she had got seven or eight inches of water in her, she might have got such a blow as would have sprung those butts. The water by splashing about might have tendency to start the plank off, straining the vessel still more. I am acquainted with the *Mayo* and her deck. I should think that in towing her between two barges, the water would naturally flow on her deck, and I see no way for it to escape, and consequently the water would run aft down the hatches. I saw her loaded before she went off. I should think she was not loaded safely. I should not think there was over three inches of free board. I should not

think it was prudent to put hay on deck. Having so much iron on deck, and hay on the top of it, it would naturally make the vessel top heavy.

And being cross-examined, says:—I have never commanded a barge. I never made a trip on one but once, and then from New York. It was the barge Stephens, built for the Stephens & Condit Transportation Company. I would have put 75 or 80 tons of the pig iron loaded on the Mayo, in the hold, to cause her to stand up. If she stood up without, I would still put it in. I would put it in for safety. I should think she would stand up better. It would not make any difference if the plank was sealed, seven inches of water swashing about in her would do the injury with a sealed plank. The water running through has a free course right through the floors. The water is between the ceiling and the plank. The water passes right through the keelson. It passes through my vessel. I should think the load on her deck would tend to make her top-heavy and careen her.

And being re-examined says:—She would roll most if loaded on deck—that seems to be natural. The rolling would strain her butts. The pump generally goes down through the deck beneath the ceiling, within two inches of the vessel's bottom. There is always space there, from whence the water is pumped. The water runs there from a leak on either side. They put it there in order to make it run aft.

And Plaintiffs also called *Captain Henry Mullins*, who being duly sworn, says:—

I live in Newark. My business is a boatman. It has been so for 24 years or 25. I have been employed by different Companies. I first commenced for T. V. Johnson and Company, for 8 or 9 years. I then got part of a vessel myself in the Newark & Rosendale Lime and Cement Company. I know the Mayo. I was once Captain of her. It was from the 1st of February to the 1st of September, 1862. That was at the same time she was

repaired, in 1862. She was repaired June and July, 1862, and finished in August. Comparing her with other barges in her build, she was a good deal sharper at her ends than many barges, and what we call wall-sided—that is, straight up and down. The proper way of loading her with pig iron, for the safety of the vessel and cargo, would be to put one-half of it in the hold—one-third is sufficient—that is my judgment of it. When I had her I carried iron on her sometimes. I loaded her with some in the hold and some on deck. I never had a great quantity of iron on her. I had once 80 tons. I put about 25 tons of it in the hold. That was my instructions from Mr. Smalley.

And being interrogated by the Court, says:—That 80 tons was carried from Troy to Elizabethport.

And being further examined, says:—I have had her loaded with coal. I let all that would run in the hatches go down, and the balance I carried on her deck. I had some little trouble when I loaded her that way. She rolled considerably from Port Ewen, near Rondout, where the Pennsylvania Railroad comes out. We had to put her alongside another barge to keep her steady. She has been sunk before this to my knowledge. Twice, I believe, I have known her sunk. She was sunk once, if I am not mistaken, about Piermont, Hudson River. She sunk once at the Gas Company's dock, here in Newark. At Piermont she was sunk in the river. I was not along with her at that time. I passed by in another vessel. I was in a schooner at that time. I don't know who commanded her at that time. When she was repaired in 1862, I think the combings of the hatches was cut down. The combings formed four square pieces mortised down on top of the hatch, and projects, some four, six, ten, and some vessels have them twelve inches above the hatch. I know they were cut down some. I believe to make it easy to roll casks across her. The scuttle was not cut down, there was no reason of that. Any time that the water comes on deck higher than the combing, there is nothing to prevent the water going down the hatches. If the

sea continues to wave over the hatches, she is sure to get too much water in her. I don't think the water that might get into her, unless a large quantity in her, would have effect of making her spring a butt. I do not consider seven or eight inches of water enough to swash against her sides to cause her to do it. I do not consider seven or eight inches of water in a barge much. If that quantity was on her ceiling it would be a great quantity. If there is much water in her there is more strain. A vessel that had all her load on deck would certainly roll more and strain more than a vessel that had part of the load in the hold. I was out that night, the 20th November, 1865. I was in Newark bay. I left Newark by 7 o'clock in the evening to go down to Little Washington, New Jersey, on the Raritan river. I was in Newark bay during the night. There was a good stiff breeze, northeast—some rain I believe—it continued that way pretty much all night. I got as far as the Central Railroad bridge and anchored, and lay there till next morning. I had one anchor out. My vessel measured 50 tons and carries about 90. Next morning I heaved up my anchor, and went about my business. I went down the sound to Amboy and anchored to wait for the tide. Then I went up to Washington. There was quite a breeze of wind; nothing so very desperate—I have been out in heavier storms. At that time of the year we generally expect some pretty good blows, northeast and northwest too. As compared with our own Newark bay, Tappan bay is the larger. Tappan bay is rather the worst, of course; the water is a little deeper and gives more chance to get up a bigger sea. Sometimes a northeast wind in Newark bay makes quite a bubble—makes it quite rough, quite a middling sea on. I consider neither Newark bay nor Tappan bay dangerous spots. A canaller out there might be frightened perhaps. I never see much danger.

And being cross-examined, says:—I saw the barge Mayo when she was loaded on her last journey. I did not consider her unsafely loaded—not in ordinary weather. I could not say whether she was loaded the way she was usually loaded. I could not say

whether I had seen her loaded with iron before. I had not seen her loaded like that before. The only objections I should have had would have been, to have put more in the hold. I was sworn on the last trial; I then said I could not find fault with her loading and I should consider her safe. Barges that go from here to Elizabethport generally load on deck. Just when she went to go to Saugerties and sunk, she was accounted a good sound barge. She was pronounced so at the ship yard. At the time she rolled with me when loaded with coal, and I had to fasten her to another vessel, it was before her guards were taken off. The time when I was directed by Mr. Smalley to put iron in the hold, was before her guards were taken off. Before she was overhauled she had a deck same description as now; her beam was filled up with pine boards; they were taken off and curtains were substituted when she was overhauled. She had a mast and derrick. They were taken off. Her deck house was made narrower to the width of the guards taken out. These alterations had a tendency to make her stand up better and steadier. I never saw a vessel you could get all the water out of, except by tipping her, having the cargo astern; when on even keel it is a difficult matter to get the water out clean. The general thing is for a man to get the water out as clean as he can. There will usually be not less than two inches of water. I like to keep my water off the ceiling. I think seven inches would about fetch it on the ceiling. I should think her timbers about five inches. When I went out on the evening of the 20th November, 1865, I went to the Central Railroad bridge. I left Marcus Sayre's wharf here. I was light—unloaded. I had been loaded with brick. I went about three-quarters of a mile from the Central Railroad bridge. I afterwards went down the sound—not far. I waited for the tide. I was up once or twice during the night. It was a rough night, but nothing particular. I got up because the topsail was not clued fast to mast, that was one reason. I load my schooner on deck. Brick and stone is what I get to carry. I put some in the hold—if I was going to Saugerties I would put 30 tons in the hold.

And being re-examined, says :—I would put 30 tons out of 85 tons in the hold on my schooner if going to Saugerties. When they took the guards off the Mayo, it lighted her above ; it was to make her carry well and more ; it was to make her steadier because it lighted her above. I did make a remark the day I saw her loaded that I considered she was not safely loaded, considering where she was going. It was to the men that loaded her I think. I think they were putting the last draft of iron on while I was there talking.

And being further re-examined, says :—I said on the last trial I do not know that I can give any reason why I should consider it unsafe.

And Plaintiffs also called *Samuel Paradise*, who being duly sworn, says :—

I live in Malden, Ulster County. I am a boatman. I am used to going on sailing vessel, barges and canal boats. I was out on the same night the Mayo was going out, and sunk. I was alongside of her. I was on the "New Style;" she is a Western boat, a lake boat. A barge is wider than a boat and carries more than a boat. I had on my boat then 200 tons of coal ; all in the hold. The wind was northeast that night. It did not blow very hard when we started. There was some rain. My boat was on the port side of the Mayo. I was lashed to her. She took my berth when the tow was made up—her place was outside. She lay ahead of us and the captain of her would not haul back. There was not a great deal said between us about it. I said I ought to have that place, being as I was the tallest boat in the tow. He told me if I was afraid of my boat I could come aboard of him. I started from New York between 4 and 5 ; the wind continued to blow. About 11 o'clock it blew fresher. I have often seen worse blows ; it was not so very bad, I should think—not so bad as I expected. I went out once and asked if she was leaking ; he said yes, and I said if they needed help we would help them. I

then saw a boy, who said she was leaking, and I asked him how much. He said I was to try for myself. I sounded, and there was two or three feet of water in her. I went aboard and warned my brother to be ready to cut loose, because I thought she would sink. In fifteen or twenty minutes she went down. I told the Captain if he had warned us and put some iron on our deck, we could have carried 20 tons more. I had been in the cabin; had laid down to snooze a little, and turned out occasionally. I did not see any particular danger to our boat. We had a clock. By our time it was very near 12 o'clock, but by the right time it was between 2 and 3 when the Mayo sank. I staid up after that until it was daylight—a very short time afterwards. I did not hear anybody halloo for the steamer. I got up and waved a light for the steamer to stop. I think the Arrow was the boat that was made fast to the Mayo. She had open hatches. A gentleman came aboard of us from the Arrow, and we heard that she sunk next morning.

And being interrogated by the Court, says:—I saw the Arrow astern.

And being further examined, says:—After the Mayo sunk there was not so heavy a sea, and it did not blow so much. The Captain of the Arrow cut himself loose to prevent himself from sinking; she was fast to the Mayo. There were two men aboard our boat, counting me. We had one tin pump and two log pumps; we could lend one—a tin pump. We were not asked for any help.

And being cross-examined, says:—I live in Malden, Ulster County. I am 27 years old. I have followed the rivers and lakes thirteen years. I was master of this vessel—the New Style. She ran from Philadelphia, to New York, through the Delaware and Raritan Canal. That has been my principal route. I was then going to Rondout, the reason I was going up the river on the 20th of November, 1865. She was loaded with the coal at Richmond, just above Philadelphia. I had made one trip a month, for two seasons, on the river. I and the Captain of the Mayo had a bit

of a "scrimmage," not of any account. It was on account of lines—not more than we usually do in same circumstances. I sounded the Mayo with a rod in the cabin and found about two or three feet of water in her. I thought I could not help them much then; it was almost too late. I would have helped the Captain if he had asked. I don't know how much water weighs. I don't know how much heavier the water in her would make her. She had been listed and was almost on her deck on the starboard side. If she had three feet of water in her in addition to her load, that would settle her down "decks to." It looked to me as if ten or twelve inches midships out, and between two and three feet forward. My vessel is calculated to carry 60 tons on deck. We carry flagging stone on deck, if they are too large to put in the hold. She is $17\frac{1}{2}$ feet wide, and 96 feet long. I asked all hands that were aboard the Mayo, those who stood at the pump, if I could help them. I understood they had a passenger aboard, but I am not sure. I don't know the names of any of them who were aboard the Mayo. I had never seen them before that night.

And being re-examined, says:—My vessel could carry 225 tons. Her build is flat bottom, straight up and down. She is five years old. My vessel is not a superior boat in point of strength.

And being interrogated by the Court, says:—When I tried the water in the hold I saw the Captain of the Mayo; he was by the pump, and the boy was dressing himself. The Captain of the Mayo never warned us, and we might have been drowned.

And Plaintiffs also called *Patrick Lynch*, who being duly sworn, says:—

I live at Philadelphia. My business is a boatman. That has been my business since 1853, off and on, both river and canal boating. I was out on the night the Mayo was sunk on the Hudson River. I was alongside her on the boat Whitehall. She is an Erie Canal boat. Her Custom House measurement is 96 tons. Her capacity 220 or 230 tons. We were loaded with coal, with some-

where around 215 or 220 tons. There was a few tons on deck, and the remainder was in the hold. She was about 5 years old at that time. She was a regular lake boat, built for the Erie Canal. On that night the weather was stormy, raining and blowing pretty severe. It was a northeast wind, I should judge. The degree of the wind was a pretty heavy wind. There was nothing remarkable in it—it was a pretty good storm, though. I have been out in worse weather before. I cannot tell exactly the time of the night it began to blow hard. It was blowing a little when we left New York. I thought the boat I was in was fit to stand the weather. It had all the appearances at that time to storm. I was up and down all night, I suppose. I was not apprised that the Mayo was in trouble. I did not know a word about it. I only knew of it about ten minutes previous to her sinking, probably that—some-where around that. I came to know of it then, when the Captain came and said his boat was in a sinking condition, and asked me to let him put some iron on my vessel to save his. I said yes. We commenced putting some on—a few pigs, but she was just about down then. I carried that iron on along with my load. I might have taken 25 or 20 more tons from him. The Mayo went right down soon after that. I commenced cutting the stern lines and she dropped right down. The Captain of the Mayo was aboard our boat at that time. I saw the Arrow that evening. She was tailed under the Mayo's stern. She was an open boat, half kind of decks on her. She was loaded with coal, I believe; she went adrift down the river. I don't know much about the safety of her load. I was not much acquainted with the boat.

And being cross-examined, says:—I was Captain of the boat I speak of, the "Whitehall." There was another man beside myself aboard. The capacity of the boat is 220 or 230 tons. I had 115 or 120 tons on her then. That was the draft we were allowed to carry on the Delaware and Raritan Canal. We could always carry more on rivers. It would be according to the force applied how long it would take to shift 20 tons of the pig iron from one

boat to the other. It might take one man two hours. One pig weighs about 100 pounds. It would take about 22 pigs to make a ton.

And being re-examined, says:—I had two men on my boat; on the other boat there were two more. One of the boats astern of us was tailed under Paradise's stern, and another was tailed to the Mayo's stern. The other boats were on the wings of the tow ahead of us. They hauled us up a little closer after the Mayo sunk.

And Plaintiffs also called *Captain William Fengar*, who being duly sworn, says:

I live in the City of Newark. Have done so about 15 years. My business is following the water—in fore and aft sailing vessels. I have been employed in that business about 20 years. My vessel, as a general thing, run between here and New Brunswick—has for the last eight or ten years. I have coasted otherwise than that up the North River formerly, before I came here. In the distance between Spuyten Duyvil and Upper Nyack there is harbor to be made with the wind northeast. Piermont is one, and Tarrytown point another. Piermont is on the west side of the river, and Tarrytown point on the east side. Along the shore on the easterly side, I should not think there was any difficulty in a vessel dropping away and anchoring. I know the barge Mayo. I have known her ever since she has been here. I have seen her frequently. In comparison with other barges, I should take the Mayo not to be a very able barge. She has not got much bearings, for one thing, and her ends are not very good to make her an able barge. She has not got much bearings—built up straight and wall-sided. Compared with other barges in point of sharpness and build, she is sharper than some other barges. In loading such a vessel with 200 tons of pig iron, and 13 tons of hay, to go to Saugerties, and at that time of the year, in my judgment, 50 or 75 tons of that cargo should have been below at the least calculation. The reason I would load her below is that I

should not think her capable of carrying it on deck. She has a hurricane deck, one thing which is a great detriment to make her not able. The iron put on deck, and the hay put on the top of it reaching to the other deck and tarpauling put around it, would produce a great effect in a gale of wind; it would produce the same effect as with a sail of that size. We always consider a vessel more able to ride out a gale of wind with part of her cargo in the hold. Supposing the leak which sunk this vessel to be the springing of butt on the bilge, I should think her laboring in the sea would have the effect to produce that result. I was out on the night of the 20th of November, 1865. I went from here to Sayre and Fisher's Brick Works, on the Raritan river. I think as near as I can recollect, I left here about two o'clock in the afternoon. The weather then was blowing very heavy, about north-northeast, I think, as near as I can remember. I think it was not at that time raining. I could not be positive; but I think it rained some part of the evening. I sailed down in my craft. I got there about dark, I think. I think we loaded next day. That night was bad weather. I am not certain whether the next day the storm was so bad. I should think not; we loaded next day. It was a steady storm.

And being cross-examined, says:—I commanded a fore and aft schooner. I never commanded a tow. I went into the harbor at Piermont with seven feet. I say I have carried seven feet in the slip of Piermont and below the dock—the lower side of the dock. I have been in there with different vessels. I went in with the sloop "Wave," belonging to Coldspring. It is an ordinary slip; a good wide slip that a sailing vessel might go into. There is no difficulty to go in there. I should think, to the best of my opinion, the vessels in the tow might have been dropped there. The steamer could have anchored outside the dock. I see no difficulty in the steamer landing a barge there, not with a tow. I went in with six and a half feet of water in Tarrytown point. I could get in at Piermont with a vessel drawing seven and a half feet of

water, but I could get better in if drawing five and a half. Between low and high tide, there is a difference of four or five feet of water. If a vessel was drawing as much as seven and a half feet I would not attempt to get in. I should make harbor outside at Tarrytown Point. We always make harbor there with six and a half feet of water. I could not get in as close as we did with a vessel drawing seven and a half feet. I have been inside the slip with a steamer. I don't think there is anything to hinder a steamer from landing a tow there, but not to go in with the whole tow. If there were no sign of difficulty, there was no reason for stopping there. If I had wanted a harbor, I should not go in at Piermont, but at Tarrytown Point, because there with a northeast wind he would have got in with his tow, and lain there with perfect safety. We could not go with steamer where only six and a half feet of water, that is a sure thing. I don't pretend to say what Captain Rogres would have done, but I have no hesitation in saying he could have made a safe harbor there with that tow. I never had a tow; a fore and aft schooner is the extent of my craft. I should think that the build of the barge Mayo was not such as we would consider right. She has not got ends to make her an able barge, and she is wall-sided. In the first place I should not think she was built for an able barge; her ends come up sharp. I could not explain how her build would affect her strength; but when so built, we always suppose they are unfit to carry deck load. Alongside of a boat she would be more able to carry load on deck; but not as able as some other boats. I should think she was never able to carry 200 tons on deck. I could not say whether she was actually loaded that way. If she had 50 or 75 tons below, it would prevent her rolling quite so heavily. The more top hamper you have got on a vessel, the heavier she rolls. There are a great many reasons for it, perhaps. I could not explain it to you. A boat of that kind is not calculated to carry her load on deck. I don't know whether she was built expressly to carry her load on deck. I judge by the appearance of her she was not built to carry it on deck. I think 50 to 75 tons should be in the hold. I should

say the hurricane deck is eight to ten feet high from main deck. I should say if the load on deck was as high as hurricane deck was canvassed, it would have the same effect as a sail of that extent. It would make her roll. If she was going cross of the sea, quartered on the sea, neither head nor stern to the sea, I should say that would help her some. In Tappan Bay, in certain parts of the tide, she could not help but roll. The natural effect of laboring in a heavy sea would spring butt—sometimes plank springs. I went up Staten Island Sound. The wind was fair after I left Newark Bay. I went to bed pretty early; about 9 o'clock. I should say it was a very bad night. It was an unusually bad storm where we were. I think I was up once or twice between the edge of evening and 12 o'clock. It was raging violently on flood tide. I think it was the after part of the night. I could not say what time. I carry brick most of the time. Sometimes we put nearly or quite all on deck, in the summer time, when the weather is moderate. But that depends on the class of vessel you have got, whether able to carry load on deck. In Fall and Spring I generally put ten tons below, out of seventy-five tons; that is about the dead weight of my schooner. In Summer time, we put all on deck; that is, on that class of vessels. That is an able vessel to carry load on deck and be able with it.

And being re-examined, says:—I should say there was plenty of water for vessels drawing seven and one-half feet. Supposing Capt. Rodgers was at Piermont with flood tide, northeast wind and slack water; I should say there would be no difficulty in harboring the whole tow and himself harboring in deeper water. There would be no difficulty without an extraordinary gale of wind. We got more wind where I was, than on the other side of the river. We are land-locked nearly the whole way. We were pretty well land-locked at Raritan River.

And being re-cross-examined, says:—I should anchor the steamer and hold fast to the tow. I don't pretend to say what I should do with tow of hawser ties.

And being further re-examined, says :—I suppose they could also anchor. I can see no difficulty.

And Plaintiffs also called *Charles Riley*, who being duly sworn, says :—

On the night of the 20th November, 1865, I was on board the "Whitehall." I was a hand aboard her. I was there when the Mayo sunk. I was up at the time. I had before that been turned in a few hours. I had been in bed probably 2 or 3 hours—rather more than that. The Captain of the Mayo, or one of the hands—I am not sure, came to the cabin and said they were in a sinking condition, and asked if we would let them put some of his iron on board. We said, yes, and with that went out of cabin, and threw some iron on our deck, five or six, or so, pieces. Soon after she went down. It was five or ten minutes after he called us that she went down. Things were in confusion and I could not tell the time exactly. I heard call for steamboat while she was going down; that was the first I heard. We did not turn in exactly with our clothes on. We never go to bed with tow. We had been asleep. It blowed up a pretty good breeze. I should not consider it a very bad storm as compared with what I have seen before. I have been boating on rivers and canals. Delaware and Hudson canal. Philadelphia and Baltimore, through the canals. I should think the Mayo was three feet out of the water forward, and two feet to stern. She might have been out fifteen or eighteen inches midships. I did not take any special notice how high she was—how much out of water.

And being cross-examined, says :—I was up as near as I can tell five or ten minutes before the Mayo went down. I was waked by the alarm given. I had been asleep before. If alarmed before I think should have heard it, being in the next boat. If I were so sound asleep as not to hear it, I should not, I suppose, have got up. The Iron Company of Philadelphia, got the iron saved. There were six or seven pigs, I think. I guess there was not more than that. There were two men on our boat. There was myself, and Captain

Lynch was the other. Captain Lynch was in the cabin. He was laid off at that time. I don't know whether he was asleep.

And being interrogated by the Court, says:—I don't know what time Captain Lynch turned in. He did not turn into bed—he had his clothes on.

And being further cross-examined, says:—Captain Lynch was lying on the floor. He lay there to take a snooze, I suppose. I could not tell how long he had been there. I was also lying down there, on the floor, too.

And the Plaintiffs rested their case.

Thereupon the Defendants recalled *Captain Elvin Rodgers*, who says:—

I heard the evidence of Captain Fengar on the subject of making a harbor. I could have made a harbor for a vessel drawing $6\frac{1}{2}$ feet of water, but I had no chance with a steamboat drawing $7\frac{1}{2}$ feet. With flood tide and head sea, I had no opportunity of getting in at Piermont. There is not room enough, and not far enough to get in. The probability is I should have lost half the tow; I would not have risked it anyhow. There was no chance of getting in at Tarrytown Point—no chance of getting in with the steamer. I should probably have lost half the tow. The tow would in that condition roll together and lift their plank shears. I durst not go in. The hawser tier could not have anchored, and would have swung around in the trough of the sea, and the probability is they would all have sunk. The Point does not project out far enough to make a shield there. I question whether the steamboat *Herald* would have got in there. The Captain of the steamboat directs the making up of the tow. This tow was made up by my orders.

And being cross-examined, says:—If there is any fault in making up the tow I am responsible for the fault. The difficulty here was, I did not know that the barge was in a sinking condition or I should have endeavored to get her clear, when she would

have gone down in shoaler water. There would have been no chance to make a harbor to have saved us.

And Defendants also re-called *James Anderson*, who says:—

I do not know that Mr. Paradise came on board the *Mayo* on the night of the loss. I did not see anybody come on the vessel. I heard nobody offer assistance. I did not go to the pump.

And Defendants also re-called *Captain Thomas E. Richards*, who says:—

I can tell exactly the time when the *Mayo* was overhauled before the loss. We hauled her out on the 22d of September, 1864; by hauling her out, I mean, out of the water; and we examined and caulked her. She was thoroughly overhauled at that time; she was searched. I mean by that, going over her with caulking iron and finding out slack places and seams, and driving them up.

And being cross-examined, says:—The book I now produce shows what was done to the *Mayo* when she was overhauled in September, 1864. We did considerable in re-caulking the vessel. She was on the ways in May before that. She had got on a stone at the timber works, and we then hauled her out to stop a leak. She was not re-caulked, it was only to stop the leak. We hauled her out generally every year, and re-caulked her if she needed it. She was not regularly re-caulked every season. She was tried and did not need it.

And being interrogated by the Court, says:—When she was overhauled in 1864, a quantity of new materials was put in. The planks were put on her guards and wearing pieces.

And being further cross-examined, says:—Her length was about 95 to 100 feet; her width, 22 or 23 feet; her hatches were about 6 to 7 feet square, or 6 by 7. The scuttle was 6 feet square, and the combings probably 2 inches high. The combings around the hatches were probably from 4 to 5 inches high.

And Defendants also re-called *Captain* ——— *Kelsey*, who says:—I heard the evidence of Captain Fengar, about making a harbor. I am acquainted with towing barges on the Hudson River. I don't think Captain Rodgers could have made a harbor at Piermont, or anywhere after he left New York. There is no shelter for a tow. I do not know of any harbor at Tarrytown Point at all. From my knowledge he could not have harbored his tow with a northeast gale.

And being cross-examined, says:—I speak of going in with such a tow and such a steamer as Captain Rodgers had.

The case was closed.

Counsel for the Defendants prayed the Justice that he would charge the jury on the following points:

First.—That the Defendants having proved that they do not ordinarily send vessels or transport goods to Saugerties, they were not bound as common carriers to accept and carry goods destined for that place.

Thereupon, the Justice charged the jury that the said question was not material to the issue.

Second.—If they do accept such goods they are for that journey only private carriers, although they may be common carriers on other routes, and being private carriers are only liable for negligence, and the Plaintiffs are bound to show such negligence to recover.

Thereupon the Justice refused so to charge, and charged as set forth in the charge itself.

And the Counsel for the Defendants thereupon excepted to such charging, and to such refusals to charge, respectively, and his exceptions are thereupon sealed accordingly.

[SEAL.]

DAVID A. DEPUE, *Judge.*

And the Justice charged the jury as follows:

On or about the 9th of November, 1865, the Plaintiffs, who are manufacturers of iron, at Saugerties, in the State of New York, became the purchasers of 200 tons of Glendon Pig iron, of Tisdale & Co.

At the time of the purchase, the order was in bulk on storage with the Defendants, on their dock in the City of Newark. The Plaintiffs, desiring to have the iron shipped to Saugerties, opened a correspondence with Mr. Smalley, the Superintendent of the Defendants, with a view of obtaining a shipment of the iron to that point.

The correspondence ended in an arrangement by which the iron was to be shipped, at a freight of \$1.50 per ton, and one of the Defendants' boats was detached from their usual and ordinary route for the purpose of transporting the iron to the place in question. The correspondence is a matter of no importance in the cause. The bill of lading, which was accepted by the Plaintiffs, and is sued on, constitutes the sole contract between the parties.

At this time the Defendants were common carriers, regularly engaged in the business of transporting goods and merchandise between Newark and the City of New York, and holding themselves out, however, as willing to engage, on special terms, for transportation elsewhere. The goods were shipped on the Defendants barge Mayo, which, on its way up the North river, was sunk, and the iron lost.

The Supreme Court held, in this very case, ⁺ when it was before them, upon substantially the same evidence on this particular point, that the Defendants were common carriers not only between Newark and New York, but that they were common carriers over the whole route of this employment from Newark to Saugerties, and that their liability to the Plaintiffs to respond to them for the damages sustained by the loss of this iron was to be determined with reference to the obligations which the law puts upon common carriers, engaged in the transportation of goods and merchandise, under a contract of shipment such as exists in this case.

J

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By law, common carriers are held to the strictest kind of accountability. They are absolute insurers of the safety of all property entrusted to them for the purpose of transportation, and can only discharge themselves from that liability by showing that the loss was occasioned by the act of God or public enemies.

The reason given for the strictness of this rule is that the owner parts with the custody of his property, and puts it in the care and under the control of the carrier, and considerations of public policy require that he should be held as an insurer of its safety—to be discharged from liability to respond for its value in case of loss, only by showing that the loss was occasioned by the act of God or of the public enemies.

This rule of law which I have stated is well settled, and has received the sanction of our Courts, not only in this case, but also in an earlier case, decided by the unanimous opinion of our Court of Errors—the highest court of the State of New Jersey. It is therefore the well settled law of this State.

For a long time in judicial history the courts denied the power of common carriers to limit, qualify or abridge their common law liability, as insurers, by express contract, but gradually this principle has been relaxed until the law is now settled; that while common carriers are still bound by virtue of their general business, to accept all goods offered to them to be transported over their route, subject to their common law liability, yet if the shipper consents that the goods shall be received upon an express contract, by which that common law liability is modified, the carrier is held only to the terms of that express contract, *provided* that such contract does not amount to an agreement, to exempt the carrier from the consequences of his own negligence.

But such express contract, when made, is not considered as an entire substitution for the common law liability of a carrier, but rather as an exception, taking the case thereout. And the Courts give to such exceptions the strictest construction, and put upon the carrier the burden of proving affirmatively that the loss was occasioned by some one of the causes that the parties stipulated that the

carrier should not be responsible for. There is such an express contract in this case—that contained in the bill of lading—and by that contract the rights and liabilities of the parties in this case are to be determined. That bill of lading contains an acknowledgement of the receipt of this iron, and an agreement by the Defendants to deliver it at Saugerties in like order and condition, the dangers of the seas only excepted.

By this contract the defendants became absolute insurers of this property against all losses except such as were caused by the dangers of the seas; and the burden of proof rests upon the Defendants to satisfy you affirmatively that the loss in question was occasioned solely by the dangers of the seas, and if they have failed to do so, as otherwise insurers, they must respond to the Plaintiffs for the value of the goods lost.

The burden of proof lies in this wise: By proof of the delivery of the iron to the defendants, and its non-delivery at Saugerties, the Plaintiffs have made out a *prima facie* case against the Defendants, from which the Defendants can only escape by showing that the goods were lost in the course of transportation, and that such loss was occasioned by the dangers of the seas; and you must be satisfied as the result of the evidence, that the loss was due not only proximately to the dangers of the seas, but that it was not contributed to by any negligence or default of the Defendants, either in the unseaworthiness of the vessel to engage in such a voyage, even if that defect be latent, or in the improper or unsafe loading of the vessel, or in putting to sea in a storm, by which navigation was rendered perilous, or by negligence, default or mismanagement by the hands on the barge, at the time of its loss, which contributed to the occurrence.

The question of absence of negligence does not form the groundwork of this defence. A common carrier, receiving goods under a special contract, may be answerable for them, although no actual blame is imputable to him. The efficacy of the defence consists in showing that the loss was occasioned by *that* cause, which by

the stipulation of the parties was agreed upon, as *the* excuse for the non-delivery of the goods.

If the accident, which occasioned it the loss in question, was not within the exception in the bill of lading, and yet happened *wholly* without any fault on the part of the carriers, it is their misfortune and not the misfortune of the shipper, and the carriers are nevertheless liable.

I desire to be correctly understood on this point, as jurors frequently misapprehend the precise point of a defence of this character, and are misled into considering that the question of negligence or no negligence, is only involved in this defence. I therefore repeat what I have already said, that the efficacy of this defence consists in proof that the loss as w occasioned by the dangers of the seas; as to loss happening from any other cause, the defendants are insurers, and liable therefor, even if entirely free from blame.

The question of negligence only becomes an element in the cause, when, after the Defendants have proved that the storm in which the vessel went down, was one of overwhelming power, it is introduced by the Plaintiffs to deprive the Defendants of the benefit of that defence, by showing that the loss was not occasioned solely by that cause, but was contributed to by the want of ordinary skill and prudence on the part of the defendants.

You will perceive by these principles of law that I have stated that the meaning of the phrase "dangers of the seas" is of great importance in this case. That expression has a legal signification, somewhat different from what might ordinarily be inferred from the primary meaning of the words; and as we are sitting in a court of law, construing a legal instrument, to ascertain what the legal rights of the parties are, we must give to these words their legal signification.

The Supreme Court has defined the expression "the dangers of the seas" to mean those accidents, peculiar to navigation, that are of an extraordinary nature, or arise from irresistible force or over-

whelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence.

The expression is somewhat wider in its scope than the expression, act of God. It includes loss occasioned by hidden obstructions to navigation recently placed there—collision without fault of either party, and some few other cases not covered by the phrase—act of God. But where the insistent is, as it is in this case, that the loss was occasioned by the force of the elements, the phrase dangers of the seas is entirely synonymous in its meaning with the act of God, and was so considered in the Supreme Court in the opinion which was read in your hearing.

Adopting then the language of this definition, was the storm in which this vessel was sunk, a storm of irresistible force or overwhelming power? This is a question of fact for your consideration, and a few general observations upon the evidence to aid you in applying it to the issues in the cause, is all that is necessary.

The barge was not capsized by a sudden squall which spent its fury upon this vessel alone. The storm in which she perished was one of considerable extent. Other vessels in the immediate vicinity and elsewhere were subjected to the same stress of weather. The place where she sunk was not, at ordinary times, unusually dangerous to navigation; and in a storm, the only peculiar dangers were due to the width of the bay, allowing the wind to sweep across it.

Much evidence has been given, by witnesses who describe the storm as extraordinary, or otherwise. Evidence of that character was competent to be received. But as expressions of that kind are merely the opinion of the witnesses, or their own inference from facts within their observation, their weight and importance must depend upon the extent to which they are justified by the facts proved in the cause.

It is your province and your duty to determine as a question of fact, whether this storm was an extraordinary storm of irresistible force and overwhelming power, and the opinions of witnesses contained in words of description are entitled to consideration, accord-

ing as they are justified or not justified, when encountered by the *facts* proved in the cause.

To illustrate: If a man should describe a storm as of unwonted fury, bursting upon this city, and it should appear that after it subsided little or no damage was sustained by property exposed to it, the force of such description would be greatly impaired.

So in this case, you are to subject these descriptions to the test of the facts proved and results which was occasioned thereby. Such a test you have in this case in the conduct of the persons on this barge and on other vessels in this tow, and in the refusal of others to put out in this storm, and in its effects on other vessels subjected thereto.

On the part of the Defendants it is insisted that the description of these witnesses of the storm is not only justified by the facts proved in the case, such as its effects upon other vessels and the refusal of other experienced watermen to put out because of the storm; but that those facts raise the degree of the violence of the storm to that of one of irresistible force and overwhelming power.

On the other hand, it is argued that the fact that the Captain turned in from to two three hours before the vessel sunk—that the two hands who were left on watch, as soon as they were put on watch, pumped the barge out and found that the water in her readily yielded to the pumps—that they did not again try the pumps until she was in a sinking condition, and that they, who of all others, should have observed the condition of the weather, and the perils to which the vessel in their care was exposed, have not testified to any extraordinary occurrence—that of the twenty-five vessels in this tow, only this barge and the Arrow, which was cut adrift when the Mayo sunk, met with disaster; and that of all the other shipping afloat on that night, at most only one other vessel was sunk or driven ashore. These facts, Plaintiffs, counsel insists show that this storm was not such as is necessary to the Defendants, defence.

These facts are entitled to great consideration at your hands, and I have no doubt you will give them the importance they de-

serve; keeping steadily in view that the subject matter of inquiry, is not whether this was an unusual storm, but, whether it was a storm of irresistible force and overwhelming power.

If after an examination of this part of the case, you are not satisfied that the storm was a storm of irresistible force and overwhelming power, the defence has failed, and you need not enter upon the consideration of the other part of the case, but should proceed at once to assess the Plaintiffs damages.

But if it has been made to appear to you satisfactory, by the evidence of the Defendants, that this storm was one of irresistible force and overwhelming power, such as made navigation unusually perilous, the defence is complete; unless the Plaintiffs break the line of that defence, by showing default or negligence on the part of the Defendants, which contributed to the disaster to the vessel, because by proof of such default or negligence, contributory to the loss, the excuse of the carrier fails; because the act of God, to relieve the carrier, is necessarily exclusive of all human agency.

But, the Defendants when they have shown that the storm was one of overwhelming force, are only bound for the exercise of ordinary skill and prudence, in their efforts to avoid the disaster, and are only to be considered negligent when it appears that they did not exercise ordinary care and skill.

The Plaintiffs have endeavored to introduce that element in the case. They deny 1st, that the storm was one of irresistible force or overwhelming power, and in the second place, their insistent is, that if the storm was of such violence that it was of overwhelming power, yet that the Defendants were themselves negligent, or in default, and that therefore, they are not within the protection of the exception of the bill of lading.

This insistent, if relied on, must be proved by the Plaintiffs. The burden in that respect lies upon them. But if proved, it will destroy the defendants defence, even if they have satisfied you that the storm was one of irresistible force, or overwhelming power.

The insistent is, that the Defendants were in such default in

several particulars. If they succeed in establishing *any one* of these particulars, and that the accident was contributed to by reason thereof, the Defendants' proper defence is overcome, and the Plaintiffs for *that* reason, will be entitled to a recovery.

They insist—

1. That the vessel was not suitable for the voyage or was not seaworthy. By seaworthiness, as applicable to this case, is meant that the vessel in construction and build, and in condition and repair should be *reasonably fit* to engage in that voyage, with *that* load, at *that* season of the year, and sufficiently staunch, to withstand the ordinary action of the winds and the waves, which it was expected would be encountered.

That a vessel of staunchier build or of a different class, would have successfully encountered these perils, is not of itself evidence that this vessel was not suitable for this voyage, if it appears that craft of this construction and build were ordinarily and usually employed in this kind of transportation.

Nor will it be presumed from the fact of loss standing alone that the vessel was unseaworthy.

But where it appears that a vessel starts a plank when in a tow of twenty-five boats, among which were vessels of the same description and build, or of a build less suited to encounter the ordinary perils of navigation, that circumstance affords a presumption that she was unseaworthy, unless another adequate cause for the starting of the plank is shown.

Again, while on this subject of seaworthiness, it is proper that I should call your attention to the extent to which the Defendants are accountable for any defects which makes the vessel unseaworthy.

The carrier guarantees that his vessel was in point of fact seaworthy. If in point of fact it was not seaworthy, he is liable. If the defect was a latent defect, and unknown to him, he nevertheless must answer for damages occasioned by such defect.

The evidence is that this barge was built in 1842; that from time to time she was overhauled, examined and put in order. That

when she was raised after she was sunk, it was found that two planks on her side had been sprung.

It further appears in evidence that the last time she was overhauled was fourteen months before this disaster. It is testified to, that she was then carefully examined. It does not however appear that any of her planks were then renewed.

If you believe, from the evidence, that the springing of these planks was the cause of the sinking of the barge, and that by reason of the condition of these planks, or their fastenings, the barge was not seaworthy, the Defendants will not be discharged, because of their having had the barge examined, and that such defects were not discovered.

They had contracted that the vessel was seaworthy, and they are bound by that contract. Nothing short of its complete performance will discharge them.

In the second place, it is said that this barge was not sufficiently equipped with pumps. If you are satisfied by the evidence that she was not furnished with the usual complement of pumps, the owners were in fault; but the owners were not bound to procure more pumps than usually constitute the proper equipment of a vessel of this class engaged upon such a voyage.

In the third place, it is insisted that the vessel was not properly loaded. That an insufficient quantity of the iron was put in the hold; that too much of the load was on deck; and that by reason of such proportion of the iron being on deck, and the placing of hay on the deck, and the inclosing of it with a tarpaulin, between the lower deck and the hurricane deck, the barge was made top heavy. And that this mode of loading, by reason of the peculiar construction of the barge, made her unable to withstand a storm which otherwise would not have sunk her.

Whether such defects in loading, or in the building of the barge existed, is a question for you to determine from the evidence in the case, applying to it the rule of law, that the load of the vessel must be stowed in such manner as to provide for their safety in the course of transportation.

If you find, from the evidence, that the barge was improperly loaded for its safety in transportation, and that the sinking of the barge was contributed to thereby, the Defendants cannot discharge themselves, by proof that this barge was loaded as barges are usually loaded.

For all other causes, as I have already stated, except dangers of the seas, the carrier is liable. If unsafely or improperly loaded the carrier was in default. For that default, the carrier is responsible by well-settled rules of law. And the Defendants cannot by proving that the barge was loaded as barges usually are, discharge themselves from liabilities put upon them by law.

Proof of a custom to load barges chiefly on deck is entitled to this effect, that its general adoption by persons engaged in the carrying business, is evidence that for the safety of transportation such method of loading is a proper and safe method of stowing the loads, and the force of such evidence is not to be overcome unless by clear proof that the loading was improper and unsafe.

But proof of such custom will not conclude you from determining from all the evidence in the cause, whether in fact the barge was properly loaded.

In considering this question, a vessel is to be considered as properly loaded when her load is so stowed as to insure a safe transportation, and not with a view to recover the load in case the vessel is sunk. As was well said by counsel, the carrier is bound to load so as to secure a safe voyage, and not a recovery after a loss.

In the fourth place, it is insisted by the Plaintiffs that Defendants were guilty of negligence in starting out in the midst of a storm.

If that be so, and the storm, when they left New York, was such as to make navigation perilous, or that appearances betokened a storm, so that a prudent man would not have ventured out, under those circumstances, it was negligent in the Captain to venture out.

But it ought to appear, clearly, that the condition or appearance of the weather was such as to have deterred a prudent man venturing out.

Fifth. It is further insisted that there was negligence in the Captain of the tow in not making a harbor with his whole tow, or in not putting this barge in harbor.

You have heard the evidence as to possibility of making a safe harbor at that part of the river with the tow, or of putting this barge in a safe place.

I need not repeat the evidence on this subject. It is only necessary for me to say that if the Captain, in the exercise of a sound discretion, knowing the difficulty of making a landing and the danger of dropping the barge from the tow, in good faith, pursued the course he judged best for the safety of the whole tow, he is no default because he might have ventured to make a landing which, probably, might have insured the safety of this barge.

It was also insisted that there was negligence or want of ordinary care by the hands employed on the barge at the time of this accident, and that by the exercise of negligence, after it was discovered that the barge was sinking, a portion, at least, of the Plaintiffs iron might have been saved.

As to the first branch of this insistent, it is undoubtedly the duty of the carrier to have a sufficient complement of skillful hands on board, all the while, to guard against the possibility of accidents.

It appears, from the evidence, that the barge had on all the usual complement of hands—that the watch was changed at the usual hour, and that the watch was made up according to the usual custom.

If, when the Captain turned in, he had no reason to expect unusual dangers, he was justified in adopting merely such precautions, as to watch, as ordinarily are considered sufficient to guard against accidents. But if the vessel was laboring in a storm and these hands neglected to try the pumps, as they were directed, as

frequently as was necessary to enable them constantly to know the condition of the water in the hold, they were guilty of neglect; and if such neglect contributed to produce the result, the defendants cannot shelter themselves behind the exception in the bill of lading, for the result, in that case, was not caused solely by the violence of the elements.

As to the second branch of this insistent, that there was neglect to remove the goods after the vessel was in a sinking condition, the carrier, when the vessel is sunk by dangers of the seas, is not bound to recover the goods, but he is bound, even in such case, to the exercise of ordinary skill and prudence to prevent the loss of the goods. You will remember the short interval that elapsed between the discovery of the condition of the barge and her sinking. The first duty of the Captain was to ascertain what was the matter with the vessel and to endeavor to keep her up if he could. The Captain appears to have done that, and it does not appear that after he finished his examination of the barge it was within his power to have removed any considerable part of the cargo.

It is said that the Plaintiffs should have insured the iron. They might have done so, and if they had the insurance would not have benefitted the Defendants, and their failure to insure is no discharge of the Defendants. The question of insurance is entirely immaterial in this case.

I have now gone over the whole of this case, and stated the different issues raised by the evidence in the case, and the rules of law applicable to each.

One question remains to be considered—that is the question of damages. It appears, from the evidence, that a portion of the iron was saved and a portion was subsequently recovered. For that the Defendants are answerable. Whether the Plaintiffs shall be allowed to recover for the residue will depend on your finding of the issues in the cause. For whatever portion they are allowed to recover, its value should be assessed at \$55 per ton, with interest

from the 21st of February, 1865, until the 27th day of February next, when judgment will be entered on your verdict.

And thereupon Defendants' counsel requested the Justice to charge the jury that it was not necessary for the Defendants to prove a storm of such violence that no vessel could withstand its effects, but that it was only necessary to prove a storm of such violence as would be sufficient to cause the destruction of a vessel reasonably fit for the voyage, and thereupon the said Justice did so charge.

Whereupon counsel for the Defendants excepted to so much of said charge as stated :

I. And to so much thereof as charges the jury that the Defendants were common carriers on the whole route of this employment, from Newark to Saugerties.

II. And to so much thereof as relates to the burden of proof.

III. And to so much thereof as charges the jury that by this contract the Defendants became absolute insurers against all losses except such as were caused by the dangers of the sea, and that they must prove affirmatively that such loss was occasioned solely by the "dangers of the sea," otherwise, being insurers, they are responsible for the loss.

IV. And to so much thereof as charges the jury that unless the loss falls within the exception named in the bill of lading, the Defendants are liable, even if wholly without fault.

V. And to so much thereof as charges the jury that the springing of a plank, under the circumstances stated in the charge, raises a presumption of unseaworthiness.

VI. And to so much thereof as charges the jury that if the barge, by reason of the condition of her planks or their fastenings, was unseaworthy and sunk, proof of care in overhauling and examining her will not excuse.

VII. And to so much thereof as charges the jury that if the

lading of the barge contributed to the loss Defendants cannot discharge themselves by proof that the barge was loaded as barges usually are, and as to the effect of proof of custom.

And thereupon the Defendants' counsel excepted to the charge of the Justice upon the several points thereof above stated, and their exceptions are hereby sealed accordingly.

DAVID A. DEPUE, *Justice Sup. Court.*

There - what way do you think?

Then my agent of error

via agent of error p. 96.

APPENDIX I.

LUCIUS TUCKERMAN, WILLIAM MULLIGAN,
JOSEPH TUCKERMAN and DAVID W. WEISS,
vs.
THE STEPHENS AND CONDIT TRANSPORTA-
TION COMPANY.

In Case.

This cause came on to be tried at the Essex Circuit Court, before His Honor, Mr. Justice Depue, and a Jury, upon the pleadings and issue, which are as follows :

In the Supreme Court of the State of New Jersey, of the tenth day of February, eighteen hundred and sixty-six.

ESSEX COUNTY, ss :

The Stevens and Condit Transportation Company, the defendants in this suit, were summoned to answer Lucius Tuckerman, William Mulligan, David W. Weiss and Joseph Tuckerman, the plaintiffs therein, of a plea of trespass on the case, upon promises and thereupon the said plaintiffs, by their Attorneys, Parker & Keasbey, complain

For that, whereas, the said defendants before and at the time of the making of their said promises and undertaking, hereinafter mentioned, were, and thence hitherto have been and still are, common carriers by water, of goods and chattels, for hire, from the city of Newark, in the county aforesaid, and State of New Jersey, to the city of New York and divers other places along the East River and Hudson River, in the State of New York, aforesaid, to wit, at Newark, in the county aforesaid.

And the said defendants so being such carriers, as aforesaid, the said plaintiffs heretofore, to wit, on the eighteenth day of November, eighteen hundred and sixty-five, at Newark, in the county aforesaid, at the instance and request of the said defendants, caused to be delivered to the said defendants, so being such carriers, as aforesaid, at Newark, in the county aforesaid, certain goods and chattels, to wit, two hundred tons of number two, Glendon pig iron of the said plaintiffs, of great value, to wit, of the value of one hundred dollars each ton, to be taken care of, and safely and securely carried and conveyed by the said defendants, as such carriers, as aforesaid, from Newark in the county aforesaid, to Saugerties, a place on the Hudson river, in the State of New York aforesaid, and there, to wit, at Saugerties, in the State last aforesaid, to be safely and securely delivered by the said defendants to the said plaintiffs; and in consideration thereof, and of certain reward to the said defendants, in that behalf contracted by the plaintiffs to be paid, they, the said defendants, so being such carriers, as aforesaid, then and there, to wit, on the day and year aforesaid, at Newark, in the county aforesaid, undertook, and faithfully promised the said plaintiffs to take care of the said

goods and chattels, and safely and securely carry the same from Newark, in the county aforesaid, to Saugerties, in the State of New York, aforesaid, and there, at Saugerties, aforesaid, safely and securely to deliver the same to the said plaintiffs aforesaid.

And although the said defendants, as such carriers, as aforesaid, then and there, as aforesaid, had and received the said goods and chattels for the purpose, yet, the said defendants, not regarding their duty as such carriers, nor their said promise and undertaking so made, as aforesaid, but contriving and fraudulently intending to deceive and injure the said plaintiffs in this behalf, have not taken care of the said goods and chattels, nor safely nor securely carried or conveyed the same from Newark, in the county aforesaid, to Saugerties in the State of New York, aforesaid, nor have there, to wit, at Saugerties, aforesaid, safely or securely delivered the same to the said plaintiffs, but, on the contrary thereof, they, the said defendants, being such carriers, as aforesaid, so carelessly and negligently behaved and conducted themselves, with respect to the said goods and chattels, that by and through the mere carelessness, negligence, and improper conduct and default of the said defendants and their servants, in this behalf, the said goods and chattels, being of the value aforesaid, became and were, and still are, wholly lost to the said plaintiffs, to wit, at Newark in the county aforesaid.

And whereas, also, the said defendants, before and at the time of the making of their promise and undertaking, in this count mentioned, were common carriers, and possessed, used and had, as such, a barge or vessel called the "Charles Mayo," then in the river Passaic, at Newark, aforesaid, and bound from thence to Saugerties, in the State of New York; and thereupon the said plaintiffs heretofore, to wit, on the eighteenth day of November, in the year one thousand eight hundred and sixty-five, at Newark, in the county of Essex, aforesaid, at the special instance and request of said defendants, caused to be shipped and loaded in and on board of said vessel, which said defendants then and there possessed, had and used as such common carriers, divers other goods and merchandise, to wit, two hundred tons of pig iron of great value, to wit, of the value of one hundred dollars per ton, to be taken care of and safely and securely carried and conveyed by the said defendants, in and on board said vessel, from Newark, aforesaid, to Saugerties, in the State of New York, to be there safely and securely delivered to and for the said plaintiffs the dangers of the seas excepted; and in consideration thereof, and of certain freight and reward to the said defendants in that behalf to be paid, they the said defendants, then and there undertook, and faithfully promised the said plaintiffs, to take care of and safely and securely carry and convey and deliver said last mentioned goods and merchandise, as aforesaid, (the dangers of the seas only excepted,) and although said defendants then and there had and received the said mentioned goods and merchandise to be carried and conveyed

and delivered as aforesaid, yet the said defendants, not regarding their duty in that respect, nor their said promise and undertakings, but contriving and intending to deceive, injure and defraud the said plaintiffs in that behalf, did not nor would take care of and safely and securely carry and convey said last mentioned goods and merchandise, so shipped in and on board said vessel, as aforesaid, from Newark, aforesaid, to Saugerties, aforesaid, and there safely and securely deliver the same to or for the said plaintiffs, (although no danger of the seas prevented them from so doing,) but on the contrary thereof, they, the said defendants, and their servants in that behalf, so carelessly and negligently behaved and conducted themselves in that behalf, that by and through the mere carelessness, negligence and improper conduct of said defendants, their mariners and servants in that behalf, the said last mentioned goods and merchandise, being of such value as aforesaid, became and were and still are wholly lost to said plaintiffs, to wit, at Newark, in the county aforesaid.

And whereas, also heretofore, to wit, on the eighteenth day of November, eighteen hundred and sixty-five, at Newark, in the county aforesaid, in consideration that the said defendants, at their instance and request, then had the care and custody of divers other goods and chattels of the said plaintiffs, to wit, goods and chattels of the like number quantity, quality, description and value as those in the said first count mentioned, they, the said defendants, undertook, and then and there faithfully promised the said plaintiffs, to take due and proper care thereof, whilst they, the said defendants, so had the care and custody of the same; yet the said defendants not regarding their said promise and undertaking, but contriving and intending to injure and defraud the said plaintiffs in this behalf, whilst the said defendants had the care and custody of the said goods and chattels, took so little and such bad and improper care thereof, that the same afterwards, to wit, on the day and year aforesaid, became and were, and still are wholly lost to the said plaintiffs, to wit, at Newark, in the county aforesaid.

And whereas, the said defendants, heretofore, to wit, on the eighteenth day of November, eighteen hundred and sixty-five, at Newark, in the county of Essex, were indebted to the said plaintiffs in the sum of twenty thousand dollars on an account stated between them, and being so indebted, the said defendants, in consideration thereof, then and there promised the plaintiffs to pay them the said several sums of money, on request.

Yet the said defendants have disregarded their said several promises, and have not paid the said several sums of money, nor any of them, nor any part thereof, although often requested so to do, but to do so have hitherto wholly refused, and still do refuse, to wit, at Newark, in the county aforesaid.

To the damage of the said plaintiffs, twenty thousand dollars, and therefore they bring their suit, &c .

PARKER & KEASBEY, Atty's of Plaintiffs.

And the said defendants, The Stephens and Condit Transportation Company, by Thomas N. McCarter, their Attorney, come and defend the wrong and injury, when, &c., and say they did not undertake or promise in any manner or form as the said plaintiffs have above thereof complained against them. And of this they put themselves upon the country.

THOMAS N. McCARTER, Att'y of Def'ts.

And the plaintiffs do the like.

PARKER & KEASBEY, Atty's of Plaintiffs.

I, Charles P. Smith, Clerk of the Supreme Court of the State of New Jersey, do hereby certify that the foregoing is a true transcript of the declaration and pleadings in the above cause, now on file in my office.

{ L. S. } In testimony whereof, I have hereunto set my hand and affixed my seal of said Court, at Trenton, this fourth day of October, A. D. 1866.

CHARLES P. SMITH, Clerk.

SHIPPED, in good order and condition, by the STEPHENS & CONDIT TRANSPORTATION Co.'s Agents for WM. S. TISDALE, on board the Barge called the CHARLES MAYO, whereof McKEON is Master for this voyage, now lying at the Port of Newark, and bound for Saugerties, N. Y. To say:

TWO HUNDRED TONS OF No. 2 GLENDON PIG IRON

being marked and numbered as in the margin, and are to be delivered in like order and condition at the port of Saugerties, (the dangers of the seas only excepted) unto TUCKERMAN, MULLIGAN & Co., or their assigns, he or they paying freight for the said Pig Iron, one 50-100 dollars per ton of 2240 lbs., without primage or average accustomed.

In Witness Whereof, the Master or Purser of said vessel hath affirmed to four Bills of Lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in Newark the eighteenth day of November, 1865.

MILES McKEON.

STEPHENS, CONDIT & CO'S

Line of

STEAMBOATS AND BARGES

between

NEW YORK AND NEWARK.

U. S.

Stamp.

Towing by Steamer JAMAICA,

leaving

Foot of Dey-st., New York, at 4 P. M.

“ Centre st., Newark, at 9 A. M.

60 tons per boat Somerset,	No. 63.
60 “ “ Mary Ann,	No. 60.
50 “ “ Mary Allin,	No. 61.
30 “ “ S. Edy,	No. 105.

200 Tons of Glendon Pig Iron,

To TUCKERMAN, MULLIGAN & Co.,

Saugerties, N. Y.

APPENDIX No. 2.

APPENDIX III.

NEW YORK, Nov. 8, 1865.

Messrs. STEPHENS, CONDIT & Co., Newark :

GENTS :—We have bought from Messrs. W. S. Tisdale & Co., two hundred tons of No. 2 foundry Glendon pig iron, now on your dock, at Newark. The iron is bought deliverable free on board, and is to be weighed. Will you engage vessels and ship it to the Ulster Iron Works, Saugerties, at once. We presume the freight can be engaged at about \$1 per ton. Messrs Tisdale & Co. will send you the order to deliver it to us, by this mail.

Yours Truly,

TUCKERMAN, MULLIGAN & Co.

APPENDIX IV.

NEW YORK, Nov. 13 1865.

Messrs. STEPHENS, CONDIT & Co., Newark:

GENTS :—We wrote you last week about shipping 200 tons of Glendon No. 2, foundry pig iron to us, at the Ulster Iron Works, Saugerties. We do not hear from you. Is it being shipped?

Yours Truly

TUCKERMAN, MULLIGAN & Co.

APPENDIX V. (*Telegram*)

NEW YORK, Sept. 20, 1866.

TUCKERMAN, MULLIGAN & Co. :—Cannot get iron freight to Saugerties less than one dollar and fifty cents per ton. Shall we give it?
A. A. SMALLEY, Supt.

APPENDIX VI.

CERTIFICATE OF THE STEPHENS & CONDIT TRANSPORTATION COMPANY.

In pursuance of an act of the Legislature of the State of New Jersey, entitled "An Act to authorize the establishment and to prescribe the duties of companies for manufacturing and other purposes," approved March 2, 1849, and a supplement thereto approved March 25, 1852. The persons whose names are hereto subscribed did, upon the nineteenth day of February, in the year of our Lord one thousand eight hundred and sixty-two, in the city of Newark, in the county of Essex, State of New Jersey, enter into and make the following certificate, that is to say—

Be it known unto all men by these presents, that we, the subscribers, do hereby certify, under our hands and seals, that we have on the day of the date hereof associated ourselves into a company for the purpose of conducting and carrying on the hereinafter lawful business of transportation within the State of New Jersey, under the

State of New Jersey, entitled "An Act to authorize the establishment and to prescribe the duties of companies for manufacturing and other purposes," approved the 2d day of March, in the year of our Lord one thousand eight hundred and forty-nine, and of a supplement to said act, approved the twenty-fifth day of February, in the year of our Lord one thousand eight hundred and fifty-two.

First—The name assumed and hereby taken by us to designate this company and to be used in its business and dealings is and shall be "The Stephens and Condit Transportation Company." Second—The place where the business of this company is to be conducted and carried on is in the city of Newark, in the county of Essex and State of New Jersey, and the objects for which this company is formed are the transportation of goods, wares, merchandise and passengers upon land and water, to purchase lands or wharves, to make, purchase, construct or lease such land and wharves, buildings, steamboats, vessels, horses, wagons, carriages or other property as may or shall be necessary and proper to conduct, and carry on the said transportation to the fullest extent practicable. Third—The total amount of capital stock of this company shall be one hundred thousand dollars, and the amount with which this company will commence shall be the sum of one hundred thousand dollars, and that the whole amount of capital stock aforesaid shall be divided, is and shall be one thousand shares of one hundred dollars each. Fourth—It is hereby further certified in pursuance of the said act, that John H. Stephens, of the city of Newark, in the county of Essex and State of New Jersey, has and holds _____ shares of the said capital stock of the company, &c., &c., &c., which said respective sums make and constitute all the amount—one thousand shares amounting to one hundred thousand dollars. Fifth—This company shall be organized, commence on and from the first day of April, in the year one thousand eight hundred and sixty-two, and shall continue unto and shall cease and determine upon the first day of April, in the year of our Lord one thousand eight hundred and ninety-nine. Witness our hands and seals the said nineteenth day of February, in the year of our Lord one thousand eight hundred and sixty-two.

Signed, sealed and delivered in my presence.

[COPY.]

{ JOHN STEPHENS, [L. S.]
 { C. HARRISON CONDIT, ex [L. S.]
 { C. HARRISON CONDIT, [L. S.]
 { JOSEPH HARRISON, [L. S.]
 { JAMES L. HIBBLER, [L. S.]
 { JACOB L. LAWRENCE, [L. S.]
 { FREEMAN A. CAMP, [L. S.]

APPENDIX VII.
NAVIGATION OPENED.

OFFICE OF THE STEPHENS & CONDIT TRANSPORTION COMPANY, }
Newark, February 27th, 1865. }

The freight and tow boats of this Company have resumed their regular trips between this city and New York, leaving Centre street wharf and Commercial dock at 9 A. M. and pier 20 North River, foot of Dey street, at 4 P. M., daily (Sundays excepted). Barges and other vessels furnished at short notice to any point in the East and North Rivers, on reasonable terms.

For freight or towing, enquire at this office, or of the agent in New York.
A. A. SMALLEY, Superintendent.

N. J. ERRORS AND APPEALS.

STEPHENS & CONDIT TRANS. CO. vs. LUCIUS TUCKERMAN, et als.

In Error—Assignment of Errors.

apud
of
Error

The said The Stephens & Condit Transportation Company, plaintiffs in error, by N. Perry, Jr., their Attorney, come and say, that in the record and proceedings aforesaid, there is manifest error; and the said plaintiffs hereby assign the following causes of Error:

1. That the said Justice refused, after the plaintiff had first rested his case, to grant the defendant's motion to nonsuit the plaintiff, and thereby erred.

2. That the said Justice erred in so much of said charge as stated that the correspondence between the parties which led to the bill of lading was a matter of no importance.

3. That the said Justice erred in charging that the defendants were common carriers along the whole route of this employment.

4. That the said Justice erred in charging that the defendants, by this contract, became absolute insurers against all losses except such as were caused by the "dangers of the sea."

5. That the said Justice erred in all of said charges relating to the burden of proof.

6. That the said Justice erred in charging the jury that when deciding upon the severity of the storm in question the true test was, "was it a storm of irresistible force and overwhelming power."

7. That the said Justice erred in charging that the springing of a plank under the circumstances raised a presumption of unseaworthiness.

8. That the said Justice erred in charging that proof of care in examining and overhauling the barge will not excuse if she sank by reason of the condition of her planks or their fastenings.

9. That the said Justice erred in charging that neither proof of custom nor usage will excuse if the loading of the barge contributed to the loss.

10. And, also, that there is manifest error in this, that the declaration aforesaid and the matters therein contained are not sufficient in law for the said Lucius Tuckerman, et als., the plaintiffs, to have or maintain their aforesaid action thereof against the said defendants.

And also there is error in this, that the judgment aforesaid was given for the defendants in error and against the plaintiffs in error; whereas, by the law of the land said judgment ought to have been given for and not against the said plaintiffs in error.

And the plaintiffs in error pray that the judgment aforesaid, for the errors aforesaid, and for other errors in said record and proceedings, may be reversed, annulled and altogether holden for naught, and that they may be restored to all things which they have lost by occasion of the said judgment.

N. PERRY, JR.,

Attorney for Plaintiffs in Error.

W. H. B. & C. 1850

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