a government in which other States and their citizens are equally interested with the State which imposes the taxation. In my judgment, the limitation of the power of taxation in the general government, which the present decision establishes, will be found very difficult of control. Where are we to stop in enumerating the functions of the State governments which will be interfered with by Federal taxation? If a State incorporates a railroad to carry out its purposes of internal improvement, or a bank to aid its financial arrangements, reserving, perhaps, a percentage on the stock or profits, for the supply of its own treasury, will the bonds or stock of such an institution be free from Federal taxation? How can we now tell what the effect of this decision will be? I cannot but regard it as founded on a fallacy, and that it will lead to mischievous consequences. I am as much opposed as any one can be to any interference by the general government with the just powers of the State governments. But no concession of any of the just powers of the general government can easily be recalled. I, therefore, consider it my duty to at least record my dissent when such concession appears to be made. An extended discussion of the subject would answer no useful purpose.

TRANSPORTATION COMPANY *v.* DOWNER.

1. The terms "dangers of lake navigation" include all the ordinary perils which attend navigation on the lakes, and among others, that which arises from shallowness of the waters at the entrance of harbors formed from them.
2. When a defendant—a transportation company—shows that a loss of goods, which it had contracted to carry from one port to another, was occasioned by a danger of lake navigation, from losses by which it had exempted itself by its bill of lading, the plaintiff may show that the danger and consequent loss might have been avoided by the exercise of proper care and skill on the part of the defendant; in which case the defendant will be liable notwithstanding the exemption in the bill of lading. The burden of establishing the absence of such care and skill on the part of the defendant rests with the plaintiff.

Statement of the case.

3. A presumption of negligence from the simple occurrence of an accident seldom arises, except where the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This case was an action against the Western Transportation Company to recover damages sustained by the plaintiff from the loss of eighty-four bags of coffee belonging to him which the company had undertaken to transport from New York to Chicago. The company was a common carrier, and in the course of the transportation had shipped the coffee on board of the propeller Buffalo, one of its steamers on the lakes. The testimony showed that the steamer was seaworthy, and properly equipped, and was under the command of a competent and experienced master, but on entering the harbor of Chicago in the evening she touched the bottom, and not answering her helm, got aground, and during the night which followed kept pounding, and thus caused the hold to fill with water. The result was, that the coffee on board was so damaged as to be worthless.

The bill of lading given to the plaintiff by the transportation company at New York, exempted the company from liability for losses on goods insured and losses occasioned by the "dangers of navigation on the lakes and rivers." The defence made in the case was, that the loss of the coffee came within this last exception.

Upon the trial the plaintiff having shown that the defendant had the coffee for transportation, and that the same was lost, the defendant then showed by competent evidence that the loss was occasioned in the manner above stated, that is, by one of the "dangers of lake navigation." The plaintiff then endeavored to prove that this danger and the consequent loss might have been avoided by the exercise of proper care and skill. The defendant moved the court to instruct the jury as follows:

Argument for the plaintiff in error.

"If the jury believe from the evidence that the loss of the coffee in controversy was within one of the exceptions contained in the bill of lading offered in evidence, that is to say, if it was occasioned by perils of navigation of the lakes and rivers, then the burden of showing that this loss might have been avoided by the exercise of proper care and skill is upon the plaintiff; then it is for him to show that the loss was the result of negligence."

The court refused to give this instruction and the defendant excepted, and at the request of the plaintiff, gave instead, the following, to the giving of which the defendant also excepted, viz.:

"The bill of lading in this case excepts the defendant from liability, when the property is *not* insured, from perils of navigation. It is incumbent on the defendant to bring itself within the exception, and it is the duty of the defendant to show that it has not been guilty of negligence."

The plaintiff recovered, and the defendant brought the case here on writ of error.

Messrs. J. N. Jewett and G. B. Hibbard, for the plaintiff in error:

The case of *Clark* v. *Barnwell*,* in this court, shows that the doctrine for which we contended below is the true one, and the principle of that case has been recognized and established in numerous other cases.†

Mr. J. T. Mitchell, contra:

The weight of authority is in favor of the instruction complained of.

In *Whitesides* v. *Russell*,‡ a steamboat ran on a rock in the Ohio River and knocked a hole in her bottom, whereby her

* 12 Howard, 272, 280.

† Hunt *v.* The Cleveland, Newberry, 221; The Neptune, 6 Blatchford, 193

‡ 8 Watts & Sergeant, 44.

cargo was damaged. The bill of lading excepted losses by "dangers of the river," and the carrier was held to have the *onus* of proving, not only how the loss occurred, but that he had used due diligence and skill.

So in *Hays* v. *Kennedy*,* where Lowrie, C. J., says:

"From the very nature of the relation the burden of the proof of a loss by inevitable accident is thrown upon the carrier. He must prove not only an accident which the law admits as inevitable in its character, *but also that he was guilty of no fault in falling into the danger*, or in his efforts to extricate himself from it."

In *Graham* v. *Davis*,† the Supreme Court of Ohio decided this precise point. The case was ably argued and elaborately considered both on principle and on authority, and the decision is entitled to great weight. The reason of it is stated by Ranney, J., with clearness.

This rule is established also in other States.‡

If the case of *Clark* v. *Barnwell*—relied on by the other side for the position that it is sufficient for the carrier to show an accident, which may or may not be a danger of navigation (that is, such a danger as reasonable skill and care could not avoid), to put on the plaintiff the burden of proving negligence—can be considered as deciding so broad a proposition, then it is erroneous in principle and against the great weight of authority. It is supported only by a Nisi Prius opinion of Lord Denman, and the cases in the United States courts, which have followed it as authority, without examining the ground upon which it rested. The principal State courts in which it has been cited have refused to follow so clear a departure from established principles.

But the decision does not in reality go to the extent claimed. In that case, the carrier *proved affirmatively* that his ship was tight and staunch, well equipped and manned,

* 41 Pennsylvania State, 378. † 4 Ohio State, 362.

‡ Swindler *v.* Hilliard, 2 Richardson, 268; Baker *v.* Brinson, 9 Id. 201; Berry *v.* Cooper, 28 Georgia, 543; Turney *v.* Wilson, 7 Yerger, 340; Hill *v.* Sturgeon, 28 Missouri, 327.

and that the cargo was well stowed and dunnaged.* He, in fact, proved all the elements of proper skill and care on his part. The case was argued and decided on the *evidence*, not on the burden of proof. The subject of the burden of proof was not argued at all, and the remarks of the court upon it were not necessary to the result arrived at. The decision was right on the evidence, and it is fairly inferrible from the report, that all that was meant to be laid down as to the burden of proof was, that *after the carrier had proved due care and skill* (which he had done in that case), the plaintiff was still at liberty to rebut that evidence, and assume the burden of proving negligence. This is unexceptionable doctrine, and the case is authority for so much, but not for anything more.

Mr. Justice FIELD delivered the opinion of the court.

On the trial the plaintiff made out a *primâ facie* case by producing the bill of lading, showing the receipt of the coffee by the company at New York, and the contract for its transportation to Chicago, and by proving the arrival of the coffee at the latter place in the propeller Brooklyn in a ruined condition, and the consequent damages sustained. The company met this *primâ facie* case by showing that the loss was occasioned by one of the dangers of lake navigation. These terms, "dangers of lake navigation," include all the ordinary perils which attend navigation on the lakes, and among others, that which arises from shallowness of the waters at the entrance of harbors formed from them. The plaintiff then introduced testimony to show that this danger, and the consequent loss, might have been avoided by the exercise of proper care and skill on the part of the defendant. If the danger might have been thus avoided, it is plain that the loss should be attributed to the negligence and inattention of the company, and it should be held liable, notwithstanding the exception in the bill of lading. The burden of establishing such negligence and inattention rested with the

* See p. 281.

plaintiff, but the court refused an instruction to the jury to that effect, prayed by the defendant, and instructed them that it was the duty of the defendant to show that it had not been guilty of negligence. In this respect the court erred. In *Clark* v. *Barnwell*,* the precise point was involved, and the decision of the court in that case is decisive of the question in this. And that decision rests on principle. A peril of navigation having been shown to exist, and to have occasioned the loss which is the subject of complaint, the defendant was *primâ facie* relieved from liability, for the loss was thus brought within the exceptions of the bill of lading. There was no presumption, from the simple fact of a loss occurring in this way, that there was any negligence on the part of the company. A presumption of negligence from the simple occurrence of an accident seldom arises, except where the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible. Thus, in *Scott* v. *The London and St. Catharine Dock Company*,† the plaintiff was injured by bags of sugar falling from a crane in which they were lowered to the ground from a warehouse by the defendant, and the court said, "There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

So in *Curtis* v. *The Rochester and Syracuse Railroad Company*,‡ the Court of Appeals of New York held that the mere fact that a passenger on a railroad car was injured by the train running off a switch was not of itself, without proof of

* 12 Howard, 272.

† 3 Hurlstone & Coltman, 596.

‡ 18 New York, 543.

the circumstances under which the accident occurred, presumptive evidence of negligence on the part of the company. The court said that carriers of passengers were not insurers, and that many injuries might occur to those they transported for which they were not responsible, but as railroad companies were bound to keep their roads, carriages, and all apparatus employed in working them, free from any defect which the utmost knowledge, skill, and vigilance could discover or prevent, if it appeared that an accident was caused by any deficiency in the road itself, the cars, or any portion of the apparatus belonging to the company and used in connection with its business, a presumption of negligence on the part of those whose duty it was to see that everything was in order immediately arose, it being extremely unlikely that any defect should exist of so hidden a nature that no degree of skill or care could have seen or discovered it.

It is plain that the grounds stated in these cases, upon which a presumption of negligence arises when an accident has occurred, have no application to the case at bar. The grounding of the propeller and the consequent loss of the coffee may have been consistent with the highest care and skill of the master, or it may have resulted from his negligence and inattention. The accident itself, irrespective of the circumstances, furnished no ground for any presumption one way or the other. If, therefore, the establishment of the negligence of the defendant was material to the recovery, the burden of proof rested upon the plaintiff.

For the error in the refusal of the instruction prayed and in the instruction given, the judgment must be REVERSED, and the cause

REMANDED FOR A NEW TRIAL.