

LACOMBE, Circuit Judge, (*concurring.*) This case is very fully set forth in the opinion of the district judge. There can be no doubt that when the policies on so-called "advances" were issued both the assured and the insurers undertook to describe some interest other and different from the ownership of hull and machinery. It seems also very evident that, besides their part ownership of the *res*, the managing agents, who earn interest and commissions on all moneys they advance from time to time, not for repairs, but to keep the vessel in service, deriving a profit to themselves from such advances, controlling the vessel and her earnings so as to secure their repayment from her profits, and finding their business in such management of the ship, have an interest in her, not identical with that which they have as part owners, entitled to share in her profits if she makes any, in her proceeds if sold, or her insurance if lost. It is not material in this case to determine whether such interest was insurable, or whether the policies on advances did insure it. If they were wager policies or the payments under them a gift, that is no defense to the claim on the policy in suit here. They were not intended to be hull policies, nor paid because they were construed to be. As they purported to cover a different interest from the one defendant has insured, their payment cannot avail to relieve him from liability.

THE NESSMORE.

PERRY *et al.* v. THE NESSMORE.

(Circuit Court, D. Maryland. May 21, 1892.)

1. COLLISION—STEAM AND SAIL—NIGHT—LOOKOUT.

A steamer going out between the capes of the Chesapeake, and a schooner bound from Bangor to Richmond, collided by night just inside Cape Henry light. The court found that the lights of the schooner were set and burning, and ought to have been seen on the steamer, but were not; nor was any good reason for not seeing them advanced by the steamer. *Held*, that the steamer was in fault.

2. SAME—EXHIBITION OF FALSE LIGHTS.

The steamer was looking for a steam pilot boat as she and the schooner approached on converging courses. The steamer burned a blue light, and the schooner returned a flash light, and afterwards showed a white light on her stern. These lights, and her failure to see the side light, deceived the steamer. *Held*, that the schooner had not sustained the burden of showing that the exhibition of all the lights which she showed, and which were forbidden by law, was not one of the causes of the collision, and that the schooner also was in fault for her lights, and the damages should be divided.

41 Fed. Rep. 437, modified.

Appeal from the District Court of the United States for the District of Maryland.

In Admiralty. Libel by Oliver H. Perry and others, as owners of the schooner Joseph Wilde, against the steamer Nessmore for collision. Decree below holding the Nessmore solely in fault. Decree for divided damages.

Frank Goodwin and Eugene P. Carver, for libelants.
Brown & Brune, for respondent.

BOND, Circuit Judge. The facts in this case are fully set forth in the opinion filed by the district judge. *The Nessmore*, 41 Fed. Rep. 437. The principal facts are there stated, and all that is necessary to repeat is that on the night of the 25th of August, 1889, the steamship *Nessmore*, having left Baltimore for Liverpool in charge of a pilot, and nearing Cape Henry at the entrance of Chesapeake bay, was anxious to discharge the pilot, and put him aboard a pilot boat. Those boats generally lie off Cape Henry, inside the mouth of the bay, and when the *Nessmore* reached the proper place for so doing, a blue light was burned over her port side under her rail, to give notice to any pilot boat there in waiting that she was desirous of putting off her pilot. The *Joseph Wilde*, a large schooner, was on a voyage from Bangor, Me., to Richmond, Va. The vessels were on intersecting courses. Those on board the steamer, though the night was not very dark, the stars occasionally shining without a moon, did not see the schooner's lights, which, I think, as the district judge found, were set and burning. One of them (her starboard light) was burning after the collision, and this is the light, in the position the vessels were, that ought to have been seen from the *Nessmore*. Why those in charge of her did not see it the district judge has endeavored to form a theory, but, whether his suggestions are true in point of fact or not, they do not excuse the *Nessmore*, for it is upon those in charge of her to show affirmatively a good reason for not seeing them. I agree with the district judge that this they have not done, and are in fault. Those in charge of the *Nessmore* signaled with a blue light for a pilot boat. Upon so doing they saw in the direction from which the pilot boat was expected to come a bright flash light, which they took to be an answer to their signal. At this time the *Nessmore* had greatly reduced her speed, in order not to pass by the pilot boat, which was supposed to be under steam, approaching her. Then there appeared a white light, which those in charge of the *Nessmore* took to be a stern light of a vessel going in the same direction as the *Nessmore*. Both these lights were exhibited on board the schooner, and not on the pilot boat. Not seeing her regulation lights in the rigging, and seeing the other two lights, those on the *Nessmore* were deceived into thinking that it was the steam pilot boat ahead of them, and not a sailing vessel. The burden rests upon the schooner to show that her exhibition of the lights mentioned, which was forbidden by law, (Act March 3, 1885, c. 354, 23 St. at Large, p. 438,) was not one of the causes of the collision, which shortly afterwards—in a few minutes, indeed—took place. I am of the opinion that both vessels were in fault, and the damages should be divided. A decree will be passed accordingly.

THE KOMUK.

THE DON JUAN.

LOW v. THE KOMUK AND THE DON JUAN.

(District Court, S. D. New York. May 7, 1892.)

1. COLLISION—STEAM VESSELS—CROSSING NEAR PIERS—BAD LOOKOUT—FAILURE TO REVERSE—RIGHT OF WAY.

The tug D. J. backed out of a slip without heeding the presence or signals of the tug K., approaching near. The K. recognized the risk of collision, but did not reverse. Held, that the K. in voluntarily going near the piers, had no priority in the right of way over the D. J., though on the D. J.'s starboard hand, and both were held for negligent navigation.

2 SAME—NOTICE OF CLAIM—LAGRES.

On a slight collision, and no notice of claim or of survey until six months afterwards, and after a season's running of the boat and without repair, libel not filed till eight months, costs disallowed.

In Admiralty. Libel by Mortimer E. Law against the tug Komuk and the tug Don Juan for collision. Decree for libelant against both vessels.

Hyland & Zabriskie, for libelant.

Carpenter & Mosher, for the Komuk.

Wilcox, Adams & Green, for the Don Juan.

BROWN, District Judge. At about 5:40 p. m. on March 28, 1891, as the tug Komuk was going up the East river in the flood tide with two canal boats in tow on her port side, the libelant's boat being the outer port boat, for the purpose of putting them in a tow to be made up off pier 9, the libelant's boat was run into, off the slip between piers 7 and 8, East river, by the tug Don Juan, which was backing out of the slip with a barge alongside, by which it is alleged two planks of the libelant's boat were broken.

The libel was not filed until December 9, 1891. No notice of survey was given until six months after the accident, nor any claim for damages made. All the witnesses from the Don Juan testify that they had no knowledge of any collision at all, and have no recollection of the alleged occurrence. The witnesses from the Komuk, however, examined for the libelant, testify to the collision, and identify the Don Juan as the boat that backed into the tow. The Komuk had taken the two canal boats from the slip below, between piers 6 and 7, and proceeded up the East river about 200 or 350 feet only from the ends of the piers. Her pilot testifies that he did not see the Don Juan coming out of the slip until she was near its mouth and about 250 feet above him; that he gave her a signal of one whistle, got no answer, then stopped his engine, repeated the signal, and hailed the Don Juan's pilot, who gave him no response but kept on backing. This proves negligence in the Don Juan.