

factory. The terms apply as distinctly to unloading as to loading. It is common language in charters, and must receive the usual interpretation. If a charterer wishes to avoid the consequences he must not use the language. The vessel was entitled to necessary wharfage unless the consignee chose to receive the cargo in lighters. The latter method would be more expensive, and he therefore ordered her into dock. He is under the same obligation for wharfage as he is for freight. He stands in the charterer's place respecting both. His bill of lading is drawn subject to the charter, and both instruments were delivered to him at the same time, before the cargo arrived. He has the same remedy against the charterer for repayment of the one as for the other.

The respondent further contends, however, that the libellant admitted responsibility for the wharfage, and paid it. If this is so the settlement should stand. The proofs do not, however, show it to be so. They show that the master wrote his name on the bill directly after unloading; but this signified no more than that the wharfage charged was correct in amount. He distinctly denied liability to pay it, at the time. The acknowledgment was doubtless necessary to a settlement between respondent and the charterer. He subsequently went in company with Wesenberg & Co.'s clerk to collect the freight, and when payment was declined (without the deduction claimed) he again denied liability and left. The clerk afterwards called, accepted a check for \$2,293.56, receipted for the freight, and received a receipted bill for the wharfage, saying, in effect, at the same time, (and it is immaterial whether before or after the check was delivered,) that the master would not be satisfied, but would hold the respondent liable for the balance retained. He had no authority to do more than receive and receipt for the check—which was for an amount admitted to be due. The receipt for wharfage did not reach libellant. If the respondent had supposed the clerk's authority extended further, and delivered the check in consequence, the fact would be unimportant. It was his plain duty to pay this sum, in any event. He admitted it to be due, and could not properly retain it to coerce payment of his bill, nor for any other purpose. If misled he was not misled to his disadvantage, and could not complain, therefore, even if libellant was responsible for the clerk's conduct. But he was not misled. The libellant's repeated denial of liability for wharfage before, and the clerk's declaration at the time, that the master would hold him liable for the money retained, precluded misunderstanding.

The libel must be sustained, and a decree be entered accordingly.

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#### THE BARGES 2 AND 4.

#### McMULLEN v. BARGES 2 AND 4.

(District Court, S. D. New York. June 9, 1893.)

#### LIENS FOR REPAIRS—NOTES—APPROPRIATION OF PAYMENTS.

Where several notes have been given for different bills of repairs, and some of the notes paid in full, and others in part, the appropriation of

the notes upon the bills should be made in their chronological order, in the absence of any other proof of intention, and the payments upon the notes also applied in the same way.

In Admiralty. Libels on domestic liens for repairs. Decrees for libellant.

Hyland & Zabriskie, for libellant.

W. J. Weldon, for claimants.

BROWN, District Judge. I cannot find in this case any evidence that the libellant, after filing his specifications of lien, by accepting the four notes of September 10th "in settlement," intended to waive the security which the statute gave him upon his specifications of lien filed in July previous. There are no special circumstances showing any such intention; and I shall follow in that regard the rulings in the case of *The Alabama*, 22 Fed. Rep. 449; *The D. B. Steelman*, 48 Fed. Rep. 580, and *The John C. Fisher*, 1 C. C. A. 624, 50 Fed. Rep. 703, and other cases.

A question arises, however, on the application of payments. On July 13, 1892, specifications were filed for claims to the amount of \$655.40 for repairs on barges 2 and 4 completed within 30 days prior to that date. On August 3d work amounting to \$9 was done for barges 2 and 3 belonging to the same owner without any separate designation, and on August 13th work amounting to \$82.35 was done on No. 3. For neither of the last two items was any specification of lien filed. On September 10, 1892, the libellant received from the owner four notes of that date "in settlement of bills for repairs on barges 2, 3, and 4." Three of the notes were for \$186.69, maturing respectively 1, 2, and 3 months from their dates; and the fourth for \$186.68 maturing four months from the same date. The two notes maturing first were paid in full. \$86.69 was paid on the 3-months note, and the balance of \$100 due on that note was included in two subsequent notes embracing other work; while the fourth note remains wholly unpaid.

For the claimants it is contended that as the four notes of September 10th embraced \$91.35 for which no lien was filed, the different debts were so merged and consolidated that the different claims can no longer be separated, nor any specific lien claimed upon either of the barges, because it is impossible to determine how much is due from either. *The Klersage*, 2 Curt. 421; *Read v. Hull* of a New Brig, 1 Story, 250; *The Pacific*, 1 Blatchf. 569, 573.

In the present case, however, there was no general contract covering the various boats, except as to the single item of nine dollars, nor any such confusion or general credit for work on different boats under one charge as appeared in the cases cited. Nor is there any difficulty, as it seems to me, in making the application of the notes, or of the payments made upon the notes, in such a manner as to accord with the presumed intention of the parties. The notes of 1, 2, 3, and 4 months respectively, and the amounts paid upon those notes, should be applied as payments of cash would have been applied, had there been no notes given; namely, chronologically. This

accords with the natural course of dealing; and the evidence does not afford the least reason to suppose that the parties had any different intention. The *A. R. Dunlap*, 1 Low. 350, 361, 362; The *Mary K. Campbell*, 40 Fed. Rep. 906. The repairs done in August amounting to \$91.35 constitute the last items; and they must, therefore, be held to be embraced in the note at four months which matured last and is still wholly unpaid. The sums paid upon the other three notes must, in like manner, be applied chronologically on the earlier items which are covered by the specifications filed in July. After applying the amount of money thus paid, namely, \$460.07 upon the July specifications, which amounted to \$655.40, there remains a balance of liens unpaid amounting to \$195.33, for which the libellant is entitled to decrees against the two barges, to be apportioned as the bills indicate, with interest from the maturity of the notes.

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LA NORMANDIE.

LA COMPAGNIE GENERALE TRANSATLANTIQUE v. O'SULLIVAN  
et al., (two cases.)

(Circuit Court of Appeals, Second Circuit. October 17, 1893.)

1. COLLISION—FOG—EXCESSIVE SPEED.

A speed of over 10 knots an hour, in a dense fog, near the entrance to New York harbor, is excessive, and renders the steamer liable for a collision, unless it is affirmatively shown that such speed did not contribute to the collision. 43 Fed. Rep. 151, affirmed.

2. SAME—SUFFICIENCY OF CREW.

If the number of officers and crew of a vessel on deck when a collision is impending is sufficient to perform all the duties required of her, it is immaterial that more are not there.

3. SAME—EVIDENCE—FINDINGS—APPEAL.

The finding of the trial court, on the testimony of the officers and crew of a vessel, that she was sounding her fog horn and showing lights at the time of an impending collision, will not be reversed on appeal merely because the officers of the other colliding vessel, however alert, failed to see or hear such signals through the dense fog.

4. SAME—STEAM AND SAIL—SAIL HOLDING COURSE.

A sailing vessel is under no duty to disregard the rule requiring her to hold her course merely because, being in a dense fog, the bearing of an approaching steamer, as ascertained by her fog signals, does not perceptibly change.

5. SAME—DAMAGES—TOTAL LOSS.

Where a New York harbor pilot boat is sunk by a collision which cuts her half through on the port bow, the utter refusal of one wrecking company to attempt raising her, and of another to do so except for \$3,000 contingent on success, without regard to value when raised, is sufficient to warrant a finding that she is a total loss.

6. SAME—VALUE—HOW DETERMINED.

Where a vessel sunk in a collision is of a kind which is seldom bought and sold, so as to establish a market value, as in the case of harbor pilot boats, which are of little use for other purposes, its value may be established by evidence as to original cost, age, probable future life, and the like.