

stays. What makes it stay? Upon the evidence in this cause is there any possible answer to this question except one—the use of a coating? Do the defendants suggest any other? According to their testimony, as before stated, they do not use the process of drying the ingredients pointed out in the 1882 patent. Even if they had done so it would not have prevented the escape of the ammonia. In these circumstances would not a chemist expect to find precisely what Prof. Chandler testifies, in unqualified terms, he did find, viz. a protecting coating? If the defendants' account of their method is entirely correct it appears that Prof. Chandler, basing his opinion solely upon his analysis, was mistaken as to the precise stage when the oily substance was applied. He thought it was before the ammoniacal salt was mixed with the soap; but whether before or at the same time can make no difference so long as the fact remains that the coating exists. I cannot doubt this fact without doubting Prof. Chandler's word supported as it seems to me by a strong presumption.

It follows that the complainant is entitled to a decree upon the first and third claims of No. 382,323 for an injunction and an accounting, but without costs.

THE JOHN G. STEVENS.¹

In re THE JOHN G. STEVENS.

(District Court, E. D. New York. September 13, 1893.)

MARITIME LIENS—PRIORITY—NEGLIGENT TOWAGE—SUPPLIES.

A lien for supplies, and a lien arising out of the neglect of some duty assumed by a voluntary agreement between the parties, are equal in point of merit, and priority will be given to that one which first accrued. *Loud v. The R. S. Carter*, 40 Fed. 331, distinguished.

In Admiralty. On application for distribution of proceeds.

Geo. A. Black, for Loud and others.

Alexander & Ash, for colibelants Gladwish and others.

Wing, Shoudy & Putnam, for the J. G. Stevens.

BENEDICT, District Judge. This is a controversy in regard to priority, between Loud and others, as owners of the schooner *Flint*, and Gladwish, Moquin & Co., coal dealers, each having a lien upon the tug *John G. Stevens*. The tug having been sold under the order of this court, and the fund being insufficient to pay both the claims, the question arises as to which of these parties is entitled to be paid first out of the fund in court. The claim of Loud and others, owners of the schooner *Flint*, arises out of injuries to the schooner *Flint* caused by negligence on the part of the *John G. Stevens* while performing a contract to safely tow the schooner *Flint*. The claim of Gladwish, Moquin & Co. arises out of coal furnished by them

¹ Reported by E. G. Benedict, Esq., of the New York bar.

to the John G. Stevens prior to the time of the injury done to the Flint by the John G. Stevens.

If the claim of Loud had arisen out of a tort, pure and simple, committed by a vessel between whom and the Flint no relation by contract existed, the decision of the circuit court of this district, affirming a decision made by this court in the case of *Loud v. The R. S. Carter*, 38 Fed. 515, 40 Fed. 331, would be decisive, and compel a decision here that the claim of Loud is entitled to priority over the claim of Gladwish, Moquin & Co. But that case differs from this, in that the claim of Loud against the *R. S. Carter* was for a tort, pure and simple, arising out of a collision between the Flint and the *R. S. Carter*, between which vessels no relation by contract existed. Here the claim of Loud against the John G. Stevens is for damage done by the John G. Stevens by reason of negligence in performing her contract to tow the Flint. The question therefore arises whether, in distributing proceeds by a court of admiralty, this distinction between two competing claims makes a difference that is to be noticed in determining the question of priority. In the case of *Loud v. The R. S. Carter*, above referred to, this question was not before the court. When the case of *Loud v. The R. S. Carter* was decided by this court, the case of a claim arising out of neglect of some duty assumed in pursuance of a voluntary agreement between the parties was carefully excepted. The same exception was made by the circuit court. It cannot be held, therefore, that the decision in favor of Loud against the tug *R. S. Carter* compels a decision in favor of Loud in this case.

But in that case the ground upon which a difference between the two claims there involved was held by this court to exist was that one was a voluntary creditor, who, for a consideration, gave time, with a lien on the vessel, in place of present payment, while the other was an involuntary creditor who had no option, and between whom and the offending vessel no relation whatever existed; and this difference was also noticed by the circuit court. No such difference exists between the two claims here conflicting. The claim of Loud, although, in a certain sense, a claim *ex delicto*, arises out of the neglect on the part of his employe in the performance of a contract voluntarily entered into by Loud. Loud selected a careless tug to tow the Flint, and suffered thereby. It was at his option what tug should be given the opportunity to injure the Flint. In the exercise of this option, he selected a careless one, responsible, indeed, to him for any damage to the Flint caused by negligence, but given the opportunity to do damage to the Flint by the voluntary act of Loud. In this respect, therefore, the claims of Gladwish, Moquin & Co. and of Loud stand on the same ground. In respect to the time of the inception, the claims differ. The claim of Gladwish, Moquin & Co. for coal arose prior to the claim of Loud. For the reason given in the case of *The Samuel J. Christian*, 16 Fed. 799, it must be held that the claim of Gladwish, Moquin & Co. is entitled to priority over the subsequent claim of Loud in the distribution of the proceeds in question here.

THE ANERLEY.¹

SHERBORNE v. THE N. & W. NO. 4 and BOSTON TOWBOAT CO.

(District Court, S. D. New York. October 8, 1893.)

1. SHIPPING—ANCHORED VESSEL—DANGER OF DRIFTING—DUTY.

When there are known indications of danger of the drifting of an anchored vessel from any extraordinary cause, whether ice, storm, or position, ordinary prudence requires more than one anchor to be let go, and the omission of this precaution is at the vessel's risk.

2. COLLISION—ANCHORED VESSEL—HARMLESS CONTACT—ANTICIPATION OF LATER INJURY—NECESSITY OF CHANGING POSITION.

When two barges drifted in the ice alongside a steamship, and remained there two or three hours, and until the change of the tide, when, in swinging, the ship was injured, but during the interval before the turn of the tide the ship had made no attempt to extricate herself from her dangerous position, as she might have done, *held*, that the ship was partly liable for the damage.

3. SAME—THREE VESSELS IN FAULT—DIVISION OF DAMAGES.

Where two barges, entangled, and practically one mass, drifted upon an anchored vessel, which made no effort to avoid the damage which subsequently was sustained by her, *held*, that the anchored vessel should pay one-half the damage, and the other half should be divided between the two barges.

In Admiralty. Libel for collision. Decree for divided damages.

Convers & Kirlin, for libelant.

Robinson, Biddle & Ward, for the N. & W. No. 4.

Wilcox, Adams & Green, for the Boston Towboat Co. and the Merryman.

BROWN, District Judge. The primary cause of the damage to the libelant's steamer *Anerley* was the drifting of the two barges in the ice during the night of February 22d, whereby the two came alongside the *Anerley*. No immediate damage was done. The damage arose afterwards, upon the change of tide from flood to ebb, when the relation of the three became somewhat complicated upon swinging to the southward, and the *Anerley* had a plate stove in before the vessels got clear. I am satisfied that the two barges, after they got alongside the *Anerley*, made all reasonable efforts on their part, and did as well as they could, to get clear, and to avoid any subsequent damage. If their original drifting upon the *Anerley* was without any fault on their part, the libel should be dismissed.

The case differs, however, from others that are cited on behalf of the respondents, in that both the defendant vessels had ample notice of the presence of an unusual quantity of ice in the bay, and of the consequent necessity of taking special precautions against the liability to be carried away by the ice; to say nothing about their place of anchoring, nearly in line with each other and with the *Anerley*. Both barges had two anchors. Neither put out

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