

rule of valuation that will apply to all losses; and, it seems to me, that such has been the agreement in this policy.

The doctrine indicated as being applicable to this case appears to be in conformity with good reason and with the intention of the parties to the contract in the case under consideration. What did they intend? Did they mean to settle such partial loss as might occur upon the principles of a salvage loss, the right of recovery being limited to where the loss amounts to 50 per cent. on the sound value of the whole shipment at the port of delivery? Or did they intend that the 50 per cent. should be computed only on the net loss? For the reasons stated, I can but conclude that the former is the true construction of clause 3 of the policy, and one which, for reasons of justice and equity, should obtain in the present suit. A judgment will therefore be entered in favor of libelants for the stipulated sum of \$1,110.80 and costs.

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THE ADVANCE.

THE ALLIANCA.

THE SEGURANCA.

THE VIGILANCIA.

EMPIRE WAREHOUSE CO., Limited, v. THE ADVANCE. SAME v. THE ALLIANCA. SAME v. THE SEGURANCA. SAME v. THE VIGILANCIA.

(Circuit Court of Appeals, Second Circuit. January 16, 1896.)

**MARITIME LIENS—WHARFAGE—CONTRACT WITH OWNERS OF DOMESTIC VESSEL.**

Where wharfage, together with the use of warehouses and piers for receiving and storing freight, were furnished to several vessels belonging to a domestic corporation for a single price per day, under a contract with it, *held*, that no lien arose—First, because the contract embraced other valuable considerations the supply of which would give no lien against the ship, and which could not be separated from the wharfage proper; and, second, because the contract did not look to the credit of the ship, but only to the personal responsibility of the owner. 60 Fed. 766, affirmed.

Appeal from the District Court of the United States for the Southern District of New York.

These were four libels filed by the Empire Warehouse Company, Limited, against the steamships Advance, Allianca, Seguranca, and Vigilancia, respectively (the United States & Brazil Mail Steamship Company, claimant), to enforce an alleged lien for wharfage. The district court dismissed the libels on the ground that the libelant had no lien. 60 Fed. 766. The libelant has appealed from that decree.

Ulls, Ruebsamen & Cochran, for appellant.

Carter & Ledyard (Chas. D. Wetmore and Edmund L. Baylies, advocates), for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

**WALLACE**, Circuit Judge. We are not called upon in these causes to decide the question whether a maritime lien arises for wharfage furnished to a vessel at her home port. The lien certainly does not arise when the circumstances of the transaction are inconsistent with the contemplation of an hypothecation of the vessel. In *The J. M. Welsh*, 8 Ben. 211, Fed. Cas. No. 7,327, the lien was claimed for towage. It appeared that the towage was rendered under an agreement between the libelant and the vessel owner to tow all the boats of the latter between Troy and New York during the season of navigation in a certain year for a fixed sum per trip. **Benedict, J.**, said:

"The contract is inconsistent with the idea of a lien, and shows that a lien upon the boats was not within the contemplation of the parties. For services rendered under such a contract, and upon an exclusively personal credit, no lien exists."

In *The Stroma*, 11 U. S. App. 673, 680, 3 C. C. A. 530, 53 Fed. 281, this court used this language:

"It is perhaps unnecessary to say that the same prima facie presumption, by virtue of which a lien is placed upon a vessel for the payment for necessary supplies furnished to her in a foreign port upon the sole order of the master, is not applicable in the case of supplies furnished in a foreign port to a vessel upon the express direction of the known general owner. In the latter case there is not, prima facie, a presumption that there was a necessity for the credit of the ship."

A lien for wharfage stands on no better ground than one for towage, or for supplies furnished to a vessel in a foreign port.

In the present cases the wharfage accrued during the later months of 1892 and the early months of 1893 for accommodations furnished to several vessels belonging to the appellee, under the following circumstances: In June, 1891, or shortly thereafter, a contract was made between the libelant and the vessel owner, a New York corporation having its domicile at New York City, and running a line of steamers between that port and Brazil, by which the former, in consideration of a per diem compensation to be paid by the latter, agreed to allow the latter the entire use of one of its piers for loading and discharging outward and inward cargoes, for receiving and storing freight pending the arrival of any of the company's steamers, and while any of them might be in berths for inward or outward cargo, and also the right to use the pier for any and all purposes for the interests of the company, and to use one of the libelant's warehouses for outward freight. The contract rate of compensation was considerably in excess of statutory rates for wharfage, and the per diem was payable whenever there was an inward or outward cargo on the wharf, and until notice, whether any steamer was present or not. The steamship company used the premises under this contract during 1891, 1892, and 1893, until it became insolvent, a receiver of its property having been appointed in February, 1893. Bills for the per diem compensation were presented to and paid by the steamship company from time to time, and were allowed to run for a considerable period. No specifica-

tions of lien were ever filed against the vessels pursuant to the provisions of the state law; and no claim was ever made against the vessels by the libelant until after the failure of the steamship company. At that time the steamship company was indebted for the use of the premises for 148 days, amounting to \$4,440. From the course of business between the parties it is entirely plain that the libelant relied upon the personal credit of the steamship company.

The learned district judge who decided the cause in the court below made the following observations in his opinion:

"I am constrained to find that there is no maritime lien in this case. (1) because whatever wharfage privileges were furnished, were furnished under a contract which, for a single price per day, embraced other valuable considerations, the supply of which would give no lien upon the ship, and it is impossible to divide the price per day into different parts; (2) because the evidence indicates, beyond doubt, as it seems to me, that the dealings were upon a personal contract between the two companies, which did not look to any credit of the ship, but only to the personal responsibility of the steamship company."

In these observations we fully concur.

So far as the libelant's claim rests upon the items for supplies, the use of the stationary engine on the wharf, and the services of the engineer in running it, it stands on no better footing than the claim for wharfage.

The decree of the district court dismissing the libel is affirmed, with costs.

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THE HORACE B. PARKER.

CHISHOLM et al. v. ABBOTT et al.

(Circuit Court of Appeals, First Circuit, January 9, 1896.)

No. 140.

1. COLLISION—LIGHTS—EVIDENCE—PRESUMPTIONS.

In this case one vessel was not held in fault, as against the direct and well-sustained testimony of her two lookouts that no light was burning on the vessel with which she collided, merely upon the inference that a light which was burning in a strong wind at midnight was also burning four hours later.

2. SAME—ADMISSIONS IN PLEADINGS.

Where the answer alleged "that there was a heavy vapor or mist at the time, and the night was very thick," and that the other vessel did not sound a fog horn, or use any other signal required by law under the circumstances, this constitutes a conclusive admission that claimant's vessel was bound to sound a fog horn.

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

This was a libel in rem by William V. Abbott and others, owners of the schooner pilot boat D. J. Lawlor, against the fishing schooner Horace B. Parker, to recover damages for a collision whereby the Lawlor was sunk and lost. The district court rendered a decision holding the Parker solely in fault, and the claimants appeal.

Edward S. Doge and John J. Flaherty, for appellants.

Eugene P. Carver (Edward E. Blodgett, on the brief), for appellees.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

PUTNAM, Circuit Judge. This case involves only questions of fact. It grows out of a collision which occurred between the fishing vessel Horace B. Parker and the pilot-boat D. J. Lawlor about 20 minutes before 4 o'clock on a very cold morning in January. Each vessel was schooner rigged. The Parker was about 90 feet long, and the Lawlor about 73. The wind was from the northwest, and so strong that each vessel was under reefed sails. The night was clear overhead, but there is a dispute whether there was not a thick mist on the water. Each vessel was closehauled, with the Lawlor on the starboard tack, and so to the leeward and starboard of the Parker until the moment of the collision. The Lawlor's story is that she had left all her pilots, and was returning to port with a crew of four boat keepers and a steward; that two men were on deck, having been on watch nearly four hours; that, seeing the Parker approaching, one of the men on watch went below, got a blue light, and flashed it; that she was struck by the Parker on the port quarter, aft the main rigging; and that she immediately sunk with all on board, except the steward, who saved himself by climbing aboard the other vessel. The steward has testified fully. The Parker says that, on account of the severity of the night, she had three men on deck, two of them on the lookout, and that she changed her watch every two hours. One lookout was just forward of the foremast, and the other amidships, each walking from port to starboard and back. They were in position to have seen the Lawlor as she came up under their lee. These three men shifted their duties every 40 minutes, so the forward lookout had been at his post only 20 minutes when the collision occurred. Both testify that they saw no light until the blue light flashed under their bow, too late to avoid a collision.

It thus appears that the first question is the condition of the Lawlor's red light. The only evidence from the Lawlor about it is that of the steward, who says he saw it trimmed, and also saw it burning brightly at 8 o'clock and at 12. Two witnesses swear that, just after the collision, he said he last saw it at 8. On the other hand, there is the direct testimony of the two lookouts that the Lawlor's red light was not visible. The opinion of the learned judge who tried the cause in the district court indicates that the steward made a more favorable impression as a witness than the lookouts. If this were a case of direct testimony on each side, this would necessarily have great weight with us. But the evidence of the lookouts appears fair in the record, and has not been attacked in any specific particular, except by some suggestions which find no support in the proofs; and, even if there was no mist, we do not think the rules of law permit us to find a vessel in fault, against direct proof of this character, merely on the inference that a light burning in a

strong wind at midnight was also burning four hours later. The incident of the blue light strengthens the theory of the Parker. It is difficult to understand why the watch should have gone below for it, unless he had unexpectedly found that his port light had failed.

But there is one further difficulty. The answer of the Parker alleges "that there was a heavy vapor or mist at the time, and the night was very thick," and it charges as follows:

"And, further answering, claimants say that the said collision was caused entirely by the improper conduct and the negligence and want of care of those on board the said pilot-boat, D. J. Lawlor, in that they had no lookout forward; had no lights set and burning as required by law; did not sound a fog horn, or use any other signal required by law under the circumstances; had only one man, if any, on deck at the time of said collision; and did not use proper means and precautions to avoid said collision."

Thus, the Parker puts herself in fault by her admission of record, because, if there was such a mist as required the Lawlor to sound her horn, it equally required the Parker to do the same. Is it clear that her failure to do so did not contribute to the collision? We think it is not. If she had sounded a mechanical fog horn, the Lawlor, being to the leeward, might, and probably would, have heard it at a considerable distance, and replied with her horn, or shown a flash light or torch sooner, even though she kept her course. The vessels were so short that even two or three seconds saved in this way would have passed the Parker under the stern of the Lawlor. In dealing with this proposition, we do not find it necessary to weigh the proofs on the question whether there was a mist which rose high enough to obscure the lights of these vessels, because the Parker, of her own motion, has so stated the matter on record as to be conclusive against her. The decree of the district court is reversed, and the case is remanded to that court, with directions to enter a decree dividing equally the damages and the costs in each court.