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far as they would go, when the money was received by them. The fact that the claim now in question was secured by a lien on the *Laura*, can surely be no reason for applying the money in the first place to discharge it. On the contrary, it would be a sufficient reason against such an application, and would be a good ground for postponing it until all the claims for which the creditor had no security were first satisfied.

I do not comprehend how the argument that it is the first item in the account can apply. In point of fact, however, it is not the first or oldest item in the account, as I understand the transaction. And, if the lien on the vessel was originally valid, it is evident that it has never been discharged, or waived, or forfeited by unreasonable delay.

Some other items for necessities furnished at Peyta, on the last voyage of the *Laura* to that port, and also a small charge for bread at Valparaiso, and which are not included in the account signed by Leach, were allowed by the Circuit Court, and are included in the amount decreed. These items, the counsel for the respondents insist, ought not to be allowed, even if those in the account are sustained. I think, when the whole testimony is examined, it will be evident that these charges stand on the same principles with those of which I have already spoken. But I forbear to extend this opinion by discussing that question; because, as the court have determined that the repairs and supplies furnished, at the request of Leach, are not a lien on the vessel, it is useless to examine particular items, when the opinion of the court goes to the whole.

From that opinion I respectfully dissent. And, after carefully reviewing the case in all of its bearings, and scrutinizing the evidence, I adhere to the opinion I held in the Circuit Court.

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JAMES H. URE, CLAIMANT OF THE STEAMER GIPSEY, APPELLANT, *v.* JAMES M. COFFMAN AND CYRUS COFFMAN, OWNERS OF FLAT-BOAT AND CARGO.

Where a flat-boat, which was fastened to the bank of the Mississippi river at night, was run down and sunk by a steamer, the circumstances show that the steamer was in fault, and must be responsible for the loss. It was not necessary for the flat-boat, in the position which it occupied, to show a light during the night.

When a boat or vessel of any kind is fastened for the night at a landing place to which other boats may have occasion to make a landing in the night, it is certainly prudent for her position to be designated by a light, on her own account,

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as well as that the vessel making a landing may have light to do so. But when a vessel is tied to the bank of a river, not in a port or harbor, or at a place of landing, out of the line of customary navigation, there is no occasion for her to show a light, nor has it ever been required that she should do so.

THIS was an appeal from the Circuit Court of the United States for the eastern district of Louisiana, sitting in admiralty.

It was a case of collision, which occurred in the Mississippi river, about fifty-five miles above New Orleans.

The narrative of the case is given in the opinion of the court.

The District Court decreed in favor of the owners of the flat-boat, who were the libellants, in the sum of \$3,416.15, with five per cent. interest from the 24th of December, 1853, until paid, and costs.

Upon an appeal to the Circuit Court, this decree was affirmed, whereupon the claimants of the Gipseys appealed to this court.

It was argued by *Mr. Taylor* for the appellants, and by *Mr. Benjamin* for the appellees.

*Mr. Taylor* made the following points:

1st. That the appellant was engaged in a lawful business; that he exercised ordinary prudence in the prosecution of his voyage on the night in question; and that the collision was the result of an accident, and not from negligence, misconduct, or want of skill; and that he is in no way responsible for the loss sustained by the appellees. *Va. In. Co. v. Millaudon*, 11 L. R., 115; *Stainbeach v. Rea*, 14 Howard U. S. R., 532.

2d. That if there was any fault or want of care on the part of the appellant, there was also fault or want of care on the part of the appellees, inasmuch as they failed to make use of that common care and prudence which is required of all, in the public interest, by neglecting to keep any watch on the flat-boat, or to expose a light upon it, and that therefore they have no right to recover. *Delaware v. Osprey*, 2 Wallace, 273; *Ward v. Armstrong*, 14 Ill., 283, 285; *Innis v. Steamer Senator*, 1 Cal., 459, 460; *Simpson v. Hand*, 6 Wharton, 324; *Murphy v. Diamond*, 3 An., 441; *Lesseps v. Pontchartrain R. R.*, 17 L. R., 261; *Fleytas v. Pontchartrain R. R.*, 18 L., 339; *Carlisle v. Holton* 3 An., 48; *The Alival*, 25 Eng. Law and Equity, 604; 5 Statutes at Large, 306, sec. 10; Act of Louisiana of 1832.

3d. That if the appellant was at all in fault, and responsible in some degree because of that fault, then the appellees are only entitled to recover one-half of the amount of the damages



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occasioned by the collision. *Brickell v. Frisby*, 2 R., 205; *Schooner Catherine v. Dickinson*, 17 Howard U. S. R., 170.

*Mr. Benjamin* made the following points:

The claimants and appellants do not deny that they ran into and sank the flat-boat, whilst she was lying tied up to the bank at night, but they seek to excuse themselves by urging:

*First.* That the flat was lying moored to the bank of the river, at a distance of only fifty feet below a wood-yard, in the way of steamboats taking wood, and in the way of steamboats landing freight or passengers, at the usual landing of Madame Trudeau, the owner of the plantation on which the wood-yard was situated; and

*Secondly.* That the flat-boat had no light out, and was so concealed by the shadows of the bank that she could not be seen.

I. To this first excuse, the short and ready answer is, that the Gipsev was not engaged in any attempt to land at the wood-yard, or at Mrs. Trudeau's landing place, when she ran into the flat-boat; but, on the contrary, was bound up the river for a landing at George Mather's plantation.

Yet the night was so dark and foggy, that whilst they thought they were running *up* the river, they ran directly into the bank, sinking the flat-boat.

They pretend that the night was not too dark to run, and that it was quite light enough for them to pursue their voyage with safety. The testimony is somewhat conflicting on this point; but on their own evidence they are in a fatal dilemma. By the evidence of her own officers, the Gipsev would have run directly into the bank of the river, if the flat-boat had not intervened. Now, if it was light enough to navigate with safety, the fact proves the grossest carelessness and negligence, sufficient to make the steamer responsible.

If, on the contrary, it was not light enough to navigate with safety, there was criminal imprudence in continuing the voyage, instead of lying up till the darkness was dissipated.

The district judge puts the dilemma very clearly in his opinion, and there is no escape from it.

II. To the second excuse, the answer is, that there was no obligation on the part of the flat-boat to exhibit a light.

She was moored in a nook or recess of the bank where it had caved, so as to leave a point of land jutting out into the river above and below her.

Whether near a wood-yard, or not, is a matter of no consequence. She was *not* at the wood-yard. She was nestled securely, as her owners had every reason to believe, beyond the

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possibility of harm from ascending or descending boats, and she was not harmed by any boat that was ascending or descending by a proper course, but by a boat which, whilst its officers declare they were bound *up* the river, run straight *across* it, to a spot where they had no intention of going.

A steamboat running at night is bound to have lights, (act July, 1838, 5 Stat. at Large, 306,) and it would no doubt be held imprudent for a flat-boat, under the same circumstances, to neglect the same precaution; but it never has been even pretended, before, that a vessel of any kind, tied to the bank of a river, not in any port or harbor, or usual place of landing, is bound to show a light, still less when, as in the present case, the vessel was lying in a nook or recess of the bank, entirely out of the usual course of ascending or descending vessels.

Mr. Justice WAYNE delivered the opinion of the court.

This is an appeal from the Circuit Court of the United States for the eastern district of Louisiana.

It appears from the record, that the steamer Gipse<sup>y</sup> was a packet on the Mississippi river, running from New Orleans to Lobdell's Store landing, above Bayou Sara, and, as all the other Mississippi steam river packets do, was in the habit of landing freight and passengers at all the intermediate points and plantations. She was making a trip up the river from New Orleans on the evening of the 21st December, 1853. The night was rainy and dark, and after midnight somewhat foggy. It was light enough, though, for the boats navigating the river to run and to distinguish and make all their landings. All of the witnesses say it was a proper night for running, and none of the packets, or other boats, laid up on that night on account of the weather. Alexander Desarpes, a witness for the claimant, says, "he was the pilot of the Gipse<sup>y</sup>, and was on watch at the wheel at the time the Gipse<sup>y</sup> struck the flat-boat. That the collision happened above the point at Trudeau's wood-yard, about fifty-six miles above New Orleans, between twelve and one o'clock at night, on the 22d December, 1853. He says it was a pretty bad night, rainy, dark, and smoky, rather than foggy, with a little fog. There was light enough, however, for the boat to distinguish landings, and she ran and made all of her's of freight and passengers as she went up. Her last landing before the collision was one of freight, at J. B. Armant's plantation, on the right-hand side of the river descending, about half a mile below Trudeau's wood-yard. We then crossed the river from there, to go to George Mather's plantation. At that time the night was dark and rainy, but the shore could be seen for some distance. There was a light



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at Trudeau's wood-yard on the bank, which is pretty high there, at least fifteen feet above the water; I could see this light a long distance—three or four arpents from the shore; there was a point of land just below the wood-yard; I was looking out when the boat was approaching the shore, for the purpose of *going up that shore* to make a landing; *I could see an outline of the shore, or bank, all along, and distinctly, too*; I did not discover the flat-boat until we were right up against her; the flat-boat was lying close to the bank, and in its shadow, and having no light on her I could not see her; she was lying just at the foot of the wood-yard; the light on the bank was a good distance from the flat-boat, and did not shine upon her. As soon as we saw the flat-boat, we stopped the engine of the Gipse, and backed. If there had been a light on the flat-boat, I could have seen it at a sufficient distance to have avoided the collision, but there was no light on her. As the flat-boat was low down in the water, if there had been a light on her, we should have known it was something down in the water. I saw nobody on watch on the flat-boat at the time of the collision, and heard no hail from her before it." The witness further states that he had been a pilot on the river for more than ten years, "running in this lower trade," and adds, at the time of and before the collision, the weather was such as boats are in the habit of running and making landings, and I, as a pilot, consider that it was safe and proper to run the boat. Mather's landing, where the Gipse was going to land, was about a quarter of a mile above Trudeau's wood-yard. Upon the cross-interrogation of this witness, he does not give an intelligent or certain statement of the collision, or where or how the Gipse struck the flat-boat; but says she was tied to a point, and her stern lay a little out from the bank; she laid up and down the river in the same direction with the current; there are curvings in along the bank; the flat was lying at a point fastened, and there are curvings both above and below that point, which was a mere jutting out of the bank in consequence of curvings above and below it. The direct examination being resumed, this witness says, on a clear starlight night, *in such a stage of water as prevailed at the time of the accident*, we could have seen a flat-boat at a good distance in time to prevent an accident. If there had been on the flat-boat such a light as is generally carried on deck by a steamboat, or a schooner, or on flat-boats *when they are running*, I could have seen it three or four arpents off, and this would have given me time to avoid the collision.

The evidence of this witness is not in any material particular changed by any other witness examined in the case. It is

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rather confirmed ; but the captain of the Gipsej, who was also sworn as witness, gives a more certain account of the collision, as to the part of the flat-boat which was struck by the steamer, and by what part of the steamer she was struck. The testimony is conclusive, that the flat being tied to the shore, at what might have been considered a proper and safe place, was struck by the steamer with sufficient force to cut a part of her down, and to sink her in a few minutes. There are three points to be noted in the testimony of Desarpes. The first is, that the steamer, being upward bound, had made a landing at Armant's plantation, about half a mile below Trudeau's wood-yard, and that her next place for making a landing was a quarter of a mile above that, on the opposite side of the river, at Mather's plantation, making the distance between the two places about three-quarters of a mile. Secondly, that in his opinion as an experienced pilot, and accustomed to the navigation of the river, there was nothing in the state of the weather to prevent the steamer from being run as usual, and put across the river to make a landing at Mather's plantation, but that she was run so close in shore as to be brought into collision with the flat-boat, and thereby that the witness admits that the only cause of it was, that the flat-boat was lying close to the bank, and so much in its shadow, and not having a light, he could not see her. His language is, that if there had been on the flat-boat such a light as is generally carried on deck by a steamboat or a schooner, or on a flat-boat when they are running, he could have seen it far enough off to have avoided the collision.

Captain Ure, then in command of the Gipsej, gives the same account, scarcely with a variance, of the navigation of his vessel from Armant's plantation until the collision had occurred, but says, with more positiveness than his pilot spoke, that the forward end of the Gipsej—some part of the bow pretty far forward—struck the flat-boat. His language is, that he “was on the roof of the steamer in front all the time, when they had made their landing at Armant's, up to the moment of the collision. From Armant's we ran the bend of the river on the same side a short distance, and then crossed over to make a landing at Mather's, above Trudeau's wood-yard. There was a light above the wood-pile, but I saw nothing but its glare before the collision, the wood-pile being between the light and my eyes. I could see the glare some three or five minutes before the collision took place. We had almost hit the flat-boat when I saw it. I was looking out and saw the boat, seeing its outline pretty clearly about the same time that I saw the glare of the light spoken of. It was the shadow of the bank, which is high there, which prevented me from seeing. *If there had*



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*been on the flat-boat any such light as flat-boats usually carry, I could have seen it in time to avoid hitting her."* He further says, "the night was slightly foggy and bad, and it had been raining, but cannot recollect whether it was raining at the time of the collision. There was no fog until we came to Armant's, and after we left Armant's the fog came on, and I think that smoke was mixed with the fog. We did not lay up that night for fog, but ran all night." Other witnesses were examined by the claimants, but it is not necessary to notice their testimony further than to say, that neither of them give any additional facts concerning the navigation of the steamer from Armant's plantation, or concerning the collision, contradictory from what was said of both by Captain Ure and his pilot Desarpes.

Trying, then, the claimant's case only by the evidence introduced by himself, it is obvious that the steamer was put across the river from Armant's in a state of weather and on a night proper for running, without proper care to make her next landing at Mather's, which was at least a quarter of a mile above the wood-yard, a little below which the flat-boat was moored. Both the pilot and the captain attempt to indicate the place and the part of the steamer which was first in contact with the flat-boat, by mathematical figures. If that of the pilot's is taken as the fact of the case, it must be conceded that the Gipsev was put across the river a little below where the flat-boat laid, and so near the bank that she could not have been run above her, by pursuing that course, without a collision. Running so near to the bank, when there was ample channel-way further out in the river for the steamer to pass the point and curve made by it, at which and within which the flat-boat was fastened, was a want of proper care. Both pilot and captain knew that the wood-yard and its immediate vicinity was a point of the river at which boats were customarily moored at night, as a place of safety against collisions from ascending or descending boats, and should have run the steamer further out in the river to avoid all chance of collision with boats tied to the bank or wood-yard; and in this instance, there was no occasion for the steamer having been run so near to the bank of the river, as it was not intended to make a landing at the wood-yard, but to pass it to a landing higher up. The collision, according to the pilot's account of it, was caused by the steamer not having been kept on a course further out from the bank. That, of itself, is sufficient to make her answerable for all the consequences of it, without any regard to the fact that the flat-boat had not a light. A light upon her might, in the language of the witness, have enabled him to have avoided the collision by putting the steamer further out in the river, but

the want of a light was not the cause of it. The cause was, that the steamer's course was too near on shore. But if the captain's account of the collision is taken as the fact of the case, as we think it ought to be, the steamer is altogether without excuse, for she was put across the river without due care as to her course, and would have been run bow on into the bank, at the point where the flat-boat was fastened, if she had not been stopped by the collision. In such a view of the case as we have given from the testimony of the claimant's witnesses, it is not necessary for us to consider the point made by the witnesses, and by counsel in the argument, that the flat-boat had not a light to show herself or her mooring during the night. Tied, as she was, in a recess of the land, with a point of land extending into the river below the wood-yard, there was no necessity for her to show a light to protect her from boats ascending or descending the river, or from landing, which might be made at the wood-yard, as she was actually fastened to the bank, out of the line of a customary and safe navigation up or down the river. In other words, the steamer was either run closer into the bank than was necessary or usual at that point of the river, and out of what should have been her course to make her landing at Mather's, or she was run head upon the flat-boat, where the latter was tied to the bank. When a boat or vessel of any kind is fastened for the night at a landing place, to which other boats may have occasion to make a landing in the night, it is certainly prudent for her position to be designated by a light on her own account, as well as that the vessel making a landing may have light to do so. But when a vessel is tied to the bank of a river, not in a port or harbor, or at a place of landing, out of the line of customary navigation, there is no occasion for her to show a light, nor has it ever been required that she should do so.

After the best examination of this case, we are of the opinion that the steamer Gipsev was put across the river from Armant's, in the prosecution of the intention to make another landing with her at Mather's plantation, without skill or prudence, and that the collision with the flat-boat was the consequence of it, without any fault or want of care by those navigating it. There is, therefore, no ground for reducing the damages given by the District and Circuit Courts to the owners of the flat-boat.

Having examined the record very fully as to the items making up the aggregate of damage given by those decrees, we affirm the decree of the Circuit Court in the case.