THE ANASTASIA.

Case No. 347.

{1 Ben. 188.}[1]

District Court, E. D. New York. June, 1867.

BOTTOMRY—CHARTERED VESSEL—PRIOR ADVANCE REPAID OUT OF FREIGHT IN PREFERENCE TO SUBSEQUENT BOTTOMRY—UNIFORMITY IN MARITIME DECISIONS DESIRABLE.

1. The Italian brig Anastasia was chartered in Marseilles to the libellant for a voyage to New York for the round sum of £600. The charter-party provided that the master should sign bills of lading without prejudice to it, the loss or profit arising on them to be for account of the charterer: that the ship should be consigned to the charterer's correspondents, and that the charterer should "advance to the captain in Marseilles 4,000 francs on account of the freight, without interest or commissions, the captain paying the premium of insurance." The charterer advanced the 4,000 francs, and the vessel sailed with a cargo, partly the charterer's and partly taken on board by his orders. The freight by the bills of lading amounted to $3,163.89, in gold, being $283.89 in excess of the charter money. The vessel on the voyage met with disaster, and her captain took up money for her by bottomry on ship, cargo, and freight, and completed his voyage. The bottomry not being paid, the bondholder filed his libel against ship, freight, and cargo, and the consignees paid the freight into court, and gave honds for the value of the cargo, which abundantly secured the bond. Thereupon, the charterer filed a libel against the freight, claiming the amount of his advance and the excess above the charter money. By consent, his libel was treated as a petition, and the libel of the bondholder as an answer to it.

2. *Held,* That, under the rules which are applied in favor of bottomry bonds as against prior bottomries, mortgages, and other loans to the master or owner, it should be held that a bottomry bond binds not only the ship but her whole earnings. But that a distinction is made in the cases, between advances on freight and other advances, and it is held that sums advanced upon account of the freight must be deducted in preference to the bottomry.

{Cited in The Eureka, Case No. 4,547.}

3. That in this case the freight was, so far as the ship owner was concerned, paid to the extent of the advance, and was not at risk.

4. That the power to hypothecate by bottomry the cargo as well as the ship, is one conferred by the maritime law to facilitate commerce: and that it will be in furtherance of that object to limit the power as to the freight to the interest of the ship owner in the freight. This will enable a charterer to make an advance without risk of losing his security by a subsequent bottomry, which in many cases will enable a ship to raise money without bottomry, and will work no injustice to shippers of cargo, who, shipping in a chartered ship, may be held to have assented to the terms of the charter which provides for the advance.

5. That the interests of commerce require uniformity in the maritime law, as administered in the maritime courts of all countries.

In admiralty. In June, 1867, the Italian brig Anastasia, being in the port of Marseilles, was chartered to one Alfred Giraud, for a voyage thence to the port of New York. The charter-party, among other things, provided that the ship should receive its full and entire cargo at the choice of the charterer: that she should not be laden with merchandise other than that of the charterer or that sent by his order; and that she should sail to New York

direct, and there make delivery of the cargo in conformity with the bills of lading, on payment of the freight of the round sum of £600, being for the entire capacity of the vessel. It was also further provided by the charter-party that the master should sign the bills of lading for the freight therein specified, without prejudice to the charter-party, the loss or profit arising thereupon to be for the account of the charterer; that the master should consign his vessel to the correspondents of the charterer in New York, and the charterer should "advance to the captain in Marseilles 4,000 francs on account of the freight without interest or commissions, the captain paying the premium of insurance." In pursuance of this contract the charterer advanced the stipulated sum of 4,000 francs, and the vessel set sail, laden with cargo, partly belonging to the charterer, and the balance taken by his orders. the freight list of which amounted to the sum of $3,163.89, in gold, according to the bills of lading executed by

the master in pursuance of the charter-party. During the voyage the vessel met with disaster, and was compelled to put into Bermuda, where the master raised the sum of £2,500, upon bottomry of the ship, freight, and cargo. Departing from Bermuda, the vessel arrived in New York, when the master declined to consign her to the correspondents of the charterer, refused to deliver up the bills of lading, or allow them to collect the freight, and neglected to pay the bottomry bound when due. The holder of the bond thereupon filed his libel in this court against ship, freight, and cargo; whereupon the consignees of the cargo paid into court the freight money according to the bills of lading, and the ship and freight being insufficient to discharge the bottomry bond, they gave security for the value of the cargo, thus abundantly securing payment of the bond. The freight money being thus in the registry, the charterer, Alfred Giraud, filed his libel against it, claiming to be entitled to be paid out of it, in preference to the bondholder, his advance of 4,000 francs, and $283.89, being the excess of the freight list above the £600 for which the ship was chartered, and praying that the court would marshal the assets and direct payment of these sums to him. This libel being treated as a petition, and the libel of the bondholder being by consent taken as an answer thereto, and the master having filed an answer setting forth the facts attending the bottomry for the information of the court, but not claiming to be entitled to receive any part of the fund, the cause came up upon the issue so framed and the facts as alleged in the respective pleadings which were admitted to be true.

C. M. Da Costa, in behalf of the charterer, argued the following points:

1. At the time of the execution of the bond, the brig had received, on account of the freight due her from the charterer, the sum of 4,000 francs. The captain, therefore, could not and did not pledge it to the bondholder. Had no bond been given, the ship owner would, of course, have had to make the deduction; and, in the language of Dr. Lushington, "The bondholder, who stands in the ship owner's place with reference to this freight, must also be subject to the same deduction." The Catherine, Swab. 264. On principle, too, a man cannot pledge what does not belong to him. All that was then due the ship was the charter money, less the advance; with the freight list the master had, by the terms of the charter-party, no concern.

2. The rule is well settled, that a general hypothecation of the freight by the master in a foreign port, will be construed to include all the freight of the whole voyage, whether earned at the time the bond is made or not, provided it has not been paid to the master or owner.

Or, stated in other language: When freight is included in a bottomry bond, any portion of the freight which has been paid anterior to the date of the bond, is not subject to it. 1 Pars. Mar. Law, p. 429; The John, 3 W. Rob. Adm. 170; The Cynthia, 20 Eng. Law & Eq. 625; The Catherine, Swab. 264; The Standard, Id. 267; The Salacia, Holt, Adm. Cas. 322. In this last and latest case, Dr. Lushington reiterates the rule laid down in his

former decisions, but adds, that in case the charter-party provides (as it did there) that the advance was to be made for ship's disbursements, it will not be deemed an advance on account of freight, but a loan to the captain, unless the charter authorizes it to be deducted on the settlement of the freight. In the case at bar, this distinction does not apply, for the charter-party in express terms says, that it is an advance on account of the freight or charter money.

3. The theory invoked that the bottomry bond saved the adventure, and that therefore the advance should be subject to it, is not tenable for a moment, because—1. At the date of the bond, the advance had been paid, and was therefore no longer at risk. 2. Besides, a bondholder has nothing to do with what is at risk or not; all be looks to is the property pledged. The theory of general average, cannot be, therefore, and never is, invoked in his favor. What interests, if any, shall contribute in general average, does not concern him, but only the owners of the property pledged, and their underwriters. The Gratitudine, 3. C. Rob. Adm. 264; Bradlie v. Maryland Ins. Co., 12 Pet. [37 U. S.] 378, 405, 406.

4. The English cases cited under points 1 and 2 are directly in point. The fact that in the case at bar, the charterer himself shipped, only a part of the cargo (the rest being shipped by others with his permission, and by his orders), can make no difference in principle. True, we claim the profit to be for our account, but so would the loss have been. The charter-party expressly provided for the profit or loss being for account of the charterer. Had there been a loss, the bondholder could have compelled the charterer to have paid into court the entire charter money, less the advances. Besides, it nowhere appears in the English cases, that the charterers were the sole shippers of the cargo; and the case of The John, ubi supra, arose between the bondholder and an assignee of the charter-party.

5. All the equities are with the libellant; the bondholder is amply secured. The value of the cargo, alone, is fully five times as much as his bond. The court will, therefore, under any circumstances, so marshall the assets as to enforce the libellant's claim against the freight, leaving the bondholder to enforce his out of the ship, balance of freight, and cargo. See the rule as laid down by Dr. Lushington in The Trident, 1 W. Rob. Adm. 29, 35.

6. The libellant, therefore, is entitled to a decree for the amount claimed, with costs.

J. S. Ridgway, for the respondents, presented the following points:

1. The freight pledged to the lender on bottomry, &c., at Bermuda, was the freight expressed in the bills of lading and payable by the consignees of the cargo then on board for the carriage and delivery of said cargo, contradistinguished from the charter money (denominated freight) or hire of the vessel agreed to be paid by charterer to the owner of the vessel.

2. The power of the master, as agent of all concerned, including the charterer of the vessel, as well as the owner thereof and owners of cargo, to so pledge the freight payable for carriage of such cargo, will not be questioned. And in the present case, not only can the general principle be invoked that the master is in that capacity agent of all concerned, including the charterer, but the provision in the charter-party to the effect that the master shall sign bills of lading of cargo shipped, at rates of freight therefor designated by the charterer, is a recognition in express terms of such agency, and sufficient of itself to constitute the master such agent of the charterer, with power to act in his behalf concerning the subject matter.

3. The charterer was owner pro hac vice, and as such entitled to the ship's earnings on the voyage, and had undertaken the risks of safe carriage and delivery of the cargo specified in the bills of lading. The freight stipulated in the bills of lading was at risk, and dependent upon safe delivery of said cargo at the port of destination. No part of the freight stipulated in said bills of lading had been paid in advance, and the fact of the payment of part, or even the whole of the charter money in advance, does not in a case like the present, of a speculative character, create or constitute a valid claim or lien by or on the part of such charterer to be reimbursed out of the said freight the amount advanced by him on account of the charter or hire of the vessel, superior to or in preference to that of a lender on bottomry; for all the freight was at risk, and by means of the loan on bottomry, &., was preserved to the benefit of the charterer for whose account and risk said voyage was undertaken and prosecuted. Standing in the position of owner for the voyage, such advance by the charterer, being on account of hire of the vessel and to acquire the control thereof for the voyage for speculative purposes, can be no more the ground of any valid claim to reimbursement of that amount to him out of the freight in preference to the claim and lien of a lender on bottomry, &., than would the payment of a like sum by a purchaser on account of purchase money or the payment by the absolute owner of such amount to provision the vessel for and dispatch her on the voyage. The freight on cargo on board, from which the party so advancing (whether owner or charterer) is or expects to be reimbursed with profit, is at risk, and on such freight, preserved and secured by means of such loan, the lender on bottomry has the first claim and lien, and it is such freight that is pledged. The Eliza, 3 Hagg. Adm. 87; 2 Park Ins. 881.

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5. A bottomry bond operates upon property then the subject of risk. In consideration of the maritime interest, the lender assumes the risks of perils of the seas to time of termination of the voyage and against which he may insure. And in case of a total loss of vessel and cargo by perils of the seas and without fault of any party, the bond would be of no force or effect further and would cease to operate, even though by its terms freight was pledged and though notwithstanding such loss, the charterer was indebted to the owner of the vessel for or on account of charter money or hire of the vessel. The amount of such indebtedness could not be reached by admiralty process, and not because of any defect in the remedies provided, but on principle; because a lender on bottomry, &., cannot take maritime interest and at the same time have a claim on or hold as security property not subject to risk or perils of the seas on such voyage; and also because (as in the present case) the freight pledged is the compensation for the carriage of goods, and is in the cargo; while the charter money or hire of the vessel rests in covenant, and is not in the cargo, except in in the

master in pursuance of the charter-party. During the voyage the vessel met with disaster, and was compelled to put into Bermuda, where the master raised the sum of £2,500, upon bottomry of the ship, freight, and cargo. Departing from Bermuda, the vessel arrived in New York, when the master declined to consign her to the correspondents of the charterer, refused to deliver up the bills of lading, or allow them to collect the freight, and neglected to pay the bottomry bond when due. The holder of the bond thereupon filed his libel in this court against ship, freight, and cargo; whereupon the consignees of the cargo paid into court the freight money according to the bills of lading, and the ship and freight being insufficient to discharge the bottomry bond, they gave security for the value of the cargo, thus abundantly securing payment of the bond. The freight money being thus in the registry, the charterer, Alfred Giraud, filed his libel against it, claiming to be entitled to be paid out of it, in preference to the bond holder, his advance of 4,000 francs, and $283.89, being the excess of the freight list above the £600 for which the ship was chartered, and praying that the court would marshal the assets and direct payment of these sums to him. This libel being treated as a petition, and the libel of the bondholder being by consent taken as an answer thereto, and the master having filed an answer setting forth the facts attending the bottomry for the information of the court, but not claiming to be entitled to receive any part of the fund, the cause came up upon the issue so framed and the facts as alleged in the respective pleadings which were admitted to be true.

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5. A bottomry bond operates upon property then the subject of risk. In consideration of the maritime interest, the lender assumes the risks of perils of the seas to time of termination of the voyage and against which he may insure. And in case of a total loss of vessel and cargo by perils of the seas and without fault of any party, the bond would be of no force, or effect further and would cease to operate, even though by its terms freight was pledged and though notwithstanding such loss, the charterer was indebted to the owner of the vessel for or on account of charter money or hire of the vessel. The amount of such indebtedness could not be reached by admiralty process, and not because of any defect in the remedies provided, but on principle; because a lender on bottomry, &c., cannot take maritime interest and at the same time have a claim on or hold as security property not subject to risk or perils of the seas on such voyage; and also because (as in the present case) the freight pledged is the compensation for the carriage of goods, and is in the cargo; while the charter money or hire of the vessel rests in covenant, and is not in the cargo, except in inproaching

her nearly bows on, at the distance of a mile and a half.

2. The duty of unremitting attention on the part of a lookout enforced.

3. If the night was foggy, as claimed by the libellants, the steamer should have blown her whistle and moderated her speed, both of which precautions she neglected until too late.

4. If sufficiently clear to permit an approaching vessel to be seen at the distance of a mile and a half, her negligence in not keeping out of the way was inexcusable, if not unaccountable.

5. The familiar excuse set up by the steamer, that the schooner changed her course and ran across her bows, rejected as not supported by the testimony; and because, if it did occur, as stated by the steamer's second officer and lookout, the steamer had ample time to avoid the disaster.

{In admiralty. Decree for libellants. Affirmed in The Ancon v. Thompson, 17 Fed. 742.}

Milton Andros, for plaintiffs.

McAllister & Bergin, for claimants.

HOFFMAN, District Judge. At about a quarter before five o'clock on Saturday morning September 15, the schooner Phil Sheridan, bound on a voyage from this port to the Umpqua river, state of Oregon, was run into by the steamer Ancon, and received such injuries as caused her shortly afterwards to capsize and become a total loss.

At the time of the accident two persons were on the deck of the schooner—the helmsman, and a lookout forward. The schooner was sailing close hauled to the wind, and heading towards the land on a north-east half north course. Her speed is stated by those on board to have been from two to two and a half knots per hour. The claimants' witnesses, however, suppose that a four-knot breeze was blowing; but this opinion is the result of an estimate of its velocity founded on the course of the smoke issuing from the steamer's smoke-stack, a method of determining the rate at which a schooner, close hauled to the wind, was actually sailing, which seems quite unreliable. In the view I take of the case, the point is immaterial.

Upon taking the wheel at two o'clock A. M., the helmsman had been instructed by the mate to keep a good lookout for the land, towards which the vessel was heading. He was first apprised of the steamer's approach by hearing the noise of her wheels, and supposing it to be the sound of breakers on the beach, he gave his wheel a round turn, and, fixing it with a diamond screw with which it was provided, he ran forward to see if the shore was discernible. Almost immediately on reaching the forward part of the vessel, he discovered the steamer looming through the darkness some two or three hundred yards distant, and bearing down upon the port bows of the schooner. The men endeavored, by shouting, blowing the fog-horn, etc., to attract the attention of the steamer; and the helms-

man, rushing aft, found the captain—who had been aroused by the noise—at the wheel, with the helm hard-a-port. The collision occurred a few seconds afterwards, and was in fact inevitable from the moment the steamer was first discovered by the schooner.

It is not denied that the schooner was provided with lights, set and burning as required by law. It is also in proof that a fog-horn was blown at short intervals for about twenty or thirty minutes previous to the collision. The failure of the schooner not sooner to discover the steamer is accounted for by the circumstance that a dense fog prevailed, which rendered it impossible to do so. On this point the testimony is irreconcilably conflicting, not merely because the claimants' witnesses deny that a fog prevailed—although they admit that the night was very dark, that the sky was "clouded" and overcast, and that it was "smoky"—but because, if the second mate is to be credited, the schooner was first seen by him at a distance, he "can safely say," of one and a half or two miles. Her green light was also seen by Meihan, the watchman, as he says, at the distance of seven hundred yards.

The schooner was struck near her forward rigging on the port side, and, swinging around under the force of the blow, fell alongside of the steamer on her starboard side. No effort was spared to rescue her crew and passengers, and they were all, though with imminent peril to one of them, transferred to the steamer. The steamer lay near the schooner some three quarters of an hour or fifty minutes, when the master of the steamer, observing that the schooner had fallen over on her side, with her sails in the water, abandoned all hope of saving her and proceeded on his voyage.

The evidence in the case is very voluminous. Much of it, however, relates to matters comparatively immaterial, and much of it to matters so clearly established by proof as to obviate the necessity of a critical comparison and analysis.

The case may almost be determined on the testimony of one witness—Mr. Douglas, the second mate of the steamer, the officer of the deck at the time of the collision—and by applying to the facts, as stated by him, a few well-settled and familiar rules of law.

Mr. Douglas testifies that when he first saw the schooner he was standing about twenty feet from the steam of the steamer, forward of the standard compass. He had relieved and taken the place of the regular lookout, and given him permission to go below to get some coffee. He first saw the vessel, but not her lights, at the distance of one and a half or two miles. She then bore about one point, or a little better, on his starboard bow; two or three minutes later he saw the schooner's green or starboard lights. He then gave orders to the quartermaster to starboard the helm, and the vessel went off about two points towards the shore. This

he verified by the compass, but "thought," he says, "that the course of the vessel was not altered quite fast enough." He does not appear, however, to have acted on that impression by repeating his order to the helmsman. At the time this change in the steamer's course was made, the schooner was distant about a mile.

The account given by Mr. Douglas of the succeeding occurrences is obscure and inconsistent.

On his direct examination he states that, after changing his course two points, as above described, he "thought he instantly saw two lights." He "then walked aft, about 'ten feet beyond the pilot-house, and notified the quartermaster that he had lost the appearance of the lights—to look out.' He answered me, 'Yes, sir.'" "I then walked forward to the compass and looked at the compass again, and looked out for them again, and I saw they were coming very near, and I then ordered him to stop; seeing the red light, the flame, I ordered him to stop her; I then ordered him to blow the whistle, and he blew the whistle; I then ordered him to put his helm hard-a-star-board; I ordered him to blow the whistle to alarm the people, for I knew there would be a collision then."

On his cross-examination, in reply to an inquiry, how long after he saw the green light both lights came in view, he says: "That was instantaneous—probably two or three minutes after. It was so instantaneous that it confused me. That was when I ordered the quartermaster to look out—that he was changing his course."

The schooner was then, he says, probably half a mile or three quarters of a mile off. The two lights were in sight about half a minute. He then went aft to warn the quartermaster, and on his return only the red light was visible. The schooner was then "close aboard; probably two hundred and fifty yards off." It was then that he gave orders to stop and to put the helm hard-a-starboard. The helm up to this moment had remained as he had first ordered, viz., two or three spokes to starboard. In a subsequent part of his deposition the witness admits that, when he gave the order to stop, the schooner was within two hundred and fifty feet of the steamer. He also states that the collision occurred almost instantly on his return from the pilot-house, and that the time during which the schooner was not under his observation was about three minutes. He subsequently says, that on reflection he is inclined to think he has over-estimated this interval.

The above is the substance of Mr. Douglas' testimony, expressed in his own language. Assuming his account to be in all respects accurate, there can be no doubt that the steamer was in fault. A vessel is described at a distance of one and a half or two miles; she is run down by a steamer which had, by stopping, backing, or changing her helm, absolute control of her movements.

It is apparent from Mr. Douglas' narrative that, with the exception of star-boarding the helm two spokes, nothing was done by the steamer to warn the approaching vessel, or to avert the disaster. The testimony clearly shows that the blowing of the steamer's whistle,

the stopping of the vessel, and the putting of the helm hard-a-starboard, all took place too late to be of service, and when the collision was inevitable. When the lookout was permitted to go below, he was not relieved by another of the crew. The officer of the deck undertook to act as his substitute. So negligently did he perform his self-imposed duties, or rather so negligently did he attempt to discharge the duties of lookout and of officer of the deck at the same time, that he deserts his post, goes to the pilot-house, and only regains his station (after an absence of, as at first stated by him, three minutes) at the moment of the collision. At the speed at which the vessels were approaching each other, more than half a mile of the interval between them would be traversed in that time.

The absence of a competent lookout is of itself a circumstance strongly condemnatory, and clear and satisfactory proof will be exacted that the misfortune encountered was not attributable to her misconduct in that particular. The Alabama and The Game-cock, [Case No. 122;] The Armstrong, [Id. 540;] The Batavier, 9 Moore, P. C. 300, 301; The Blossom, [Case No. 1,564;] The Colorado, 91 U. S. 694—699; The Europa, 2 Eng. Law & Eq. 563, 564; The Farragut, 10 Wall. [77 U. S.] 337; The Genesee Chief, 12 How. [53 U. S.] 462, 463; The Iona, 2 Mar. Law Cas. 133; The Java [Case No. 7,233;] Killam v. The Eri, [Id. 7,765;] The Londonderry, 4 Notes of Cas. Supp. 41—46; The Northern Indiana, [Case No. 10,320;] The Sea Gull, 23 Wall. [90 U. S.] 174—177; The New Orleans, [Case No. 10,179;] Ward v. The Ogdensburg, [Id. 17, 158.]

Nor will the captain or officer of the deck be accepted as competent lookouts. Chamberlain v. Ward, 21 How. [62 U. S.] 570; The Comet, [Case No. 3,051;] The Northern Indiana, [Id. 10,320;] The Ottawa, 3 Wall. [70 U. S.] 273. Nor the pilot and helmsman. The Alabama and Gamecock, [Case No. 122;] The Genesee Chief, 12 How. [53 U. S.] 463; The Ottawa, 3 Wall. [70 U. S.] 273; Rusk v. The Freestone, [Case No. 12, 143;] Western Ins. Co. v. Goody Friends, [Id. 17,436.] Nor the steward and passengers. The Gratitude, [Id. 5,704;] McGrew v. The Melnotte, [Id. 8,812;] Amoskeag Co. v. The J. Adams, [Id. 338.]

The want of a lookout is not excusable because all hands are called to haul in a damaged mainsail, or to reef sails, or to haul down the flying jib, or to stow the anchor or by a custom for all the ship's company to stand lookout the first day of the

voyage. Whitridge v. Dill, 23 How. [64 U. S.] 453; The Catharine v. Dickinson, 17 How. [58 U. S.] 177; Thorp v. Hammond, 12 Wall. [79 U. S.] 414; The H. P. Baldwin, [Case No. 6,812;] The Lady Franklin, [Id. 7,984;] Sturges v. The Mazeppa, [Id. 11,271.]

The authorities I have cited sufficiently illustrate the inflexible rigor with which the rule which requires a competent lookout to be stationed, and that he be vigilant and unremitting in the discharge of his duty, is enforced.

"When strong evidence in a case of collision tends to show that the catastrophe was owing to the failure of the lookout of the libeled vessel to attend to his duty, every doubt as to the performance of the duty, and the effect of non-performance, should be resolved against the vessel sought to be inculpated, until she vindicates herself by testimony conclusive to the contrary." The Ariadue, 13 Wall. [80 U. S.] 475.

The proof in the case at bar brings it fully within the principles thus laid down by the supreme court. But it is not merely that the second mate dismissed the lookout and assumed the discharge of his duties, and that he left his post and was absent during several critical minutes. while there was yet time to avert the disaster, but, by his own showing, he sees a vessel approaching nearly bows on, at the distance of one and a half or two miles; he sees her, as he says, change her course at the distance of one half or three fourths of a mile, and yet, up to the moment of the collision, takes none of the precautions, such as stopping, slowing, blowing his whistle, etc., enjoined by law and dictated by common prudence.

On the contrary, the starboarding (which might have been proper if, as he says, he first saw her green light) is persisted in after the red light became visible, and when there was ample room, by porting his helm, to pass under the stern or on the port side of the schooner, or by stopping and backing to have avoided all possibility of disaster.

The steamer being thus found to be clearly in fault, it remains to consider whether the schooner, by any fault on her part, contributed to the disaster. It is intimated, though not directly charged, by Mr. Douglas, that the cause of the accident was the change by the schooner of her course, so that she ran directly across the bows of the steamer.

This defense is characterized by Mr. J. Grier as "a stereotyped excuse, usually resorted to for the purpose of justifying a careless collision; it is always improbable, and generally false." [Haney v. Baltimore Steam Packet Co.] 23 How. [64 U. S.] 291.

The only evidence tending to show that the schooner made the change in her course imputed to her, is the statement of Mr. Douglas, that he first saw her green light alone. To accept this statement, we must disbelieve the evidence of those on board the schooner; we must also reject the inferences which may naturally and safely be drawn from facts which are not fairly open to dispute.

The schooner was beating up the coast against a north north-west wind. She was close hauled to the wind on her port tack. The steamer was coming down the coast, heading

nearly south. If, as the second mate testifies, she was one point on his starboard bow, the green light would probably not be visible to him—certainly not her green light alone. There is not the slightest reason to suppose that she went about and was put on the other tack. Her helmsman and lookout both testify that she was standing towards the land. The latter had been cautioned by the mate to look out for the shore, and the noise of the steamer's paddles was at first mistaken by both of them for the sound of breakers on the beach. This circumstance, which it is impossible to suppose they have invented, appears conclusively to show that they were in fact on the port tack, heading in shore, and that the vessel had not gone about so as to present her green or starboard light to the approaching steamer. No necessity or convenience of navigation is suggested which could have induced the schooner, when sailing on the wind, to luff up so as to expose her green light alone to a vessel approaching her from an opposite direction: and I see no reason for discrediting, on the faith of Mr. Douglas' unsupported statement, the positive testimony of those on board of her

With regard to the weather, the testimony is, as has been observed, conflicting. All agree that the night was cloudy and dark. The claimants' witnesses deny that it was foggy. Two circumstances, however, lead me to the conclusion that in this they are mistaken:

1. The fact, which is uncontradicted, that some time before the accident, the fog-horn was passed by the man at the wheel of the schooner to the lookout, and was blown at short intervals up to the moment of the collision. That at the time of the collision it was sounded and heard on board the steamer is not denied. The weather, therefore, must have been such as to suggest to the crew of the schooner the propriety of its use.

2. A fog did in fact set in after the collision. It was of short duration; but the line which led from the steam whistle forward to the lookout station, was adjusted, and the whistle was sounded some half a dozen times, a short time after the collision.

This, though it does not prove, makes it probable that similar weather prevailed before the collision. The supposition, that owing to the fog the second mate of the steamer failed to observe the schooner until she was close aboard of her, is the more natural, and indeed more charitable, explanation of the occurrence, for it relieves Mr. Douglas of the imputation of gross and almost unaccountable

negligence, to which otherwise he would be obnoxious. It does not, however, acquit the steamer; for it was her plain duty to moderate her speed and to blow her steam whistle, both of which precautions she utterly neglected. A decree will be entered in favor of the libellants, and an order of reference to take proofs as to the damage.

[1] {Reported by Robert D. Benedict, Esq., and here reprinted by permission.}