

Case No. 4,335.

THE ELEANORA.

{17 Blatchf. 88;<sup>1</sup> 8 Reporter, 810.}

Circuit Court, S. D. New York.

Aug. 28, 1879.

COLLISION—STEAM AND SAIL—FOG—SPEED—CONTROL OF VESSELS—FOG SIGNALS—LIGHTED TOUCH.

1. A steamer must, in a fog, run at only such a speed as is consistent with the utmost caution; and she must, if possible, be kept under such control that she can be stopped after another vessel with which she is in danger of collision may be seen or otherwise discovered.

{Cited in *The City, of New York*, 15 Fed. 629; *Clare v. Providence & S. S. Co.*, 20 Fed. 536; *The Nacoochee*. 22 Fed. 857; *The Parthian*, 55 Fed. 428. Followed in *The Oregon*, 27 Fed. 755.}

2. A schooner sailing in the night, in a fog, in a common thoroughfare of approaching steam vessels, and heading on a course crossing their regular tracks, and hearing fog signals from them from various directions, was *held* in fault for not exhibiting a lighted torch, a collision having occurred between her and one of such steamers.

{Cited in *The Isaac Bell*, 9 Fed. 848; *The Narragansett*, 11 Fed. 921; *The I. C. Harris*,

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29 Fed. 928; Hood v. The Lehigh, 43 Fed. 601.]

3. Nothing short of an absolute certainty that the torch could do no good, to be established by proof, will justify an omission to obey the rule.

[Cited in The Excelsior, 12 Fed. 203; The Hercules, 17 Fed. 607.]

4. The schooner was *held* in fault because, while on her port tack, she sounded one blast only at a time of her fog horn, instead of two blasts at a time. The rule of the supervising inspectors of steam vessels on that subject, though it does not have the force of law as regards a sailing vessel, had become binding on the schooner, as a usage of the sea.

[Cited in Re Long Island Transp. Co., 5 Fed. 623; The Nacoochee, 22 Fed. 858; IT. S. v. Miller, 26 Fed. 97.]

5. The schooner was *held* in fault for sailing short handed in a fog, having only two men on deck, one attending to going about, and acting as a lookout, and the other steering and blowing the fog horn.

[Cited in Meyers Excursion & Nav. Co. v. The Emma Kate Ross, 41 Fed. 828.]

6. A schooner and her cargo were lost by a collision with a steamer. The steamer being sued separately for the two losses, both vessels were *held* in fault. The damages for the loss of the schooner were apportioned between the two vessels. A decree was given to the owners of the cargo for the full amount of their loss; and a credit was allowed to the steamer, on the decree in favor of the schooner against her, for a sum equal to one-half of the decree in favor of the owners of the cargo. As, in the suit by the schooner, both parties had appealed to this court, the costs in this court in that suit were equally divided between them.

[Cited in The Hudson, 15 Fed. 165; Atlantic Mut. Ins. Co. v. Alexandre, 16 Fed. 282; Empresa Maritima a Vapor v. North & South Am. Steam Nav. Co., Id. 505; The Canima, 17 Fed. 272; The John E. Mulford, 18 Fed. 459; The Hercules. 20 Fed. 205; Briggs v. Day, 21 Fed. 730; The Bristol, 29 Fed. 875; The Queen, 40 Fed. 695.]

[Appeal from the district court of the “United States for the southern district of New York.]

In admiralty. These were two libels in rem, filed in the district court, in admiralty, against the steamship Eleanora, one by the owners of the schooner Transit, and the other by the owners of her cargo, to recover for the loss of the schooner and her cargo by a collision between the schooner and the steamship. The district court held that both vessels were in fault, and apportioned equally between the schooner and the steamship the damages for the loss of the schooner. It gave to the owners of the cargo a decree against the steamer for the full amount of the damages sustained by the loss of the cargo. In the suit by the owners of the schooner, both parties appealed to this court. In the suit by the owners of the cargo the claimants appealed to this court. The decision of the district court, (Blatchford, J.) was as follows:

“These libels are filed, the first of them by the owners of the schooner Transit, and the second of them by the owners of her cargo, to recover for the damages caused by the loss of the schooner and her cargo of coal, which took place on the night of the 30th of August, 1875, shortly before midnight, in consequence of a collision between the schooner and the steamship Eleanora, in Long Island Sound, off Faulkner’s Island, during

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a dense fog, the schooner and her cargo being sunk and totally lost, and the master of the schooner being drowned. The steamer was bound from New York to Portland, Maine. The schooner was bound to the eastward. The wind was east, and very light, and the tide was running flood or to the westward. The schooner was on her port tack, beating, and heading about south southeast or six points off the wind. The course of the steamer had been a little north of east. The stem of the steamer struck the starboard side of the schooner a few feet forward of the stern of the schooner, and substantially cut off the part of the schooner that was aft of the line of the blow. The libels allege that those on the steamer were either negligent in not discovering the schooner in time to avoid the collision, or, seeing the schooner and her lights, or, hearing her signals on her fog horn, were negligent in continuing to run the steamer at the rate of ten or twelve knots an hour, and in not causing the steamer to be stopped before colliding, or causing her course to be changed. The answers allege, that a fog came on at 20 minutes past eleven o'clock; that the steamer was running at a moderate rate of speed, and had competent lookouts, properly stationed and keeping a vigilant lookout, and her whistle was sounded at regular and proper intervals; that, while thus proceeding cautiously, the lookout reported, and there was, at the same time, heard, one blast of a fog horn, about one half a point over the port bow of the steamer; that thereupon, immediately, her wheel was put hard apart, and thereafter kept so, and she was stopped and backed; that, immediately thereafter, the sails of the schooner came into view, crossing the bow of the steamer from port to starboard; that the schooner exhibited no flash nor other lights at any time, nor was any signal given from her except the one blast of her fog horn, just immediately before the collision; that she had no competent officers, nor crew; nor lookout, nor wheelsman, at or previous to the collision; that, notwithstanding every effort, from the moment of receiving any signal from the schooner, to avoid her, was made by those in charge of the steamer, the vessels came into collision; that the collision occurred about 20 minutes to 12 o'clock, midnight, and was inevitable as to the steamer; that the collision was solely owing to negligence and want of skill and care on the part of the schooner, in that she had no competent crew, and had no proper lights set and burning, and exhibited no flash light, and had no competent or proper lookout, and gave no sufficient or timely or proper signals

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by lights or fog horns, and did not indicate her port tack by two blasts of her fog horn, so that vessels approaching her might be warned in time and thus avoid her, and had no competent helmsman, and, for some time before, and at the time of the collision, had no one at all at her helm; that the only signal, to wit, the one blast of the fog horn, which the steamer received, was acted upon promptly; and that, had such signal been timely and proper, and had those navigating the schooner not been guilty of the other negligent acts above mentioned, the collision could have been avoided. The fog was very dense. The steamer, when the fog came on, reduced her speed to the rate of between 5 and 6 miles an hour, her ordinary rate being 10, and blew her fog whistle at proper intervals. There were in her pilot-house her master, and first mate, and one seaman, and there was a seaman on watch just outside of the pilot-house, and one on the lookout forward, on the forecastle deck, close to the stem. All were listening attentively for sounds of fog horns and looking attentively for lights. The schooner, as I find, on the evidence, had her colored lights set and burning, but they were not seen at any time from the steamer, nor could they, or the lights of the steamer, have been seen in such a fog at any useful distance. The schooner had on her deck a seaman, who was at the wheel, and her mate. Her master came on deck very shortly before the collision. The persons on the deck of the schooner were listening and looking. They had a fog horn on deck, and it was being blown by them at proper intervals. Yet, it is plain, from the evidence, that neither vessel became conscious of the presence of the other, until just before the collision. I cannot resist the conclusion, that the collision was due, in part, at least, to the improper speed of the steamer. The violence of the blow, and the fact that, notwithstanding the steamer stopped and reversed at full speed, as soon as she became aware of the proximity of the schooner, by hearing her fog horn, the impetus carried her, despite the obstacle, a considerable distance ahead and beyond the place of collision, before she came to a standstill, indicates that her speed was too great. The schooner gave blasts on her fog horn at proper intervals, unconscious of the approach of the steamer. The schooner was bound to the eastward, with her booms off to starboard. The blasts of her fog horn were delivered, as was natural, towards the eastward, and the position of the sails of the schooner would tend to intercept the sound from being heard by a vessel approaching the starboard side of the schooner nearly at right angles. The moment the whistle of the steamer was heard on board of the schooner, the fog horn of the schooner was blown over the starboard side of the schooner, and towards the direction from which the blast of the whistle came. The steamer was running at the rate, at  $5\frac{1}{2}$  miles an hour of 484 feet in a minute. The wind was blowing the sound of the whistle directly away from the schooner. It will not do to say that the fact that the schooner did not hear the steamer's whistle sooner, or the fact that the steamer did not hear the schooner's foghorn sooner, it appearing that those on both vessels were watchful and attentive, proves-that the steamer gave no blasts of her

whistle before the first one that the schooner heard, or that the schooner gave no blast of her fog horn before the first one that the steamer heard, in the face of the clear evidence that both whistle and fog horn were blown, and blown at proper intervals, in view of the existing state of things before the blasts which were respectively heard. If the steamer had been going at less speed, or had gone ahead a short distance and then stopped still and listened, and thus made her speed, or her passage from point to point through the intervening space, and not merely her running rate while in forward motion, that "moderate speed" which the statute requires, it is quite apparent, that, blowing her whistle continually, at proper intervals, the blast would have been heard by the schooner, and answered by the fog horn over the starboard side of the schooner, in sufficient season for the steamer to have stopped and backed, and be brought to a stand-still, before reaching the schooner. Therefore, the steamer was in fault as to her speed. It is contended that the schooner was in fault in not showing a lighted torch. It is provided, by section 4234 of the Revised Statutes, that every sail vessel shall, 'on the approach of any steam vessel during the night time, show a lighted torch upon that point or quarter to which such steam vessel shall be approaching.' In order to make this provision operative, it is necessary that the sailing vessel should be aware of the approach of the steam vessel towards her, or, that, if ignorant of such approach, such ignorance should not arise from negligence or inattention on the part of the sailing vessel. In the present case, I do not find, on the evidence, that there was any negligence or want of attention on the part of the schooner, in watching for sounds from the steamer. The schooner was provided with a torch, but it was not on deck. I am not satisfied, on the evidence, that there was a sufficient interval of time between the hearing of the steamer's whistle by the schooner, and the hearing of the schooner's fog horn by the steamer, for the torch to have been lighted and exhibited in such manner as to have done any good, or to have indicated the presence or position of the schooner to the steamer sooner or better than the foghorn did, even if the torch had been on deck. Here, again, the difficulty goes back to the speed with which the steamer was approaching the course of the schooner. But, there is an obstacle to the entire exoneration of the schooner from fault. The board of supervising

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inspectors of steam vessels, In January, 1875, established certain regulations, which were approved by the secretary of the treasury. They are contained in a printed pamphlet of 45 pages, entitled: 'General, Rules and Regulations prescribed by the Board of Supervising Inspectors of Steam Vessels, and approved by the Secretary of the Treasury, 1875.' Among these regulations, on page 41, are 'Rules prescribing certain fog signals to be observed by steamers, sailing vessels and other craft' One of those regulations is as follows: 'Sailing vessels, and every craft propelled by sails, upon the ocean, lakes and rivers, shall, when on their starboard tack, sound one blast of their fog horn; when on their port tack, they shall sound two blasts of their fog horn; when with the wind free, or running large, they shall sound three blasts of their fog horn; when lying to or at anchor they shall sound a general alarm.' This regulation was in force at the time of this collision. The statute respecting fog signals (rule 15 of section 4233 of the Revised Statutes) does not cover the point of an indication of the starboard tack by one blast of a fog horn, and of the port tack by two blasts. The power of the board of supervising inspectors of steam vessels to establish the regulation in question is claimed to be derived from section 4405 of the Revised Statutes, which provides, that 'the board shall establish all necessary regulations required to carry out in the most effective manner the provisions of this title, and such regulations, when approved by the secretary of the treasury, shall have the force of law.' This provision was a re-enactment of a like provision found in section 23 of the act of February 28, 1871 (16 Stat. 449). I find it impossible to hold that the regulation respecting the indication of the tack is a necessary, or even an appropriate, regulation to carry out any provision that is found in the title in question, title 52. It is urged that the clause referred to gives to the board power to make any regulation which tends to prevent the loss of life on board steam vessels. The provisions of title 52 are, indeed, many of them, provisions to prevent such loss of life. But they are specific provisions in regard to various matters. None of them relate to fog signals, or to the navigation of a steamer or a sailing vessel in a fog, or to the manoeuvring of a steamer with reference to a sailing vessel. Therefore, I cannot hold that the regulation respecting the indication of the schooner's tack had the force of statutory law, as respected either the schooner or the steamer. But, the evidence is clear, that, as the language of the sea, the steamer had the right to understand one blast of a fog horn as indicating a sailing vessel on her starboard tack; and, in view of the evidence on the part of the steamer, and the absence of testimony on the part of the schooner, to the effect that one blast of a fog horn was not understood by those on the schooner to indicate the starboard tack, it must be held that the schooner knew that a single blast would indicate to the steamer that the blast came from a sailing vessel on her starboard tack. The schooner had, very shortly before, been on her starboard tack. On that tack, the one blast was proper. When she came on her port tack she continued her one blast. The steamer heard that one blast a little on her port bow, not over half

a point With the headway she had, she ported her helm. This threw her head to starboard, and, on the evidence, she changed, by compass, before the collision, a point and a quarter, or from east one-quarter north to east by south. Her view was, that the fog horn was on a sailing vessel which was on the starboard tack, and had already got on the port bow of the steamer, and was moving away from the course of the steamer. Therefore, porting would ensure the passage of the steamer under the stern of such vessel. But, the schooner was on the port tack, and was moving towards the line of the steamer's course. As it was, although the steamer, by porting, changed a point and a quarter, she struck the schooner at a point only 15 feet from the schooner's stern. If the schooner had, by two blasts of her fog horn, indicated that she was on the port tack, it is apparent that the steamer, hearing the sound only half a point on her port bow, would not have ported, and that, if she had kept her course, or, much more, if she had starboarded to the same extent to which she ported, she would have passed under the stern of the schooner without striking her, or the blow would have been a sliding and glancing one, inflicting less injury on the schooner and her cargo. I must, therefore, hold the schooner in fault I do not find that any of the other faults alleged against the schooner are established. It follows, that, as regards the suit brought by the owners of the schooner, the damages for the loss of the schooner must be apportioned between the schooner and the steamer. The decision in *The Atlas*, 93 U. S. 316, requires, that, in the suit by the owners of the cargo, there should be a decree against the steamer for the full amount of the damages sustained by the loss of the cargo. In each case there must be a reference to ascertain the damages."

This court found the following facts: "A little before midnight of the 30th of August, 1875, the schooner *Transit*, owned by the libellants in the first suit, laden with two hundred and thirty-two tons of coal, owned by the libellants in the second suit, was sunk by a collision with the steamship *Eleanora*, in Long Island Sound, between one and two miles to the eastward, and six and seven miles to the southward, of Faulkner's Island. The schooner and cargo were a total loss, and the captain of the schooner was drowned. The wind was light from the eastward, and the tide flood, running to the westward

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about two miles an hour. The schooner was eighty feet keel, and twenty-eight feet beam. Her registered tonnage was one hundred and fifty tons or thereabouts, and her carrying capacity about two hundred and thirty. She was beating eastward, on a voyage from Newburgh, N. Y., to New Bedford, Mass., and making very little headway. Her crew consisted of her captain, mate, one able seaman, one ordinary seaman and a cook. At the time of the collision she was on her port tack, having come about from the starboard tack only a little while before. The steamship was one hundred and eighty-six feet long, and thirty feet beam. Her registered tonnage was a little less than one thousand tons. She was propelled by a screw, and her usual speed was not far from ten miles an hour. She was on one of her regular trips between New York and Portland, Maine, bound east, having left her dock in New York a little after four o'clock in the afternoon of the same day. About eleven o'clock at night, a very thick fog came on, which lay low upon the water, and it was impossible to see a vessel at any considerable distance. Ordinary signal lights were of but little use. The mate's watch, consisting of the able seaman and himself only, commenced on the schooner at eight o'clock. The mate was at the wheel and the seaman on the lookout until the fog came on, or a little after. The mate then called the seaman to the wheel and went himself into the cabin, for the fog horn. On coming out he went forward near the foremast and blew the fog horn at short intervals, acting at the same time as lookout. He then came aft and gave the horn to the man at the wheel, with directions to blow it. Then he went below again and called the captain. Coming on deck soon after, he went forward and let go the jib sheets and superintended the navigation of the vessel, as she came about on her port tack. The man at the wheel steered the vessel, gave the necessary attention to the sails aft, as she came about, and did all that was done toward blowing the fog horn after he was assigned that duty by the mate. Soon after the vessel got on her port tack, the captain came on deck and looked under the sails to the starboard. Down to that time, after the vessel had come about, the blasts of the fog horn had all been given on the port side, and the sound to the starboard was obstructed by the sails. The captain at once directed that the horn be blown on the starboard side. This order was obeyed, a single blast only being given. Almost immediately afterwards the steamer appeared through the fog and struck the schooner on her starboard quarter, about fifteen feet from the stern. The steamer passed by without stopping, and, in so doing, broke off the entire stern of the schooner. Soon afterwards the schooner filled and sank. After the schooner got about on her port tack, the mate went aft to the mainmast on the port side, and remained there until the collision. The lights of the steamer were not seen until just before the steamer herself came in view, and that was only a few moments before the vessels came together. The course of the schooner was directly across the track of the steamers bound east from New York, and leaving their docks that afternoon from four to six o'clock. Their courses and position at the different hours in the night were well



understood by those accustomed to navigate the Sound, and they were regularly due in that place about the time the fog came on. Fog whistles were heard on the schooner a considerable time before the collision, and they indicated the close proximity of several of the steamers. The mate heard whistles when the schooner was going about and afterwards. Some of the steamers he had seen before the fog came on. After he got on the port tack he heard whistles near by, but gave no special attention to the sounding of the horn. No torch light was exhibited from the schooner. The torch was in the cabin, but was not brought on deck. Both the *Eleanora* and the *Transit* had the ordinary regulation lights set and burning. In June, 1871, the board of supervising inspectors, appointed under the act of February 28, 1871 (16 Stat. 449), recommended certain fog signals to be observed by steamers, sailing vessels and other craft. Among other recommendations was the following: 'Sailing vessels, and every craft propelled by sails, upon the ocean, lakes, and rivers, shall, when on then starboard tack, sound one blast of their fog horn; when on their port tack, they shall sound two blasts of their fog horn; when with the wind free or running large, they shall sound three blasts of their fog horn; when lying to or at anchor, they shall sound a general alarm. In each instance, the above signals shall be sounded at intervals of not more than two minutes.' This rule was approved by the secretary of the treasury and promulgated from the department, July 18th, 1871. Printed copies were sent to the custom houses generally, for distribution on board of vessels. In October, 1873, the collectors of customs were instructed by the department to issue to each sailing vessel, with its other regular papers, two copies of a circular intended to bring the rules to the attention of navigators, and to enjoin their observance. A supply of these circulars was furnished to collectors generally, but none appears to have been sent to Port Jefferson, a small port on Long Island, where the *Transit* was registered, until after the collision occurred. No direct evidence has been produced to show that actual notice of the rule had been given to the captain or the mate of the *Transit*, but it is abundantly established that the circulars were distributed generally to the custom houses of the country, and had been furnished to vessels in accordance with the instruction

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The evidence also establishes the fact that this rule was generally understood and acted upon by all careful and prudent navigators in Long Island Sound, and by those sailing into and out of the harbor of New York. In August, 1875, it had been generally adopted, by common consent, as a rule of navigation. This rule was not observed by the Transit. She sounded only one blast of her fog horn while on her port tack, instead of two, as the rule required. The Eleanora was, in all respects, properly manned and equipped. She ran on her usual courses and at her usual speed, from the time she left her dock in New York, until she became enveloped in the fog. She had at all times, down to the moment of the collision, competent lookouts properly stationed on deck and performing their duties. When she reached the fog, no special orders were given to slacken her speed, but it was a rule of the boat to let the speed run down while the fog whistles were being sounded. Soon after the steamer got into the fog she commenced blowing her fog signals, and kept them up at proper intervals until the vessels came together. When the engineer heard the fog signals, he closed the throttle valve somewhat and opened the furnace doors, to let the steam run down, so that, when the collision occurred, the steamer was going at somewhat less than full speed, without any direct orders to that effect having been given. The Eleanora had been running for a considerable time in company with the eastern bound steamers leaving New York that afternoon. Some ran to the north and some to the south of her. Their fog signals were plainly heard from her. Fog horns were also occasionally heard. None, however, were recognized as near by until a single blast was heard but a moment or two before the collision. The captain was then on deck, and he promptly gave the orders to port the wheel and to stop and back. All these orders were obeyed, but, before much change was made in the course, or the speed could be stopped, the vessels came together. After the collision the steamer ran out of sight of the schooner in the fog, before she was finally stopped. She then came back and did all that could be done to save life and property. The fog signals of the other passing steamers were distinctly heard and recognized from the Eleanora until they had passed beyond hearing distance. The report of the commissioner as to the amount of damages in both cases is sustained by the evidence.”

Horace Barnard, for libellants.

F. A. Wilcox, for claimants.

WAITE, Circuit Justice. I have had no difficulty in reaching the conclusion that both vessels are responsible for this collision. A simple slackening of speed by a steamer in a fog is not always enough. She must run at a moderate speed (Rev. St. § 4233, rule 21), and is never justified in coming in collision with another vessel, if it be possible to avoid it (Sup. Ins. rule 4). This implies such a speed only as is consistent with the utmost caution. Having complete control of herself, and being capable of so much damage if a collision does take place, the law has imposed on her the obligation of so directing her own move-

ments, in the midst of the uncertainties of a fog at sea, as to be at all times under easy command. If she fails in this she must suffer the consequences. Her rate of speed must be graduated according to the circumstances. The more dense the fog the greater the necessity for moderation. The object is to keep her, if possible, under such control that she can be stopped after another vessel, with which she is in danger of collision, may be seen, or otherwise discovered. She has the right to assume that other vessels will perform their duties and act accordingly, but she has no right to disregard any obligation placed on herself.

Guided by these rules, which are well settled, it is easy to see that the Eleanora was in fault for going at too great a rate of speed. She was running in a dense fog, where the ordinary signal lights were of no use, and objects could not be seen much, if any, more than her own length away. Her officers and men appear to have been watchful on deck, and a vigilant lookout was maintained, but her engineer, at his place in the engine-room, was left to act only on his general orders to slacken speed when the fog whistles were being blown. He did not know whether the fog was dense or not, and he contented himself with opening the furnace doors, to let the steam run down, and shutting off the throttle valve somewhat; how much does not distinctly appear. No orders were given to him from the deck. It is true, the witnesses, some of them, say she was going as slow as she could and have her wheels pass the centre; but in this they are evidently mistaken. The fog horn of the Transit was heard before the vessel herself came in sight. As soon as it was heard, the orders to stop and back were given and obeyed. Notwithstanding this the steamer kept on until the schooner came in sight, then ran over the schooner, and then ran again out of sight in the fog, before coming to a stop. In this way the steamer must have run three or four times her length, under a reversed engine, against a head tide of two miles an hour. It needs no argument to show that this could not have been done if, as claimed, when the order to stop and back was given, she was under no more than mere steerage way, or if she had been going, since she came into the fog, at least half an hour before, with her throttle valve to any considerable extent closed, and her steam running down. To my mind it is clear she was doing what

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is too often done under such circumstances, taking the risks of running too fast.

As to the Transit I have had no more difficulty than with the steamer. Confessedly, she did not exhibit a torch light. She was sailing in what she knew, or ought to have known, was a common thoroughfare of approaching steam vessels at the time. Their fog signals were heard from various directions, and she was heading on a course crossing their regular tracks. The statutory rule is imperative, that every sailing vessel "shall, on the approach of any steam vessel during the night time, show a lighted torch upon that point or quarter to which such steam vessel shall be approaching." Rev. St. § 4234. No sailing vessel has a right to disregard this regulation because she thinks it unimportant. If she knows of the approach of a steam vessel she must exhibit the light, or take the risks of loss occasioned by its absence.

In this case no attention was paid to the rule. The light was not only not exhibited, but the torch was not brought on deck. If exhibited, possibly it might not have been seen far enough away to have done any good; but such a possibility furnishes no excuse to the vessel for its absence. Nothing short of an absolute certainty that it could do no good, to be established by proof on the trial, will justify an omission to obey the rule. In a fog, all vessels must do all that is required of them by law or usage. While more is demanded of a steamer than a sailing vessel, it is as important that the sailing vessel should obey all the rules prescribed for her, as that the steamer should not neglect those which are to govern her. Actual safety is dependent upon a strict performance by each, of all their respective duties. While the Transit was sailing on her starboard tack, while she was coming about, and while she was on her port tack, fog signals from steamers in her immediate neighborhood were heard, and it is by no means certain that some of them did not come from the Eleanora. It was not proper to assume that the torch light would have done no good. It was her duty to exhibit such a signal, and, under the circumstances of this case, I cannot but consider it a fault that she omitted to do so.

But, even if this were otherwise, her failure to give two blasts of the fog horn while on the port track was, certainly, a fault. The testimony taken since the appeal leaves no doubt on my mind that, when this collision occurred, in 1875, the recommendation of the supervising inspectors in respect to special signals to indicate the course and movements of sailing vessels during a fog, had been adopted by navigators in Long Island Sound and in and about the harbor of New York, as part of their "language of the sea," and that it had been so long in use as to make it a fault on the part of the schooner, if it was not known and understood by those responsible for her navigation. The supervising inspectors had no power to prescribe rules which would have the force of law, for the government of sailing vessels, and they did not attempt to do so. Their absolute authority did not extend beyond steam vessels, but they certainly had the authority to suggest rules for the consideration of sailing vessels, by which their conduct towards steamers should

be regulated, and these rules, if generally acted upon by navigators, might in time become binding, as usages of the sea. The suggestions of the supervising inspectors were eminently practical. They were approved and promulgated by the secretary of the treasury more than four years before this accident. They were immediately taken up and acted upon to some extent Two-years afterwards, extraordinary efforts were made by the government to give them publicity and to secure their observance. It is possible that these efforts had not been put forth at the little port of Port Jefferson, where the Transit was registered, but it is quite certain that the suggestions were known and acted upon in almost every other port she entered from the time of then promulgation until the collision. Under these circumstances, if her officers had not learned of this new sound in fog language at sea, they must be considered as unfit for the positions they occupied, and the consequences of their ignorance must be visited on her. The Eleanora, when she heard the one blast of the fog horn almost ahead, acted as if the vessel from which the sound came was on the starboard tack, and put her wheel to port. This, if the signal had indicated the truth, would have been right and quite likely would have avoided a collision. As the fact was, the movement was exactly wrong, since it brought the steamer on to the schooner. If the wheel had been put to starboard, and the steamer swung the other way, as would likely have been done if two blasts of the horn had been given instead of one only, a passage-under the stern might have been made in safety.

The Transit too was, I think, short handed on deck at the time. "While the number of her crew may have been sufficient, and two-might have been enough for a watch on deck, under some circumstances, it is easy to see that a mate, who was attending to the navigation of a vessel and letting go her sails while going about in a fog, was in no condition to act as lookout on the watch for the fog signals from steam vessels which might momentarily be expected; and that a man at the wheel, steering the vessel and looking after the sails aft, as they came about, would not be likely to give as much attention to the fog horn as the necessities of the case for the time being required. This is shown by the fact that although the steamers were due, and approaching from the west, the horn was not sounded in that direction until after the captain came on deck, which was.

## The ELEANORA.

but just previous to the collision. Until then, the sound in the direction of the danger had been obstructed by the sails. A fog horn, at the best, can be heard only for a comparatively short distance, and is by no means reliable for signal purposes under all circumstances. Hence, it is important that those who are responsible for its use should be vigilant and attentive. As it is the way prescribed by law for giving information as to the position of a sailing vessel in a fog, when sight is of but little use, the duties of the man who has it in charge are as important as those of a lookout under other circumstances. Steamers are bound to keep out of the way of sailing vessels, but sailing vessels must, in the night and in a fog, by the use of the prescribed signals, furnish the steamer with the means of knowing how this may be done. This duty on the part of the sailing vessel is as obligatory as that of the steamer to keep away.

Both vessels being in fault, as between themselves, the damages must be apportioned. Castner and others, who sue the Eleanora alone for the cargo, are entitled, under the rule in this case of *The Atlas*, 93 U. S. 302, to a decree for the full amount of their loss; and, as the *Transit*, if she had been joined, would have been liable for one-half this loss, a credit may be allowed the Eleanora, on the decree in favor of the owners of the *Transit*, for a sum equal to one-half of the damages to the cargo. Although separate libels were filed by the owners of the vessel and the owners of the cargo, they constitute, in effect, but a single suit. They have been heard together and submitted on the same evidence. Having all parties before it, the court may do what it would have done if there had been but one libel, that is to say, divide the damages of the collision throughout between the two colliding vessels. A formal claim, to that effect, on the part of the Eleanora, is not necessary. It is rare that, in any case, a defending vessel makes a demand for a division of damages. A complete defence is generally insisted upon in the pleadings, and the apportionment is made by the court, on the facts as they are finally developed at the hearing. It is unnecessary to decide what the rule in this particular would be if the Eleanora had not been subjected in the suit for the cargo, because here she has been, and that, too, upon the very testimony submitted in the suit between the two vessels. The fund belonging to the *Transit*, growing out of the collision, is in court, and no injustice is done by using it to reimburse the Eleanora for what she has paid for the *Transit*, on account of the mutual fault of the two vessels.

While the allowance made by the commissioner in his report for the value of the *Transit* seems large, I think it is sustained by the evidence. As to the other exceptions to the report in the case of *Davis*, it is sufficient to say they are overruled. The exceptions in the other case have not been seriously insisted upon here. A decree may be entered in favor of the libellants in the suit of Castner and others, for \$1,114.17, and interest at six per cent from October 25th, 1875, until the date of the decree. In the case of *Davis* and others, the damage to the vessel and freight amounted to \$4,660.14; one-half of this is

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\$2330.07; deduct one-half of the value of the cargo, \$557.08, and the balance due to the Transit is \$1,772.99; to which add interest at the rate of six per cent, from October 23d, 1875, to the date of the decree. In the case of Castner, a decree may be entered against the Eleanora for costs in both courts. In the case of Davis, the libellants are entitled to costs in the district court, but, as both parties appealed, the costs in this court may be equally divided between them.

<sup>1</sup> [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.].