THE IRIS.

Case No. 7,062.
{1 Lowell, 520.}[1]

District Court, D. Massachusetts. 1870.

COLLISION—CHANGE OF COURSE.

1. A steamer was navigating a channel with six barges lashed to each side of her, and a schooner was outsailing and passing her. The steamer ported her helm to avoid a shoal, and thus brought one of the barges across the schooner's track. There was time for the latter to change her course, but she failed to do so. *Held,* the schooner was in fault.
2. The libel on behalf of the barge did not mention the steamer's change of course, but only the schooner's fault in keeping hers; the answer on behalf of the schooner averred the steamer's porting her helm. *Held,* the state of the pleadings did not preclude a recovery by the barge.

The steamer Princeton was passing through the channel called the Kills, between the shores of Staten Island and New Jersey, towing twelve barges, six of which were lashed to each side of the steamer, forming a moving body of about three hundred feet in length and of considerable width. Off New Brighton the libellant's barge, which was the rear-most of the tow on the starboard side, came in collision with the schooner Iris, and was sunk and totally lost. This was a proceeding against the schooner to recover the value of the barge and her freight; the cargo being the subject of a separate suit. The libel stated the time and place of collision, and averred that the schooner was bound to clear the barge, but neglected so to do, and kept her course, and thus caused the collision. The answer set up that the schooner was passing between the barges and the shore of Staten Island, as near the shore as was safe, and that the steamer changed her course and drew the barge across the track of the schooner, and that the collision was brought about by the steamer not keeping as near the New Jersey shore as she might have done, and by the want of lights and lookout and steersman on board the barge.

H. C. Hutchins and J. A. Gillis, for libellant.

T. K. Lothrop and I. Lincoln, Jr., for claimant.

LOWELL, District Judge. The evidence is not quite as full and minute as in a case of more pecuniary importance it might be expected to be. Taking it as it stands, I find the facts to be that the pilot of the

steamer ported his helm some time before the collision without knowing that the schooner was near; but that he did this in order to keep the usual course, that is, to follow a bend of the channel which here sweeps to the right, avoiding a shoal. The schooner was outsailing the steamer and her heavy tow and passing between her and the shore on the starboard hand, which brings the case within the seventeenth sailing rule, that every vessel overtaking another shall keep out of her way, a rule which modifies the otherwise universal rule fifteen, requiring steamers to avoid sailing vessels. The reason given by the master of the schooner for not keeping out of the way is that the steamer ported her helm and brought the libellant's barge into contact with his vessel. This is true; but it also seems to be proved that the change was a proper one, and one that the schooner might have anticipated; and that it was made so long before the collision that the schooner had ample time to conform to it. Her master says he could not luff because there was a lighter on his bow, between him and the shore; but on this point he fails of support by any other witness, and I consider the weight of the evidence to be that he might and should have luffed.

Then the question is, was the steamer to blame in changing her course when and to the extent she did? Might not a less change have been enough to clear the shoal, and was she bound to see the schooner? The general rule undoubtedly is, that when one vessel is to take the burden of avoiding another, the latter is to keep her course. But how far a vessel is bound to keep a lookout aft, or to take measures to know whether another is coming up behind her, has not often been a subject of judicial decision. I should say that if a vessel is making a great change of course, such as going about or the like in a narrow channel, especially if the change is taken suddenly or without obvious necessity, prudence would require that others should not be put in jeopardy, but the time and manner of the change should be adapted as far as possible to meet the necessities of other vessels; but here was a change which was necessary, and which was not so sudden or so great that any danger to vessels on the starboard could naturally be expected; and I am not prepared to say that any other or different course would or ought, to have been taken if the pilot had known that the schooner was in the act of passing. The preponderance of the evidence is that this precise change was proper and necessary, and that it was one which would not have endangered the schooner unless she had been either too near or not sufficiently vigilant.

So far as lights or lookout on the barge are concerned, it seems that each vessel was in full view from the other, and that there was nothing necessary or useful to be done onboard the barge, except to hail the schooner, which the master of the barge swears he did. When barges are towed in the way these were, that is, by being firmly lashed to a steamer, it is not usual to steer the barges, because they move with the steamer. I must therefore hold the schooner to blame for not keeping out of the way of the barge.

It is urged, however, that there can be no recovery. In this case, because the allegations of the libel do not correspond with the proofs. It is true that the libel does not aver that the steamer changed her course; but it does aver that the schooner kept hers, and thus brought on the collision. The answer, not denying that the schooner kept her course, sets up the change on the part of the other vessel. I find that both are true; that the steamer did change her course and that the schooner did not, but that the change was justifiable under the circumstances, and that it did not relieve the schooner from the obligation of keeping out of the way. It turns out then that the libel which imputes fault to the schooner in not changing her course is sustained. I doubt whether, even under the strict rule adopted of late by the privy council in England, as shown by the cases of The Ann, Lush. 55, and The North American, Swab. 358, there could be said to be a variance between the allegations and the proofs. But our practice is somewhat less stringent. The object to be attained is that the defendant should know what he is called upon to meet, and in arriving at this object, we allow in the first place great latitude of amendment, and in the next we inquire whether there is in fact surprise in the particular case rather than whether on theory there might be presumed to be such. It has been settled by the highest authority that there is no technical rule of variance in our admiralty practice. Dupont de Nemours v. Vance, 19 How. [60 U. S.] 172; The Clement [Case No. 2,879]. In the former of these cases a libellant, proceeding for the non-delivery of his goods on a contract of affreightment, was permitted to recover a general average contribution for their having been jettisoned; in the other, the owners of a brig who alleged that a schooner caused the collision by changing her course, recovered damages on proof that the schooner kept her course when she should have changed it. Both these cases show a much wider departure than is found in the case at bar; Here there can have been no surprise, because the change of course of the steamer is set up in the answer, and the reason for it is given by one of the claimant's witnesses. It is true that at the trial evidence of the necessity and propriety of the change when offered by the libellant in reply to the claimant's case was objected to, but the objection was not put on the ground of surprise,

but because it was not strictly in reply. The case then comes to this. One party alleges that the other should have changed and did not; and the other that the first should not have changed and did. I find the facts alleged by each to be true, but the explanations of the one to be sufficient and those of the other to be insufficient. There is no rule of pleading which requires me to dismiss the libel under such circumstances.

Decree for the libellant for $1000.

[1] {Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.}