

13FED.CAS.—25

Case No. 7,234.

THE JAVA.

{1 Lowell, 165.}<sup>1</sup>

District Court, D. Massachusetts.

Oct, 1867.<sup>2</sup>

COLLISION—INEVITABLE ACCIDENT—CROWDED HARBOR.

1. A collision occurring in the daytime may possibly be an inevitable accident

{See note at end of case.}

2. Where a steamer in navigating a crowded harbor at a very slow rate and with a sufficient lookout, ran into a small schooner which could not be seen in time to avoid her by reason of the hull of a large ship behind which the schooner was getting under way without her sails being yet up, and the channel was a-part of the fair-way of the harbor: *Held*, the steamer was not in fault.

{See note at end of case.}

{This was a libel in rem by the Judd Linseed & Sperm Oil Company against the steamship Java, to recover for damages received by the cargo of the schooner James McCloskey in collision with the Java.}

R. H. Dana, Jr., for libellants.

W. G. Russell, for claimants.

LOWELL, District Judge. The libellants were the owners of a valuable cargo of linseed which was shipped on board the schooner James McCloskey, bound from Boston to New York. The schooner was towed from one of the wharves in East Boston into the stream, and was getting under way near the schoolship George M. Barnard, and had only a part of her foresail hoisted, when her master saw the large Cunard propeller steamer Java coming round the stern of the schoolship and

## The JAVA.

making directly for the schooner. The schooner's helm was put hard astarboard, but the steamer struck her abaft the main rigging and knocked a hole through her, and the linseed was damaged to the amount of some seven thousand dollars.

There is no doubt or question concerning most of the facts of the case. The weather was clear and fine, with a good breeze, the precise direction of which is not important; the time about one o'clock in the afternoon, the tide an early ebb, and neither vessel was seen from the other until just before the collision. The questions which arise are, whether, under the circumstances, either or both vessels were guilty of any negligence which caused or aided in causing the collision.

The burden of proof is on the steamer. And the first question is, whether her lookout was sufficient. It is shown that she had three persons properly stationed forward on the lookout, and the evidence is, on the whole, clear and decisive that they were vigilant and discovered the schooner, not only as soon as she discovered the steamer, but as soon as with reasonable diligence they could have discovered her. It appears, too, that the steamer was proceeding very slowly, having stopped her engines some little time before to make sure of clearing another vessel, and that upon the schooner being seen, prompt and efficient measures were taken to clear her, but that it was too late.

The allegation to which most of the evidence and arguments have been addressed is, that the Java was in the wrong in attempting to pass on the inner or East Boston side of the schoolship when and as she did. It appears that the George M. Barnard is a large vessel, high out of water, which is kept constantly moored during the winter months near the edge of the channel, leaving as much room as possible on the outside between her and Boston, and only a narrow passage on the other side, so that a vessel of the size of the Java could not pass there excepting at or near high-water. There was evidence tending to show that the Cunard steamers rarely do take this passage, though other vessels nearly as large do so not unfrequently, and that it would not be considered prudent for so large a vessel to attempt it when it was much obstructed. The fact that vessels of large size do or do not frequent the place is of little importance compared with more direct and pertinent evidence concerning the safety of the passage itself. That Cunard steamers rarely go there might be material in ascertaining whether the schooner in getting under way in that part of the channel had any reason to expect to meet the steamer there, and so bear upon the diligence or want of it on the schooner's part, and upon that ground I admitted this testimony; but it has not become material, to the decision of the cause. Upon the whole evidence I am satisfied that a prudent and skilful navigator would not hesitate to take the Java through that passage at that state of the tide, if he saw no obstructions, as of vessels at anchor, or the like.

It is said that if the steamer had taken a course more nearly parallel with that in which the schoolship was lying, she would have seen the schooner earlier, and might have avoid-

ed her; and this is true. But whatever direction she had taken the schoolship would have shut out some points of the compass, and there was no reason to apprehend danger from one point more than from another. The case is simply one of running under the stern of a vessel at anchor at a somewhat acute angle, and I am not prepared to say that this is bad navigation, if it be done as slowly and with as much vigilance as is shown in this case. A man may drive round the corner of a road if that is the most convenient way home, though he ought to do it slowly and with more than ordinary care if he cannot see what is on the other side. The failure to see the schooner probably arose from the fact that her sails were not set. I am not prepared to say that this was a fault on her part; but it was her misfortune.

A consideration of a good deal of weight with my mind in one aspect of the case is this: That the collision does not appear to have been affected in any degree by the narrowness of the channel. The steamer was simply coming out from behind the schoolship in one direction and the schooner in another, and however wide the channel might have been, the former could have done no more than she did. She took the proper measures promptly and without the slightest embarrassment from the narrowness of the passage between the ship and the flats, which in fact she had scarcely reached. So that I cannot see that the propriety of the steamer's course, considered with reference to the peculiarities of this passage, has much importance in the case. Nor is the fact that she intended to go to the Cunard dock very important, because she was not heading for the dock when the collision happened. It seems that the accident might and would have happened just as it did if the steamer had been going to any other dock, and the schoolship had been anchored in mid-channel, provided the relative position of the three vessels had been the same. So that it comes back, as I have said, merely to the question of running under the stern of a vessel at anchor at an acute angle. And I cannot say that any negligence has been shown on the part of the officers of the steamer, but must hold that this accident, though occurring in broad day, was what the law terms an inevitable misfortune. The distinction between this case and *Crockett v. Newton*, 18 How. [59 U. S.] 581,

## The JAVA.

is precisely in the sails of the schooner not being visible over the schoolship. Decree for the claimants.

{NOTE. The libellants, the Judd Linseed & Sperm Oil Company, appealed, and the decree of the district court was reversed in the circuit court. Case No. 7,559.

{Subsequently, an appeal was taken from the decree of the circuit court to the supreme court, which reversed the decree of the circuit court, and affirmed that of the district court Mr. Justice Bradley delivered the opinion of the court, and held that “if this was not an inevitable accident, so far as the Java was concerned, it would be very difficult to imagine a case of inevitable accident not caused by external force, as of winds and waves.” 14 Wall. (81 U. S.) 189.]

<sup>1</sup> {Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.}

<sup>2</sup> {Reversed in Case No. 7,559. Decree of circuit court reversed in 14 Wall. (81 U. S.) 189.]