

v.4, no.8-47
THE SWEDISH BARK ADOLPH.

District Court, S. D. New York. November 10, 1880.

1. ADMIRALTY—COLLISION—SIXTEENTH RULE OF NAVIGATION—NEGLIGENCE—INNOCENT THIRD PARTY.—Where the brig F., with a cargo insured by the libellant, collided at night with the bark A, being struck by the A. on her starboard side amidships, and the F. claimed to be heading southeast, close hauled on the port tack, with the wind east north-east, and to have sighted the green light of the A. a little on the port bow, and to have kept her course, and that the green light crossed to the starboard bow, and then the A. showed both lights, and ran into the starboard side of the F., and that the collision was caused by the A.'s porting after crossing the F.'s bow.

And the A. claimed to be heading north-west less than one point free on the starboard tack, with the wind north-east by north, when the red light of the F. was sighted half a point on her port bow, and thereafter, till the collision, kept her course by the wind three-quarters of a point; and that then the A. ported, and that the red light drew ahead; and that then the F. starboarded and luffed across the A.'s bow, when the vessels were very near each other, thus causing the collision.

Held, that on the evidence the vessels were meeting end on, or nearly end on, and both were bound to port, under the sixteenth rule 731 of navigation; that the claim made by the A. was incredible as a whole, and that the testimony of her lookout and mate that they made the red light, when first seen, on the port bow, must be rejected as a mistake.

Held, that upon the evidence the wind was about north-east by north, and that after making the red light nearly ahead the A. ported till she came up as close to the wind as she could get with full sails, and kept by the wind till the collision.

That the F. was in fault in not porting; that the A., having ported till she came as close to the wind as she

could get, had complied with the rule as far as she was bound to do.

Held, that on the evidence the F. did not keep her course, but starboarded when dangerously near the A., and that this contributed to cause the collision.

That while the officer of the deck on the A. was clearly negligent in not keeping his attention constantly fixed on the approaching vessel after the light was reported, still this fault did not contribute to cause the collision.

That even an innocent third party—the owner of cargo—injured by a collision, cannot recover against either vessel without alleging and proving that she was guilty of a fault which contributed to bring about the collision.

Simply showing a case of doubt as to which vessel was in fault is not enough to justify a recovery.

The James Bowen and The R. L. Dayton, Dist. Ct. S. D. N. Y.

In Admiralty.

Thomas E. Stillman and Wm. Mynderse, for libellant.

Henry T. Wing, for claimant.

CHOATE, D. J. This is a suit brought to recover damages caused by collision between the French brig *Fernande* and the Swedish bark *Adolph*, which happened about half past 11 o'clock at night, on the fourth day of August, 1880. The *Fernande*, with her cargo, was sunk by the collision, and the libellant having insured the cargo for \$11,500, and paid the loss, sues to recover the same against the *Adolph* on the ground that the collision was caused either in whole or in part by her fault. The *Fernande* was a vessel of 76 tons register, and 125 tons carrying capacity. Her length of keel was 66 feet. She had on board 118 tons of salt fish, and was bound from the island of St. Pierre to the port of St. Martin, He de Re, on the south coast of France. The *Adolph* is a

bark of 460 tons register. Her length is 141 feet. She was in ballast, and bound to New York from Sables d'Olonne, on the 732 south coast of France, a little to the south-west of St. Martin. The place of the collision is stated in the libel to have been about 50 miles S. S. W. from Belle Isle. It is stated in the answer to have been at a point about 26 miles E. by S. from the light on the Isle d'Yen. The difference is not very material; the place, according to the libellant, being about 12 miles in a south-easterly direction from that given by the claimant. Of the two positions I think that given by the claimant is probably more nearly correct, because the witnesses from the Adolph were aided in establishing the place of the collision by an observation of the light on the Isle d'Yen. at half past 9 o'clock in the evening, when it bore from them E. by N., at a distance which they estimated at 17 miles, and they claim to have been sailing north-west, at about five knots an hour, from half past 9 till the time of collision, the speed being fixed by casting the log at 11 o'clock; and, if their observation of the bearing of the light and their estimate of its distance were correct, and they made that speed for the two hours, they were at or near the place indicated by them at the time of the collision. I think the evidence tends to show that they somewhat overestimated their speed during the two hours. The master of the Fernande, who alone of her crew was examined, could not testify to her position from any actual observation, his charts and papers having gone down with his vessel. He judged of his position partly from information given by a fisherman whom he spoke about noon on the 4th, but the winds during the day had been light and varying, at one time dying away altogether. It is evident that his means of knowing his exact position, or of now stating it, are much less certain than those of the master of the Swedish bark. It is agreed that the night was clear on the water, though dark, the sea smooth, and the

wind light or moderate. The Adolph was under full sail, and the Fernande also was carrying all sail except her foresail. She had a fore-try-sail and four jibs. The parties differ as to the direction of the wind. The libel puts it at E. N. E., the answer at N. E. by N.

The case made by the libel is that the Fernande was heading

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S. E. to S. E. $\frac{1}{2}$ E., close hauled on the tack, when she made the green light of the Adolph a little to the port bow of the Fernande, and distant apparently about a mile or a mile and a half; that the green light drew across the bow of the Fernande till it appeared on the starboard bow of the Fernande, when the Adolph altered her course so as to show both lights to the Fernande; that when both lights became visible the two vessels were very near together; that the Fernande kept her course, and was struck by the Adolph on the starboard side about amidships, a blow angling from starboard forward to port aft. The faults charged against the Adolph are "not getting out of the way of the brig," "not having a proper lookout," and "porting her helm when and as she did." The case made by the answer is that the Adolph was heading on a course by compass N. W. The lookout reported a red light forward, a little on the lee (port) bow, and the officer of the deck, after seeing the light forward, a short distance off, and knowing that it must be a vessel approaching him, and that it was the duty of such vessel, having the wind free, to pass to leeward of him, told the man at the wheel to port his helm, in order to crowd the bark as close to the wind as possible, and thus give the approaching vessel as much room as possible to pass on his port hand; but that the approaching vessel, instead of porting, starboarded, and luffed up into the wind right across the course of the bark, whereby the bark came in contact with

the starboard side of the other vessel, striking her amidships; that the collision was caused solely by the fault of Fernande, in that, having the wind free, and the Adolph being on her starboard tack, about close-hauled, the Fernande, did not keep out of the way of the bark; in that, meeting the bark end on, she did not port and permit each vessel to pass port hand to port hand, as she easily could have done; in that she starboarded and luffed up into the wind directly across the course of the bark and under her bows; and in that she was improperly and insufficiently manned, tackled, and appavelled, and had no competent man at the wheel, and no competent lookout.

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The only witness called by the libellant who was on board the Fernande was the master, whose testimony tends to establish the case stated in the libel. On the part of the claimant there have been called the master of the bark, who was in his berth below till just before the collision, but who ran up on deck just as the vessels struck; the mate, who was the officer of the deck at the time of the collision; the lookout and the man at the wheel; and two other seamen who were in the mate's watch and stationed amidships. The lookout was the first to see the light of the Fernande. His testimony is that he first saw a red light forward a little to leeward; that he was standing on the port side of the top-gallant forecandle; that he saw the full blaze of it at once; that it came flashing up at once; that he thought it was seven or eight ships lengths off when he first saw it; that it bore half a point or a point on the port bow; that he went abaft the top-gallant forecandle and hailed the mate, singing out, "A red light a little to leeward," to which he got response from the mate, "All right;" that he returned to his station and looked at the light from the starboard side of bowsprit, very near the bowsprit; that he then saw the red light right ahead, right in the line of the jib-

boom; that he thought it was five, six, or seven ships' lengths off; that he could see the vessel then; that he could not tell how it was heading, but could see sails and forward part of a vessel; that on seeing the red light in this position he hailed again, "Red light ahead;" that he stood and looked at the vessel and saw her come right up and show her broadside; that she lay broadside athwartships of the bark and very close; that he thought then there would be a collision, and sung out, "Keep her off," meaning this as a hail to his own mate to keep the bark off; that he ran down from the top-gallant fore-castle because he was afraid to stay there, and instantly the collision took place.

The mate testified that he was on the poop-deck and heard the first hail of the lookout, "Red light ahead, a little on port bow;" that he ran to the side of the vessel to windward, and looked under the foot of the sail, and saw the red light a little 735 to leeward, about half a point on the port bow; that he judged it to be seven or eight times the length of his ship away; that he called to the man at the wheel, "Port your helm a little;" that he went to the compass by the man at the wheel, and saw him put his wheel to port, and saw by the compass she came up to N. W. $\frac{3}{4}$ N., her heading before that being N. W.; that after she had so come up and been steadied at that course, and while he still stood by the compass, the lookout hailed him again, "Red light right ahead;" that then he went up to leeward and saw the light right ahead on the jib-boom; that it might be six or seven lengths off; that he then went and looked at the compass, and made no other change in the course of his vessel; that she was then lying as close to the wind as she could lie with full sails; that then the lookout sung out, "Keep her off;" that he, the mate, answered, "It's too late to keep off, we are right on her;" that he saw no light on the other vessel then, but he saw the shade of the vessel; that

she was right athwartships of the bark; that it was not five seconds after the lookout's hail, "Keep her off," before the collision.

The man at the wheel did not see the light till the lookout hailed the second time. He testified that then he leaned over to the right and stooped down and saw a red light right ahead. One of the men amidships was in the forecastle and heard the lookout's first hail of "Red light little to leeward ahead," and shortly after his second hail, "Red light right ahead," and hearing that he went out of the forecastle, but he did not look for the light; he heard the lookout say "he thought there would be a collision," and he went on the starboard side and looked and saw a small vessel a couple of ship lengths ahead of the bark, lying athwartships of the bark; that then the lookout sung out "Keep off;" that he stood there and looked a few seconds and then ran back. The other seaman stationed amidships heard the first hail, "Red light little to leeward," and then the hail "Red light right ahead;" that on hearing this he ran forward and jumped up on the top-gallant forecastle and saw the red light, and then saw the broadside of the other 736 vessel lying athwartships of the bark. The master testified that he had reached the top step of the companion-way when the vessels struck; that he looked back towards the bow at the other vessel, and then immediately went to the compass and saw that the bark headed N. W. $\frac{3}{4}$ N.; then he ran to the wheel, took it from the wheelsman and rolled it over hard a-port, and gave the order to back the yards in order to get clear of the other vessel.

The four seamen of the mate's watch had the wheel successively for the four hours beginning at 8 o'clock. They all testify that the vessel was heading all the time N. W.; that her yards were braced in on the port side, close to the backstays on the wind. The evidence as to the angle at which the vessels came together was

conflicting. The master of the Fernande made the blow an angling blow, and his diagram shows an angle of 52 deg., or a little over $4\frac{1}{2}$ points, as the heading of the Fernande across the bow of the Adolph at the time of collision. The lookout of the Adolph, by his diagram, makes the same angle 87 deg., or $7\frac{3}{4}$ points. The master of the Adolph makes the same angle of the two vessels 103 deg. when he looked back over the bow an instant after they struck. The mate made two diagrams, making the angle in one 90 deg. and in the other 125 deg. Such evidence is worthless, so far as concerns any use of it to fix the precise angle of contact. The observation is made in a moment of peril and alarm, and the thing to be observed is one difficult of judgment if coolly and deliberately observed. The concurrence of the witnesses, however, establishes the general fact that the angle between the vessels at the moment of collision was not a very acute angle, and testimony is also produced that no injury was done to the starboard bow of the Adolph, while her port bow showed bruises and scratches, and the manner in which the bolts in her stem were bent indicated that the blow was nearly head on. The testimony of those on the Adolph is that at the moment of the collision the sails of the Adolph were full. This is not contradicted by the single witness from the Fernande. Assuming, then, 737 that the angle made by the two vessels at the collision was not less than 52 deg. or $4\frac{1}{2}$ points, as made by the master of the Fernande, and that at the time of the collision he was heading S. E. to S. E. $\frac{1}{2}$ E., as he testifies, and that the wind was E. N. E., then, at the time of the collision, the Adolph must have been heading N. to N. $\frac{1}{2}$ E., or within $5\frac{1}{2}$ to 6 points of the wind. The testimony of those on the Adolph is that she will not lie closer to the wind than 6 to $6\frac{1}{4}$ points.

If any weight is given to the testimony tending to show that the angle between the vessels was greater than $4\frac{1}{2}$ points at the time of collision, it becomes obviously impossible for the Adolph's sails to have continued full upon the libellant's theory of the case. This test, though not absolutely certain, favors the theory of the claimant. On the other hand, if the Adolph was heading N. W. $\frac{3}{4}$ N. at the time of the collision, and the wind was, as those on the Adolph swear, N. E. by N., and the angle between the vessels was at least $4\frac{1}{2}$ points, then the Fernande was heading up at least to E. $\frac{1}{4}$ N. This calculation would bring her within $4\frac{3}{4}$ points of the wind. The testimony of the master of the Fernande is that she could sail with a light breeze within $5\frac{1}{2}$ points of the wind. If, however, the angle of the vessels was considerably more than $4\frac{1}{2}$ points, as the evidence on the whole tends to show, then, upon the claimant's theory of the case, the Fernande must certainly have already luffed up into the wind at the time of the collision. If the evidence were satisfactory that the Fernande's sails were full at the instant of collision, this test would be most unfavorable to the theory of the claimant. But the fact of the Fernande's sails being full seems to rest mainly on the unsupported testimony of the master that she did not change her course and was kept by the wind with full sails till the collision, and the testimony of the master of the Adolph that after getting on deck, but at what precise moment with reference to the time of the collision he could not tell, the Fernande's main boom swung to starboard. As to this last circumstance, if she was in the wind the direction of the blow would tend to swing the boom over towards the Adolph or to starboard.

The rest of the crew of the Adolph give no testimony as to whether or not the Fernande's sails

were full at the time of the collision. It is not a matter of surprise that they should not have observed how this was, in the hurry and confusion of the approaching collision. Nor do the known destinations of the two vessels afford any important aid in testing the truth of their respective allegations as to their courses and the direction of the wind. It is not shown that a N. W. course was not the proper course of the Adolph at that part of her voyage to New York, and S. E. to S. E. $\frac{1}{2}$ E. is so nearly the true course of the Fernande for the Ile de Re from the place of collision, that the argument that she would have headed further to the eastward if she could has little or no force. It appears that about two hours after the collision the Adolph again got under way and steered for Belle Isle, which lay nearly north from the place of collision. This could not, of course, have been done if the wind had remained N. E. by N.; but it also appears by the testimony, and also by the log of the Adolph, that the wind, soon after the collision, hauled more to the eastward.

The case must, therefore, be determined on the conflicting evidence of the witnesses from the two vessels with little extrinsic aid. If the story told by those on the Adolph reasonably accounted for the collision, I should have no hesitation in holding that she had a very great preponderance of the evidence, both as to the direction of the wind and as to the luffing of the Fernande across the course of the Adolph after the Adolph had ported, and while she was heading N. W. $\frac{3}{4}$ N. But unfortunately their story does not account for the collision. If they made the Fernande's red light half a point on their lee or port bow, and then ported three-quarters of a point and steadied at that, it is impossible to understand how the Fernande's red light could draw across to windward, remaining in view all the time, so as to show directly ahead. The situation supposes that the Fernande, when first observed, was half a point to

leeward, showing her red light, therefore heading not to pass the bow, but to pass astern of the Adolph. She continues thus to point astern of the Adolph, 739 and yet draws a point and a quarter further to windward, while the vessels are going over the intervening mile, more or less, that separates them. I see no way in which this is possible, unless by force of a very strong current setting her to windward, and not affecting the Adolph, of which there is no evidence. To get so far to windward of her former position, the Fernande must inevitably have luffed sufficiently to show her green light long before she reached the position testified to by the witnesses, when, still showing her red light directly ahead, she luffed and showed her starboard side.

It is evident, therefore, that there is error in some or at least in one of the elements of the problem as given by the Adolph's witnesses, either in their course or movements, or the bearing of the light when first seen. In this uncertainty it is urged that the account given by the master of the Fernande will account for the collision, and that, as the story of the Adolph does not account for it, his story is to be credited as the more probable. If it were certain that the witnesses from the Adolph could not be mistaken as to the bearing of the light on their port bow, when first seen, it would be difficult to give any credit to their story. While the story of the master of the Fernande, taken alone, would account for the collision, yet on many points essential to the libellant's theory of the case he is contradicted by several witnesses, and not supported by the testimony of the other men on his vessel. It is true that their absence is accounted for by the fact that they left the Adolph to be landed at Belle Isle; and, so far as appears, the libellant has not, before the hearing of the cause, been able to obtain their testimony. But, nevertheless, this want of corroboration, though a mere misfortune of the libellant, leaves the master's

testimony very weak, shaken as it is by so serious and positive contradiction.

I think that the testimony in the case is most nearly harmonized by the supposition, not in itself improbable, that the lookout and the mate of the Adolph mistook the bearing of the red light when first seen; that, instead of being half a point on the port bow, it was nearly ahead, and a little on 740 the starboard bow. The master of the Fernande testified that he first saw, and for some time continued to see, a green light over his port bow. This is consistent only with the lookout's seeing the red light over his starboard bow. The lookout and the mate are the only witnesses who testify to the position of the red light when first seen, from their own observation. The lookout stood on the port side of the bow-sprit when he observed it. That he reported it a little to leeward is certain, not only from the testimony of himself and the mate, but from that of the other three men on deck at the time. Half a point is a very small angle, and, with a light within half a point of the stern either way, some care in observation is necessary to judge of its exact bearing. Although the lookout had a good point of observation, it does not appear that he ranged it with his eye in the line of the bowsprit. The fact that when he came back to his post on the other side of the bowsprit, after stepping back and reporting it, it seemed to him to be right ahead, and he so reported it, taken in connection with the fact, established by a great weight of testimony, that in the mean-time the vessel had ported three quarters of a point, seems to me to tend strongly to show that he mistook its bearing the first time. Moreover, if credit can be given to the courses testified to by the witnesses on the two vessels, S. E. to S. E. $\frac{1}{2}$ E. for the Fernande, and N. W. for the Adolph, the green light of the Adolph could not have been seen over the port bow of the

Fernande, if the Fernande was as much as half a point to leeward of the Adolph. If the Fernande was to leeward, where the lookout thought he saw her, and the courses are right, the Adolph must have shown her red light, and the Fernande her red light, and perhaps both lights, to the Adolph. The mate went to the starboard sail to see the red light, when first reported. He had heard the lookout's report of a red light, when first reported. He had heard the lookout's report of a red light ahead a little to leeward. He saw it, and returned to the binnacle, and gave his order to the wheels-man. His observation of it was momentary. His impression, as he now recalls it, is that the lookout was right; that 741 he found it where it was reported. I think he may be mistaken in this, as well as the lookout. His post of observation was not the best to judge of the bearing of a light from the bow, if it was nearly ahead. Perhaps he was the more likely to be mistaken in the bearing, because the lookout had so reported it, a little to leeward. He undertakes to place it by telling where he looked for it, under the foot of the foresail. The effort of the memory often supplies circumstances harmonious with the general impression of a fact or event, but which are supplied only by the imagination and the association of ideas. This witness' supposed statement that he saw the red light draw from its bearing on the port bow across to dead ahead, is not the testimony of the witness to a fact, but his inference from his impression of having seen the light the first time a little to port, and afterwards dead ahead.

Assuming, then, that the red light of the Fernande was first seen from the Adolph a little on the starboard bow; that as it got near, after the Adolph had ported three-fourths of a point, it was, as nearly as could be observed, dead ahead; and that the course of the Adolph, when she first saw the Fernande, was N. W.,—it is evident that the vessels were meeting end on,

or nearly end on. To show the red light to the Adolph ahead, or a little on the starboard bow, the Adolph's course being N. W., the Fernande must have headed a little to the southward of S. E. instead of S. E. or S. E. $\frac{1}{2}$ E., as testified to by her master. The master of the Fernande says the angle of their courses was very small, and this is doubtless true. Then, under the sixteenth rule of navigation, each vessel was required to port, in order that each might pass on the port hand of the other. Rev. St. § 4233. The Adolph ported. The Fernande did not port. I think the proof shows that she starboarded when in close and dangerous proximity to the Adolph, and so brought about the collision. But, while the Fernande must be held to be in fault, the question still remains whether the Adolph was also in fault. It is argued for the libellant that in favor of an innocent third party, the owner of a cargo, on one of the 742 colliding vessels, it is not enough for the claimant, in order to maintain his defence, to have produced by his evidence a case of doubt; that the claimant is bound to go further, and clear up that doubt. Such, however, is not the rule. Even an innocent third party, injured by a collision, cannot receive his damages against either of the colliding vessels without alleging and proving that that vessel committed a fault which caused, or contributed to cause, the collision. *The James Bowen* and *The P. L. Dayton*, Dist. Ct. S. D. N. Y.; S. C. Cir. Ct.

The specific faults charged against the Adolph in the libel are (1) not getting out of the way of the brig; (2) not having a proper lookout; and (3) porting her helm when and as she did. The first charge of fault is based on the theory that the Fernande was sailing close-hauled on the wind, on the port tack, and that the Adolph was on the starboard tack three points free, and that the Fernande was entitled to keep her course, and the Adolph was bound to keep out of

her way. But I find the fact to be that the *Fernande* was not closehauled on the wind, and not entitled to keep her course, nor was the *Adolph* bound to keep out of her way. Both vessels were bound to port. The second charge of fault is not having a proper lookout. This may, perhaps, be considered equivalent to a charge of not keeping a proper lookout. This charge is certainly sustained to this extent, that the mate of the *Adolph*, who was the officer of the deck, was guilty of negligence in not keeping in view the light of the approaching vessel after the lookout reported it. He went to the side of the vessel and looked at it. He then returned to the compass and gave the order to port. From this point the light was not visible. Yet he remained there, without watching the other vessel, till the lookout reported the light right ahead. It is unquestionably the duty of the officer of the deck, when a light is reported, to keep the approaching vessel in view, and under his constant observation, until the risk of collision is wholly passed. This the mate failed to do. This clear act of negligence throws upon the claimant the burden of showing 743 that the collision that ensued was not caused in whole or in part by this act of negligence. If, however, it is shown that the *Adolph* did exactly what she could and should have done if the mate had kept the other vessel under his constant observation, then this fault, though a gross one, cannot make her chargeable for the collision. The mate gave the order to port. He ported as much as it was possible to do without coming up in the wind, which, under the circumstances, I think he was not bound to do. There was nothing else that he could reasonably be called upon to do, after receiving the lookout's report, to prevent the collision. It is suggested that if he had been watching the other vessel when the lookout called out "Keep her off," he could have starboarded, and so avoided the collision. I think, however, upon the evidence, the time was so

short after the Fernande unexpectedly and improperly luffed that the Adolph was not chargeable with fault in not making this attempt to avert the consequences of the error of the Fernande.

It is also suggested that the lookout did not see the Fernande as soon as he should have done. The lookout testified that the red light appeared suddenly not very far off, flushing up at once. This might be the result either of his not having kept a vigilant watch or of the red light being then first turned towards him. The light of the Fernande could not be expected to be seen as far off as that of the Adolph. The Adolph was much higher in the water than the Fernande. But, before it can be imputed as a fault to the lookout that he did not see the light sooner, it must be established by competent and sufficient proof either that the red light was visible to him before he saw it, or, if the red light was hidden, that the Fernande had a green light burning, which he could have seen. The only proof of either of these facts is the unsupported testimony of the master of the Fernande. His statement as to his standing steadily on his course for several minutes before the collision is so seriously shaken by the facts which I have been compelled to find against his testimony, that this is not sufficient evidence to sustain this burden of proof. The lookout's 744 testimony rather tends to show that the red light suddenly and all at once as a bright light became visible to him, and that, as the Fernande approached nearly head on, she showed first her starboard and then her port bow. All the proof there is of the Fernande's having a green light is that her master testifies that he knew the lights were set and burning that evening, and that, during his watch, he went forward to look at them every 15 or 20 minutes. Nobody on board the Adolph saw a green light on the Fernande at any time. The fact that when she turned her starboard side towards the Adolph in luffing, just prior to the collision, those on

the Adolph should not have observed the green light, if it was there, is not, indeed, a circumstance entitled to much weight on this question. The vessel herself being within sight, those watching her would not be likely to look for a light, and might easily overlook it. Yet this fact is entitled to some weight, and, on the whole, I think the existence of the green light at the time the vessels came in sight of each other is not made out with sufficient certainty to constitute proof of negligence in the lookout in not seeing the green light, if, before he saw the red light, the starboard bow of the Fernande was turned towards him. Nor am I prepared to hold, on the testimony, that if the lookout might have seen the light or lights of the Fernande sooner, the Adolph did not seasonably port. It is true that, in the answer, it is not charged as a specific act of negligence that the Fernande had no green light; but the libel alleges, and the answer denies, that she had proper lights set and burning, and the question here is whether the libellant has proved a material fact which must be first established before the question of the alleged fault of not keeping a proper lookout, in this respect, can arise. The third charge, that the Adolph ported when and as she did, has been already discussed.

The case has some features of special difficulty and is not free from doubt, but upon the whole evidence I am not able to find the faults charged against the Adolph, or any one of them, proven. The witnesses from the Adolph seemed to me 745 to be both intelligent and credible. The mistake in their protest, which was written in a language they understood but imperfectly, does not seriously impair the effect of their testimony. It is also noticeable that the wheelsman of the Fernande had, according to the testimony of the master, been at the wheel continuously since 8 o'clock—three hours and a half. The master says that while he saw the light of the

Adolph he spoke to him two or three times to keep her close to the wind. And when he saw the two lights of the Adolph he ran to call the crew from below, thinking there would be a collision. It is not at all impossible that the wheelsman, from fatigue, steered badly, and that the final fatal movement of luffing across the bow of the Adolph was his act by mistake or from panic, without the order or the knowledge of the master. But he is not here to answer for himself, and it is of no avail to pursue the inquiry further.

Libel dismissed, with costs.

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